

# Research for AGRI Committee - The sectoral approach in the CAP beyond 2020 and possible options to improve the EU food value chain

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### **Abstract**

This study addresses the current European rules applicable to the Common Agricultural Market Organisation and the recent proposal of the Commission in the CAP beyond 2020. It also suggests possible improvements for the proposal. It was presented to the Committee on Agriculture and Rural development the fifteenth of October of 2018.

This document was requested by the European Parliament's Committee on Agriculture and Rural Development

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Cover image: ©Isabel Lopez Garcia. School Fruit, Vegetable and Milk Scheme, Primary School “Los Bateles”, Conil de la Frontera (Cadiz, Spain), winner of the “children recipes” competition 2017/1018 organized by the Regional Government of Andalucía

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## LIST OF ABBREVIATIONS

<b>AGRI</b>	Agriculture and Rural Development Committee
<b>AIBO</b>	Association of Interbranch Organisation
<b>APO</b>	Association of Producer Organisation
<b>CAP</b>	Common Agricultural Policy
<b>CMO</b>	Common market organisation
<b>DG AGRI</b>	Directorate General for Agriculture and Rural Development, European Commission
<b>DG COMP</b>	Directorate General for Competition, European Commission
<b>EAMO</b>	European Agricultural Market Observatory
<b>EC</b>	European Commission
<b>EU</b>	European Union
<b>IBO</b>	Interbranch Organisation
<b>IOF</b>	Investment Own Firm
<b>MS</b>	Member State
<b>PO</b>	Producer Organisation
<b>SMP</b>	Skimmed Milk Powder





## LIST OF FIGURES

**Figure 1: Layering model of agricultural risk management**

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## EXECUTIVE SUMMARY

### Background

As explained by the Commission in its own presentation of the legislative proposals presented in June 2018, “the Common Market Organisation and its instruments remain largely unchanged”.

To highlight only 3 major issues, the safety net continues to be composed of public intervention and private storage aid, on one hand, and exceptional measures on the other. Marketing standards and rules on farmers' cooperation are unchanged.

Nevertheless, the Commission underlines “few important points for more effectiveness and simplification”:

- The integration of sectoral interventions in the CAP plan Regulation (for fruit and vegetables, wine, olive oil, hops and apiculture).
- The extension of the possibility to initiate sectorial interventions to other agricultural sectors.
- Amendments to rules on geographical indications to make them more attractive and easier to manage.
- The adjustment of allocations following the MFF proposal.
- The deletion of a number of obsolete provisions.

On the main issues related to the single CMO, the Commission has followed the Resolution of the European Parliament of 30 May 2018 on the future of food and farming (mentioned later on as “the Resolution”).

The maintenance of the specific sectoral intervention has been also largely welcome by the different stakeholders.

### Aim

This study serves to inform the members of the European Parliament, particularly the members of the Committee on Agriculture and Rural Development, concerning both the remaining sectorial approach in the current CAP in general, and the current rules on farmers' cooperation.

The European rules on Producer Organisations, their associations and the Interbranch Organisations deserve special attention. The paper presents briefly their historical evolution, taking into account of the period when the Commission has been more active on those files... and those when it has been more reluctant.

It concluded that the first version of regulation 1308/2013 ended in a ceremony of the confusion. The same wording “Producer Organisation” was used in the same regulation with 2 significantly different meanings.

The Omnibus regulation and the recent ruling of the European Court of Justice on the so-called “endive case”, represent important and positive steps in reducing the confusion and legal uncertainties. They merit special attention.

The paper underlines first 7 relevant issues related to, but not included in, the CMO regulation:

It ends presenting 21 proposals that could deserve to be discussed and evaluated on how the European Parliament could improve the food chain value beyond 2020.

They are structured in 7 blocks on market data; EU public intervention; a more efficient and effective safety net; taking note of the “endive case” ruling; improving the rules for producers Organisations, their associations and the Interbranch Organisations; preventive market measures and addressing the prisoner’s dilemma.

## 1. GENERAL INFORMATION

### KEY FINDINGS

- In the legislative proposals presented in June 2018, “the Common Market Organisation and its instruments remain largely unchanged”, despite “few important points for more effectiveness and simplification”.
- The amendments proposed to rules on geographical indications and the maintenance of specific sectoral interventions for some key sectors (and the potential enlargement to others) have been largely welcomed.
- The financing of the Operational Programs of the Producer Organisations in the fruit and vegetable sector is the only expenditure that is not limited by a fix budget envelop. The Commission has also opened a door to the introduction of similar operational programmes for other sectors. Both proposals are also perceived as positive.
- The Omnibus regulation has significantly amended Regulation 1308/2013 introducing welcome changes on prerogatives of Producer Organisations.
- The recent ruling of the European Court of Justice on the so-called “endive case” is also an important item to be considered.

As explained by the Commission in its own presentation of the legislative proposals presented in June 2018, “the Common Market Organisation and its instruments remain largely unchanged”.

To highlight only 3 major issues, the safety net continues to be composed of public intervention and private storage aid on one hand and exceptional measures on the other. Marketing standards and rules on farmers' cooperation are unchanged.

Nevertheless, the Commission underlines “few important points for more effectiveness and simplification”:

- The integration of sectoral interventions in the CAP plan Regulation (for fruit and vegetables, wine, olive oil, hops and apiculture).
- The extension of the possibility to initiate sectorial interventions to other agricultural sectors.
- Amendments to rules on geographical indications to make them more attractive and easier to manage.
- The adjustment of allocations following the MFF proposal.
- The deletion of a number of obsolete provisions.

On the main issues related to the single CMO, the Commission has followed the Resolution of the European Parliament of 30 May 2018 on the future of food and farming (mentioned later on as “the Resolution”). The maintenance of the specific sectoral intervention (point 122 of the Resolution) has been also largely welcomed by different stakeholders.

In a context of severe budget discipline, the financing of the Operational Programs of the Producer Organisations in the fruit and vegetable sector is the only expenditure that is not limited by a fix budget envelop (on line with point 123 of the Resolution). In the direct payment proposal, the Commission has

opened a door, as requested also in point 123 of the Resolution, to the introduction of similar operational programmes for other sectors. Both proposals are welcomed.

We will mainly focus our analysis on the consequences of this small piece of sentence *“rules on farmers’ cooperation are unchanged”*. The Omnibus regulation has significantly amended Regulation 1308/2013 introducing positive changes on prerogatives of Producer Organisations. The recent ruling of the European Court of Justice on the so-called *“endive case”* is also an important item to be considered.

However, more changes could be implemented in order to clarify the regulation and improve farmers’ position in the food chain.

The paper is structured in the following way. First (part 3) we will focus on public crisis management. Secondly (Part 4), we will be centred on the role of Producer Organisations and their Associations and of Interbranch Organisations; Part 5 will discuss some more issues related to, but not included in, the Regulation 1308/2013 and in Part 6 we will present 21 proposals on how the European Parliament, as legislator, could improve the food value chain beyond 2020.

## 2. PUBLIC CRISIS MANAGEMENT

### KEY FINDINGS

- J Market transparency was the first issue raised by the Agricultural Market task Force in its report on November 2016 (EC, 2016). Since then, significant progress in market data and analysis transparency that deserve to be acknowledged. Nevertheless, more can be done.
- J To afford farmers a sound risk management, it is essential to setup clear and transparent rules for EU public intervention.
- J Market orientation of the European agricultural sector and industry is one of the major achievements of the different waves of CAP reform. This do not means that, on a case-by-case basis European reference thresholds could not be revisited.
- J Internal Commission rules and the corresponding Comitology made practically impossible for the Commission to implement preventive measures despite the fact that they are more efficient and effective.

### 2.1. Market transparency

Many authors (for instance Deloitte Conseil. 2012; OECD, 2011) have underlined the relevance of “publically available and reliable market information”. Market transparency was also the first issue raised by the Agricultural Market task Force in its report on November 2016 (EC, 2016a). Since then, the Commission has implement significant progresses in market data sharing and analysis transparency that deserved to be acknowledged.

Amongst them, we could underline the following:

- Based on the good results of the European Milk Market Observatory, the Commission has implemented Meat, Sugar and Crops Market Observatories.
- Fifteen Markets Dashboards<sup>1</sup> summarize the key variables that allow the understanding of what is happening in the European market, updated on a regular basis.
- The Milk Market Observatory is active on Twitter to disseminate its update. Unfortunately, it is the only one.
- The Short-Term Outlook of EU agricultural markets is no more limited to the arable crop, meat and dairy sectors. It now also includes some fruits (peaches and nectarines), vegetables (tomatoes) and olive oil.
- The Medium-Term Outlook with the prospects for agricultural markets addresses the farm income evolution for the next decade. Its scope has also be expanded. Each year, its presentation in a public conference has become a key date for European agricultural market specialists.

Nevertheless, more could be done in order to further increase the market transparency of European agricultural markets.

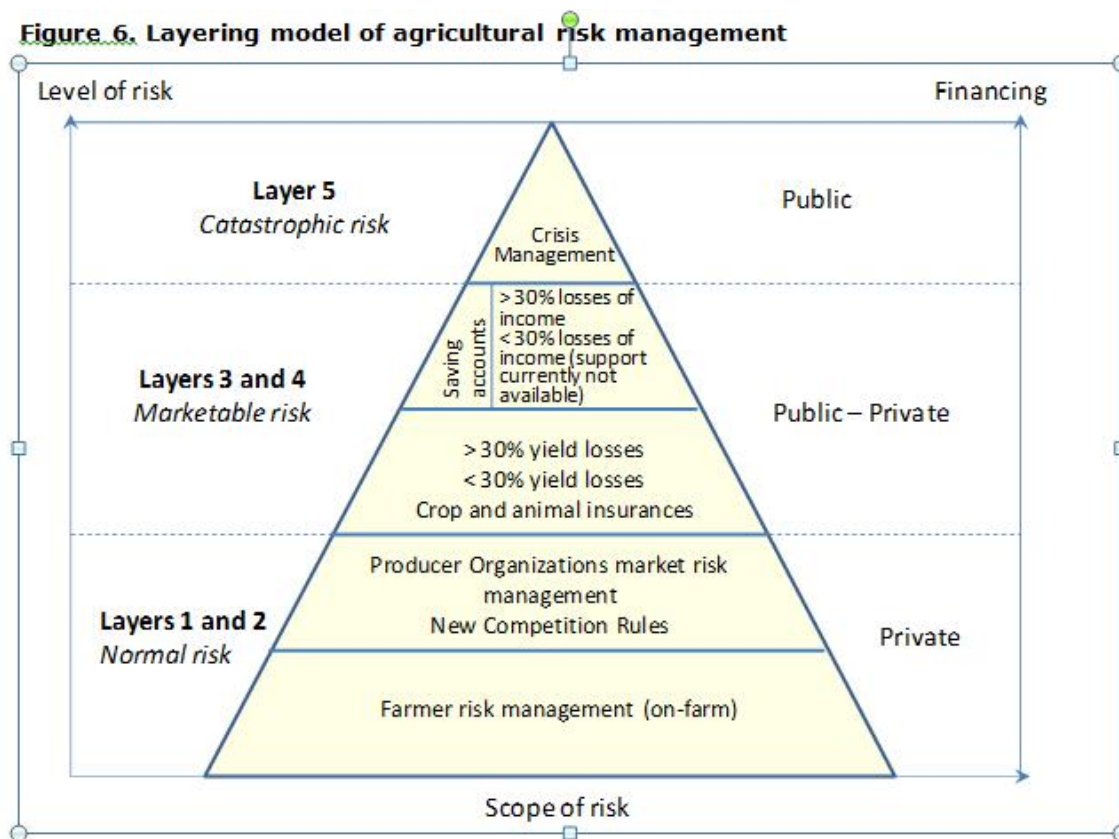
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<sup>1</sup> For milk and milk products, beef meat, pig meat, sheep meat, eggs, cereals, oilseeds, sugar, olive oil, wine, tomatoes, apples, citrus fruits and peaches and nectarines.

## 2.2. Applicable rules

Bardaji et al (2016) in their report on risk management presented a layering model of agricultural risk management. Public crisis management is related to layer 5: *“the fifth layer corresponds to highest level of risk i.e. income crisis due to production crisis (climate or animal health and plant pests), market crises or both. Crisis often results in severe and massive revenue/income losses for the farmers of a specific sector or region. The crisis should be managed through public intervention and financing as the last resort for the agricultural risk management. It includes the crisis reserve; the EU safety nets (intervention purchases financed private storage or withdraws); the ad-hoc payments and the veterinary fund.”*

**Figure 1: Layering model of agricultural risk management**



**Source:** Bardaji et al (2016).

Today, Article 219 of Regulation 1308/2013 could be activated against *“threats of market disturbance caused by significant prices rises or fall... and circumstances significantly disturbing or threatening to disturb the market where the situation ... is likely to continue or to deteriorate”*.

Article 221 focuses on *“situation likely to cause a rapid deterioration of production and market conditions”*.

As already proposed by Bardaji et al (2016) to afford farmers a sound risk management, especially in the third and fourth layers, *“it is essential to setup clear and transparent rules for EU public intervention in the fifth layer (crisis management)”*.

It is not only *“essential”*, it is also more effective. Skimmed Milk Powder (SMP) is the most recent EU public intervention case. Jongeneel et al (2018) have just concluded that *“the complete uncertainty about the EU’s destocking strategy contributes to negative market sentiments”*.



### 2.3. The level of the European reference thresholds

It is often argued that the current level of the European reference thresholds is “unrealistic” and does not contribute enough to achieve their safety net role.

This argument has been, implicitly at least, partially accepted by the Commission when it increased withdrawal prices for many fruits and vegetables from 30% to 40% of the average EU market price over the last five years for free distribution (so-called charity withdrawals) and from 20% to 30% for withdrawals destined for other purposes (such as compost, animal feed, distillation, etc.).

Public crisis management has to be related to objective (c) “to stabilise markets” of Article 39 of the Treaty and not to objective (b) “to ensure a fair standard of living for the agricultural community”. For instance, in an open economy such as the current European one, intervention prices cannot be related to production costs for, amongst other, two reasons.

Firstly, there is no “EU production cost” as such but a large range of production costs depending, for instance, of agronomic, climatic, farm and investments management, land prices, labour costs, national taxation systems and monetary factors.

Secondly, too high intervention prices would stimulate EU imports of competitive products and discourage exports. Even more, they could stimulate increased production in third countries which could be exported to the European Union.

Market orientation of the European agricultural sector and industry is one of the major achievements of the different waves of CAP reform. This is why EU agri-food trade surplus is at record levels (EC, 2018 a).

This does not mean that, on a case-by-case basis, intervention (or withdrawal) prices could not be revisited. In some cases, they could be increased but in others, it could be the opposite. For instance, Jongeneel et al (2018) concluded recently that “the intervention price level as it is currently defined for Skimmed Milk Powder (SMP) may need reconsideration and be in need to be lowered”.

### 2.4. Preventive market measures

Mahé et al (2016) concluded that “the economics of market measures shows that they have the power to prevent or mitigate deep price disturbances, but when coming late they do not address properly the waste of productive and budget resources. Selling prices production below cost as with ex-post intervention in particular implies a welfare loss. Preventive policies look attractive at first glance, but implementation raise political and institutional issues”.

Internal Commission rules and the corresponding Comitology made practically impossible for the Commission to implement preventive measures despite the fact that they are more efficient and effective.

Once the DG AGRI market unit is convinced that a potential problem is going to happen in a market, it has first to prepare a note and to convince its Director and Deputy-Director General.

Later on, it has to start discussion with DG AGRI legal and budget services in order to find an internal agreement. Then, a memo is finalized presenting the issue and the different possible options. After a discussion with the Director General, the point is raised in a meeting with the Commissioner and its private office. In between, the market situation is discussed in one (or several) Management Committee(s) with the delegates of the Member State.

Once the Commissioner has given its blessing, it is time to officially consult the relevant Commission services, in particular the Legal Service, DG BUDG, DG Trade, DG COMP and depending of the issue also DG ENV and DG CLIMA.

After that, an official Interservice consultation is launched and a proposal is presented to, and voted by, the Management Committee if it is a Commission Regulation and approved by the Commission if it is a European Parliament and Council Regulation.

Supposing it is a Commission Regulation, depending on if it is a delegated or an implementing act, there is a time delay between its approval by the Commission and its full implementation.

My personal experience is that it is difficult to convince, firstly, DG AGRI hierarchy. Secondly, you still have to face the extremely challenging task to persuade other Commission services to support a market intervention proposal based on hypothesis, suppositions and expected market evolution.

Mahé et al (2016) rightly assess *“that the possibility, for all the three political institutions to interfere into details such as changing prices or volumes of intervention is not the best framework for good policy making”*. They propose *“an independent Administrative Authority for market measures... A mandate for implementation of market measures would be written down... Whether it was a branch of the Commission or a separate body, it would be accountable to Institutions of the Trilogue but empowered to act within the mandate”*.

Market measures have, amongst others, budget, legal and trade consequences.

It is not conceivable that the *“imposition of crisis prevention cross compliance “could be decided (or even based) on an “independent Administrative Authorities” or Agency. In their conclusions, the authors propose that “during price bubbles, the Agency would be empowered to freeze part of the basic payments and, in case of predictable future imbalances, to require supply growth containment and introduce crisis prevention cross compliance payments”*.

We agreed with the diagnostic but we believe that their proposal is a *“false solution”*. Its implementation would raise **“political and institutional issues”**.

Firstly, it is against the principle of budget annuality. Secondly, in the current European framework, it seems very difficult to imagine that decisions like this could (and even more should) escape to the supervision of, first, the European Commission and, later on, the Member States, the Council and the European Parliament.

### 3. PRODUCER ORGANISATIONS AND THEIR ASSOCIATIONS

#### KEY FINDINGS

- J The EC Treaty includes a significant and general derogation to the application of the antitrust discipline to arrangements and agreements, including the associations and the associations of associations, if they are necessary for the attainment of the objectives of its article 39.
- J The fruit and vegetable sector is, probably, the sector where this exception is more “significant and general”. From the competition point of view, the most important change introduced in 2007 has been the possibility for the PO to delegate powers or functions to an Association of Producer Organisations (AOP).
- J Fruit and vegetable Producer Organisations are commercial entities that have to market the production of their members. It is a company and not a cartel, often a cooperative but not always. They are formed on the initiative of, and controlled by, the producers, but they can have non-producers members.
- J During the “years of ice” in DG AGRI, the precedent of fruit and vegetables was “the one not to follow”.
- J The “milk package” and the first version of the regulation 1308/2013 opened a ceremony of the confusion. The same wording “Producer Organisation” is used in the same regulation with 2 significantly different meanings.
- J The Omnibus regulation and the recent ruling of the European Court of Justice on the so-called “endive case”, represent important and positive steps in reducing the confusion and legal uncertainties.
- J The development and consolidation of Producer Organisations in Europe require real and deep changes of the Commission auditors’ role.

#### 3.1. A “SIGNIFICANT AND GENERAL” DEROGATION

Many authors (for instance Ries et Guida, 1968; Knudsen, 2009; Lamo de Espinosa Rocamora, 2010; Blumann et al, 2011; Bianchi, 2012; Guillem Carrau, 2012; Guillem Carrau, 2014; Adrien et Garcia Azcarate, 2015; Lianos and Lombardi, 2016; Sorrentino y Velazquez, 2016) have analyzed the relation between the European competition policy and the Common agricultural Policy (CAP). Catherine Del Cont et al. (2012) summarized perfectly the issue: *“Article 81(1) (of the EC Treaty) shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 33 of the Treaty are jeopardised”.*

*This exception is now recognized as an autonomous case of exception. According to the Court judgment 12 December 1995 in Joined cases C-319/93, C-40/94, C-224/94 (par.20): “To interpret the second sentence as having no independent meaning would run squarely counter to the wishes of the legislature, inasmuch as it would result in more stringent conditions being applied to agreements which are to be made more flexible, since they would have to fulfil the conditions laid down in both the first and second sentences. Moreover, the Commission could scarcely find that an agreement jeopardized the objectives of Article 39 of the Treaty if, by virtue of the derogation set out in the first sentence, it had already been established that that agreement or decision was necessary for the attainment of those objectives.*

*This third case represents in the European experience the most significant and general derogation to the application of the antitrust discipline to arrangements and agreements, including the associations and the associations of associations, provided that farmers only are the protagonists thereof."*

### 3.2. The fruit and vegetable precedent

The fruit and vegetable sector is, probably, the sector where this exception is more *"significant and general"*. It deserves a specific mention, as Article 152 of Regulation 1308/2013 is a transposition of the previous sectorial fruit and vegetable rules.

In proper Commission wording, *"the 1996 reform (for fruit and vegetables) marks a fundamental shift in the logic of support with the progressive phasing-out of market intervention measures and the introduction of generic aids to strengthen competitiveness and environmental protection.*

*As from 1996, the members of recognized Producer Organisations (POs) were required to market the majority of their products through their PO. Community financial support was granted through operational funds established by the Producer Organisations and co-financed at 50% by the EC and at 50% by the POs. The support was limited to 4.1% of the value of the marketed production by the Producer Organisations. Operational funds only served for financing the implementation of operational programs. The latter included measures aimed at several objectives, such as improvement of the product quality, increase in product commercial value, promotion campaigns addressed to the consumers, creation of coherent ranges of products, development of integrated productions or adoption of other environmentally friendly production methods, or reduction of the produce withdrawals from the market"* (EC, 2010).

Fruit and vegetable Producer Organisations are commercial entities that have to market the production of their members. It is a company and not a cartel, often a cooperative but not always. They are formed on the initiative of, and controlled by, the producers but they can have non-producers members.

The European Commission refrained from imposing a specific organization/governance structure of Producer Organisations. In their exhaustive literature review, Falkowski and Ciaian (2016) found limited evidence to support the existence of an optimal type of organization/governance. In other words, farmers are free to adopt the legal structure they believe suits the best their needs.

This is why the Commission, after long internal discussions, adopted the wording "Producer Organisation" instead of "cooperatives", a new wording quite close to the "Producer-owned Enterprises" concept, developed amongst other by Fulton and Pohler (2015). The purpose was not to create a new figure and more red tape but to add flexibility to the scheme. Therefore, multiple legal forms are allowed (Bijman, 2018)

POs have their own commercial strategy, selling on the market as much as they decide to and withdrawing from the market as much as is needed, as any other company.

In addition, some of those non-sold products can be included in their Operational Program as *"crisis prevention and management"* action and therefore be financed by the operational Fund or even, in some cases, directly by the European Union.

From the competition point of view, the most important change introduced in 2007 has been the possibility for the PO to delegate powers or functions to an Association of Producer Organisations (AOP).

A Producer Organisation can be member of different APOs that pursue different objectives. For instance, an AOP can try to ensure *"that production is planned and adjusted to demand, particularly in terms of quality and quantity"*. Another one can *"concentrate the supply and the placing on the market of*

*the products produced by its members*". A third one can be research or promotion oriented or can process the raw products.

POs have to be commercial entities but this is not the case of AOPs, which can be "commercial" or not. Here again, they are formed on the initiative of, and controlled by, the Producer Organisations but they can have non-producers' organisations members.

The French national competition authority (Autorité de la Concurrence, 2008) has analysed the functioning of this regime and concluded that it is "*a wide derogation from the general competition law*".

Based on this fruit and vegetable experience and wording, article 152 of Regulation 1308/2013 defines the possible objectives for a PO:

*(i) ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity;*

*(ii) concentration of supply and the placing on the market of the products produced by its members, including through direct marketing;*

*(iii) optimising production costs and returns on investments in response to environmental and animal welfare standards, and stabilising producer prices;*

*(iv) carrying out research and developing initiatives on sustainable production methods, innovative practices, economic competitiveness and market developments;*EN 20.12.2013 Official Journal of the European Union L 347/737

*(v) promoting, and providing technical assistance for, the use of environmentally sound cultivation practices and production techniques, and sound animal welfare practices and techniques;*

*(vi) promoting, and providing technical assistance for, the use of production standards, improving product quality and developing products with a protected designation of origin, with a protected geographical indication or covered by a national quality label;*

*(vii) the management of by-products and of waste in particular to protect the quality of water, soil and landscape and preserving or encouraging biodiversity;*

*(viii) contributing to a sustainable use of natural resources and to climate change mitigation;*

*(ix) developing initiatives in the area of promotion and marketing;*

*(x) managing of the mutual funds referred to in operational programmes in the fruit and vegetables sector referred to in Article 31(2) of this Regulation and under Article 36 of Regulation (EU) No 1305/2013*

*(xi) providing the necessary technical assistance for the use of the futures markets and of insurance schemes*

### **3.3. The years of ice**

Following President Santer resignation, the Commission developed a culture of prudence which went hand in hand with a certain reluctance to take "potentially risky" measures.

From this point of view, the mechanism of direct aids was almost perfect. Large EU budget could easily be committed in shared responsibility with the Member States.

This is why, for instance, in the middle of the 2009 dairy crisis, when € 280 million could be released to support milk producers, it was decided (amongst other measures) to distribute this amount among the beneficiaries as a bonus to their direct payments, instead of promoting Producer Organisations and the rebalancing of market power inside the food chain. This was simple, easy to implement even if useless

from the market point of view. As Alan Matthews (2010) pointed, payments reached farmers after the crisis has passed and incomes were already recovering.

Producer Organizations in general, particularly in the fruit and vegetable sector with their operational programs, did not fit easily into this “simple and easy-to-implement” mold. For instance, the 2006 fruit and vegetable reform was delayed almost by one year, in order to prepare an alternative option, the transfer of all “this complication” from the first pillar of the CAP to Rural Development. Cleverly, Commissioner Fischer Boel rejected this option in her first meeting with the Commission services.

The “heterodox” nature of the regulation in force for fruit and vegetables did not stop there. The scope of activity of Producer Organizations coincides with some of the measures foreseen in the second pillar of the CAP. There was a risk of potential double financing. In spite of following the provisions of the Council Regulation, which opened the way for a certain degree of flexibility, DG AGRI services were instructed to favor (and impose if possible) an “exclusionary approach” (what is possible on one side is forbidden on the other one) rather than an approach of coherence and synergy.

Not only was the example of fruit and vegetables therefore “the one not to follow”, but the support, in the context of the Rural Development regulation, to Producer Groups (a traditional measure resulting from the discussions that followed the Mansholt Plan<sup>2</sup>) was no more eligible in the old Member States (Garcia Azcarate, 2016).

The 2009 dairy crisis helped set the record straight. One of the “new” initiatives proposed by the Commission and adopted later was precisely ... to finance Producer Groups also in the old Member States. Commissioner Fischer Boel at the end of term, took full account of the situation and rightly pointed “we need to reflect some more on other ways of managing crises. Part of this will be about “helping farmers to help themselves<sup>3</sup>.”

### 3.4. Regulation 1308/2013: a ceremony of the confusion

Commissioner Ciolos initial aim what to extend the fruit and vegetable scheme to the other agricultural productions. He faced a farce resistance on the part of DG Competition but also of some important DG AGRI services.

On one hand, Regulation 1308/2013 has extended the use of POs as a common policy tool for market organizations to all agricultural sectors (Bouamra-Mechemache and Zago, 2015). On the other hand, the regulation has introduced confusion and legal uncertainties, despite the fact that its whereas clause 131 gives indicates the political will of the legislator:

*“Producer organisations and their associations can play useful roles in concentrating supply, in improving the marketing, planning and adjusting of production to demand, optimising production costs and stabilising producer prices, carrying out research, promoting best practices and providing technical assistance, managing by-products and risk management tools available to their members, thereby contributing to strengthening the position of producers in the food chain.”*

#### 3.4.1. The Milk Package

The “milk package”, following the milk crisis, marked the beginning of the confusion. “Drafted on the basis of the conclusions of a special High Level group set up after the 2009 milk market crisis, (the “milk package”) aimed at boosting the position of dairy producers in the dairy supply chain and preparing the

<sup>2</sup> Regulation 1360/78 on Producers Groups and their unions, OJEU L 166/1.

<sup>3</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/554&format=HTML&aged=0&language=EN&guiLanguage=en>

sector for a more market-oriented and sustainable future. For example, it gives Member States the possibility to make written contracts between farmers and processors compulsory in the milk sector, and it allows farmers to negotiate contract terms collectively within certain limits. The new regulation was published on 30 March 2012.

*The package provides for written contracts between milk producers and processors and for the possibility to negotiate contract terms collectively via Producer Organizations*<sup>4</sup>.

As defined in article 148 of Regulation 1308/2013, "a Producer Organisation in the milk and milk products sector may negotiate on behalf of its farmer members, in respect of part or all of their joint production, contracts for the delivery of raw milk by a farmer to a processor of raw milk, or to a collector". Cooperatives are explicitly excluded from the scope of activities of those new "Producer Organisations", which can only negotiate with the Investors Own Firms (IOFs).

The same legal term "Producer Organisations" is used in the same regulation with 2 completely different meanings and 2 completely different treatments as far as competition policy is concerned (Velazquez and Buffaria, 2017).

For instance, Article 149 of regulation 1308/2013 imposes limitation to the maximum volume of raw milk that a single PO can negotiate: *It should not exceed 3,5 % of total Union production; the volume of raw milk covered by such negotiations which is produced in any particular Member State should not exceed 33 % of the total national production of that Member State, and the volume of raw milk covered by such negotiations which is delivered in any particular Member State should not exceed 33 % of the total national production of that Member State.*

### **3.4.2. Agreements and decisions during periods of severe imbalance in the markets**

Article 222 empowers the Commission to allow Producer Organizations and their associations to intervene in the market but only "during periods of severe imbalance in markets". Two of the main conditions required by the regulator were, first, that the Commission has to adopt an implementing act and, second, that it could apply "only if the Commission has already adopted measures" such as market intervention, private storage or market withdraws.

If there is no "severe imbalance in the markets", market withdraws, free distribution, storage ... by Producer Organisations are therefore not allowed. Even worst, they could be only allowed by the Commission if and when it has already adopted one of those measures.

In this context, how can Producer Organisations succeed in "ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity" as requested by article 152 of the same regulation?

### **3.4.3. The specific provisions foreseen for the olive oil, beef and veal and arable crops sectors**

Articles 169, 170 and 171 of the CMO Regulation developed specific rules for contractual negotiations in the olive oil, beef and veal and arable crops sectors.

If the legislators have found necessary to explicitly allow certain practices under certain conditions, this means implicitly that they are forbidden in the other cases. Even if the official aim of the regulation was

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<sup>4</sup> [https://ec.europa.eu/agriculture/milk/milk-package\\_en](https://ec.europa.eu/agriculture/milk/milk-package_en) (Consulted on 20/07/2018, 15:50)

*"at contributing to strengthening the position of producers in the food chain"* (whereas clause 131), in practice it limits the scope of article 152.

The issue was so tricky that the Commission decided to *"give guidance to those producers"* approving specific Guidelines<sup>5</sup>. They give illustrative examples. In the case of the *"joint sale practice of malting burley"*, *"competition is unlikely to be restricted given the small share of the market represented by the PO"*. In the *"rapeseed producers"* example, *"the combined market share of the parties on the market for animal feed from rapeseed does not exceed 20% as required by Article 3 of the Specialisation Block Exemption"*.

POs are not seen as companies but as a cartel of producers, which market share has to be limited. Following this approach, if an Investment Own Firm buys and trades the production of 100 producers, there is no relevant market share limit, even if those 100 farmers are the shareholders of the company as long as it does request the status of a PO. If a PO does the same economic activities with the same 100 producers, the market share limit would be applicable.

Despite the whereas clause 131, this was a clear negative discrimination against the POs. Instead of *"contributing to strengthening the position of producers in the food chain"*, this interpretation of the text empties it of content.

Therefore, articles 169, 170, 171 and 222 were in contradiction with Article 152, despite whereas clause 131. As we will see later, the Omnibus Regulation and the European Court of Justice, in its *"endive case"* ruling, have clarified the issue.

Some years ago, the position of the Commission was more open on private management schemes. In its Communication of 26 October 1990 (EC, 1990) to the Council on *"organisations and agreements linking different branches within the agricultural sector"*, it clearly stated:

*"More recently, in the Explanatory Memoranda attached to its proposals for the 1987/88 prices, the Commission stated that "the aim of the introduction of more flexible institutional instruments for market support is not to replace order by anarchy but to stimulate the establishment of new structures, in the preparation and operation of which farmers and their organizations will play a more active role".*

*The Commission stated its preparedness in certain circumstances to facilitate a developing trend on contractual relationships between farming and processing, in particular in the form of inter-branch agreements. It stressed that the aim was not to build something out of nothing, as there were already good models in the Community, but there was a need to make a start in this direction.*

*As institutional market support instruments are rendered more flexible, the Commission reaffirms its view that in some sectors, flexible machinery for concerted discussion and cooperation between the various types of firms involved in production, processing and marketing of agricultural products must also be developed.*

*Such a structure should help correct the dispersion of supply which is endemic in certain agricultural product sectors. The establishment of producer groups has for some sectors and in some regions, brought good results. However, the trend towards the concentration of marketing and processing activities, together with the imbalances between supply and demand which now prevail in certain markets, suggest that the policy on producer groups should be pursued by action in support of voluntary Interbranch cooperation in case existing Instruments are insufficient to achieve the objectives of Article 39 of the Treaty".*

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<sup>5</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015XC1222\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015XC1222(01)&from=en)



### 3.5. Current situation: the Omnibus Regulation and the “endive case” ruling

Here again the French national competition authority has analyzed both the Omnibus Regulation and the “endive case” ruling (Autorité de la Concurrence, 2018).

#### 3.5.1. The Omnibus Regulation, an important step toward clarification

The so-called “Omnibus Regulation”<sup>6</sup> represented an important and positive step in reducing the previously described “ceremony of the confusion”. In particular,

- ) It clarifies, the previously conflictive issues of the “transfer of ownership of agricultural products” and the “same negotiated prices” inside the Producer Organisation, maintaining the objective of “concentration of supply” and “placing the products of its members on the market” (new article 152).
- ) It improves the legal capacity of POs and APOs to require written contract or offer when the buyer is not a micro, small or medium company (new article 168).
- ) It extended to all sectors the specific provisions previously foreseen only for the olive oil, the beef and veal and certain arable crops sectors (Massot, 2018).
- ) It removes from article 222 the condition included in its paragraph 2, the requirement of a previous adoption by the Commission of an intervention measure as a pre-condition for private market intervention by POs and APOs.

The Omnibus Regulation still maintains that the Commission has to adopt an implementing act in order to allow private crisis management by “*farmers, farmers associations or associations of such associations, or recognised producers organisations, associations of recognised producer organisations and recognised Interbranch organisations*”.

If the Commission has to adopt an implementing act before private crisis management is implemented, it is hardly conceivable that it could be “preventive”.

In addition, why do we need an explicit Commission decision needed to allow commercial POs and their associations to take actions directly related to their aim of “ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity”?

#### 3.5.2. Interbranch Organisations (IBO)

The first legislation on Interbranch Organisations has been the French Law 75-600. Despite the fact that several European sectorial agricultural market regulations included this figure (for instance, fruit and vegetable, tobacco, wine), it has mainly been during many years a “French specificity”. When the Commission approved its Communication (European Commission, 1990), only 56 IBOs were recognised.

In 2011, the European Court of Justice settled that the mandatory extension of fees to non-members (“Contributions Volontaires Obligatoires”, CVO in French) for the financing of the IBO does not constitute State aid, as the Commission during the “age of ice” argued. This legal certainty ... and the increase interest of Competition authorities about what was happening in the agricultural sector,

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<sup>6</sup> Regulation 2017/2393 of 13 December 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017R2393&from=EN>

contributed to promote a change of mentality in several Member States needing to find a legal basis for some traditional practices.

This is why Regulation 1308/2013 could enlarge the scope of possible Interbranch activities to all agricultural sectors. It acknowledged that IBOs play an important part in allowing dialogue between actors in the supply chain and in promoting best practices and market transparency. The regulation developed common provisions for their recognition and stipulated certain derogations from the EU competition rules.

The Amat et al (2016) report for DG AGRI showed *“that 19 Member States had adopted national rules on the recognition and functioning of IBOs. The first legislation was the French law 75-600 of 1975. In June 2016, 123 recognized IBOs, four of them solely recognized only under national rules, were active in eight different Member States<sup>7</sup> but their total number was growing”*.

In 2016, half of the recognized IBOs was still located in France (63) for 60 located in the other 7 MS (7 in Greece, 6 in Hungary, 3 in Italy, 27 in Spain, 7 in the Netherlands, 5 in RO, and 5 in Portugal). However, the relative French share was decreasing year by year.

The Omnibus Regulation enlarges the scope of the Interbranch Organisations possible aims to *“establish standard value sharing clauses”* and to *“implement measures to prevent and manage animal health, plant protection and environmental risks”*..

### 3.5.3. The “endive case” ruling, another welcomed clarification

The European Court of Justice adopted a preliminary ruling on 14 November 2017 on the so-called “endives case”<sup>8</sup> which clarify significantly the debate. It underlines the role of the commercial POs and their APOs. The exception to the competition rules applicable to the commercial POs are extended to the AOPs even if they are not commercial APOs but fulfil any of the other POs missions.

Amongst the findings of the Court, the followings could be underlined:

*“It should be observed that the objectives of ensuring that production is planned and adjusted to demand, of concentrating supply and placing on the market the products produced by members, and of stabilising producer prices, necessarily entail the exchange of strategic information between individual producers that are members of the PO or APO concerned, the purpose of which is, inter alia, to acquire knowledge of the characteristics of the products produced by the members. Therefore, exchanges of strategic information between producers within the same PO or APO are liable to be proportionate if they are in fact made for the purposes of one or more of the objectives assigned to that PO or APO and are limited only to the information that is strictly necessary for those purposes.*

*The objective of stabilising producer prices to ensure a fair standard of living for the agricultural community may also justify coordination between agricultural producers in the same PO or APO with regard to the quantities of agricultural products put on the market, as is clear from recital 16 of Regulation No 2200/96 and the intervention arrangements whose operating principle was laid down in Article 23 of that regulation and amended by Article 103c(2)(a) of Regulation No 1234/2007.*

*In addition, the objective of concentrating supply to strengthen the position of producers in the face of ever greater concentration of demand may also justify a certain form of coordination of the pricing policy of individual agricultural producers within a PO or an APO. That applies in particular where the PO or APO*

<sup>7</sup> Greece, Spain, France, Hungary, Italy, The Netherlands, Portugal and Romania.

<sup>8</sup> <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30dd40c3bb10989f43cd9660db7a5bd4ace8.e34KaxiLc3qMb40Rch0SaxyOahf0?text=&docid=196626&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=517023>

*concerned has been assigned by its members the responsibility for marketing all their products, as required, save in special cases, by Article 125a(1)(c) of Regulation No 1234/2007, read in conjunction with Article 125c thereof.*

The European Court of Justice is therefore recognizing the existence of a “*significant and general derogation*” to the competition rules.

*By contrast, the collective fixing of minimum sale prices within a PO or an APO may not be considered, under the practices necessary in order to fulfil the responsibilities that have been assigned to them under the common organisation of the market concerned, to be proportionate to the objectives of stabilising prices and concentrating supply where it does not allow producers selling their own products themselves in the cases referred to in Article 125a(2) of Regulation No 1234/2007 to sell at a price below those minimum prices, since it has the effect of reducing the already low level of competition in the markets for agricultural products as a result, in particular, of the possibility given to producers to form POs and APOs in order to concentrate their supply.”*

Curiously, on one hand, POs can withdraw products from the markets, in order “to adjust production to demand”. In the absence of public funding, the PO can pay the withdrawal price that it wants.

An APO can normally contribute to the adjustment between supply and demand on a more efficient and effective way than an individual PO. Here again, in the absence of public funding, the APO can pay the withdraw price it wants, if there is no abuse of dominant position to impose unreasonable price to consumers.

On the other hand, “*collective fixing of minimum sale price may not be allowed*”. The last paragraph of the current article 209.1 does not allow “*agreements, decisions and concerted practices which entail an obligation to charge an identical price or by which competition is excluded.*”

There is here a grey zone that would deserve to be clarifying in order to increase legal certainty both for farmers and for national administrations. Catherine Del Cont and Antonio Iannarelli (2018) rightly proposed simply to remove this prohibition.

### **3.6. The Commission auditors’ role**

The experience of fruit and vegetables teaches us that the great margins of flexibility left by the Community regulations to the Member States is sometime reinterpreted with retroactive effect by the Commission's auditors, sometimes disagreeing with the opinions of the unit responsible for the management of the markets in the same General Directorate of Agriculture and Rural Development.

Jos Bijman (2015) rightly underlined those tensions in its report to the European Parliament: “*It seems there (were) differences of opinion within the Commission (DG AGRI) between the policy units on the one hand and the audit services regarding the interpretation of the regulation... One of the objectives of the 2007 reform was to make the fruit and vegetable rules simpler and to increase flexibility. During the discussions amongst the Member States and the Commission on the Commission regulation (EC) N° 1580/2007 laying down implementing rules, there was an emphasis on flexibility and creativity to be used by the Member State in implementing the Regulation. The flexibility was intended to address the wide variation in market conditions between and within Member States.*

*However, once the regulation was in place, the subsequent audits turned out to be very strict. Instead of allowing flexibility and creativity, the situation turned out to be of legal uncertainty. The interpretation by the audit service, for instance on the issue of outsourcing, has contradicted, maybe not with the letter of the*

*Regulation but certainly with the spirit of the Regulation, as understood by the Member State discussing the new regulation in the management Committee”.*

Some of the concrete issues which have been subject to different retroactive interpretations from one service to another or from one year to another have been the following: criteria for the recognition of a Producers’ Organization (PO), democratic control of the POs by the producers; environmental management of packaging, externalization of functions by a PO.

The spirit of the regulation was clear for all who participate actively in the negotiations. A PO is a business that can outsource all the activities that are better (and/or cheaper) done outside. Despite the fact that the Commission auditors participate actively in all the internal discussions and the management Committees meetings, they were instructed later on to apply stricter rules. *“In some cases, auditors have questioned the democratic control of farmers over the marketing of their product when key activities were outsourced”* (Bijman, 2015)

Therefore, to avoid a financial correction, when a European new rule is approved, the national (and sometimes also the regional) responsible officials adopt the “precautionary principle”, making the most prudent possible interpretation (one could even say “conservative” interpretation), multiplying the controls and the procedures trying to anticipate what the Commission auditors could request when they will come several years later.

The development and consolidation of Producer Organisations in Europe require real and deep changes of the auditors’ role. Retroactive interpretations of the regulations should not be allowed. Auditors should become the best allies of farmers and national and regional authorities, in order to generalize best experiences and anticipate the possible problems, as we will see in the next section.

The issue was marginally addressed in the Commission Communication “The Future of Food and Farming” (EC, 2017b), in its last paragraph of chapter 2 “Towards a new delivery model”:

*“Another crucial function of the Commission would of course consist in supervising the delivery on results and the respect of basic EU rules and international commitments in the framework of a well-designed audit and assurance system. To this end the assurance process would need to be adapted to the requirements of a result-driven policy design including the development and application of solid and measurable indicators and of a credible performance monitoring and reporting”.*

## 4. SOME OTHER RELEVANT ISSUES

### KEY FINDINGS

- ) This report focusses on the sectorial approach in the CAP beyond 2020. However, consistency between the different CAP tools, an even beyond, has to be ensured.
- ) This is why we will quote here 8 relevant issues that fall outside the scope of this report but are relevant to our purpose, in particular “to improve the EU food chain value”.

### 4.1. A pluri-annual crisis reserve.

The current crisis reserve does not achieve effectively its objective. Agricultural markets crises are generally unpredictable, although it can reasonably be expected that they will not be experienced every year. Inside the budget, the annuality rule does not provide the required flexibility. Outside the budget, the saving made one year could be helpful another year of the programming period if needed.

The future crisis reserve should be *“exempted from the principle of annuality of the budget, so as to permit budgetary transfers from one year to the next, especially when market prices are sufficiently high, while maintaining the crisis reserve at a constant level throughout the MFF period”* (point 142 of the Resolution)

### 4.2. Unfair trading practices

The Commission has presented on 14 April 2018 a *“proposal of Directive on unfair trading practices in business-to-business relationships in the food supply chain”* (European Commission, 2018, b).

The European Parliament has approved already several reports on this issue (amongst others, Bové 2010, Czesak 2015, Delahaye 2016).The European Parliament (2012) voted a resolution of 19 January on the imbalances in the food supply chain (European Parliament Think Tank.,2018)

The COMAGRI has already adopted the report prepared by De Castro (2018).

The relevance of this issue and its strong link with the content of this report, do not need to be underlined. It is also a key element of the Del Cont and Iannarelli (2018) report.

### 4.3. Local market and short supply chains

Many Rural Development programmes support important issues for farmers’ income diversification such as organic farming, quality products and rural tourism. Local markets and short food supply chain are also part of the solution as underlined in point 135 of the Resolution. Pillar 2 should sufficiently support them.

### 4.4. Crop diversification and rotation

There are powerful agronomic and environmental arguments supporting crop rotation and diversification. In addition, a risk management strategy starts at farm level (European Commission. 2017a; Appel and Balmann, 2018).

The inclusion of crop rotation in the requirements and standards on conditionality imposed on beneficiaries receiving direct payments is therefore a move in the good direction.

#### **4.5. Precautionary savings**

Even if it is national competence, fiscal and tax measures can provide some revenue stabilization effect. “It can help farmers to smooth the stream of disposable income across good and bad years” (Tangermann, 2011).

At the opposite, an unbalanced national fiscal system, which for instance is systematically more favourable to investments than to savings, can in good years promote excessive investments and reduce farmers’ resilience in bad years (Bardaji et al, 2016).

The Commission raised the issue in its Communication “the future of food and farming” (European Commission, 2017b).

Some analysts have proposed that the European Union could match farmers’ contributions as an additional option for the Member State. Technically, it could be an additional, and optional for the Member State, percentage of its allocation for direct payments or as another option to be included in the Rural Development programs.

#### **4.6. Micro, Small and Medium Size Enterprises**

Several European Regulations make specific references to micro, small and medium size enterprise. For instance, article 53 of the proposal establishing rules on support for strategic plans) says that “*Union financial assistance at the maximum rate shall only be granted*” to them.

In order to be consistent with the declared political objective of contributing to strengthening the position of producers in the food chain”, commercial POs and their Associations should be added to the list.

#### **4.7. Optional financing of Operational Programmes in new sectors**

Article 83.6 of the Commission proposal establishing rules on support for strategic plans allows Member States to decide in their CAP Strategic Plans to use up to 3% of the Member States' allocations for direct payments for financing operational programmes of commercial Producer’ Organisations and their Associations in new sectors. This percentage could easily be increased.

Article 86.5 fixes the limit amounts for the coupled income support interventions, The 2 limits could be merge as, often, supporting Producer’ Organisations is an effective way to “help the supported sectors and productions ... by improving their competitiveness, their sustainability and their quality”, as requested by article 29.

As, based on the fruit and vegetable experience, the support provided by the Operational Programmes is massively eligible to the green box of the WTO, the total percentage of the former coupled payment can easily be increased.

#### **4.8. A well-designed audit system**

The Commission could be asked to ensure, through a Declaration annexed to the final agreement, that its auditors should no more apply retroactive interpretations of the Regulations.

## 5. PROPOSALS FOR ADJUSTMENTS

### KEY FINDINGS

- J We present 21 proposals that, in our opinion, could deserve to be discuss and evaluated on how the European Parliament could improve the food chain value beyond 2020.
- J They are structured in 7 blocks on market data; EU public intervention; a more efficient and effective safety net; taking note of the “endive case” ruling; improving the rules for producers Organisations, their associations and the Interbranch Organisations; preventive market measures and addressing the prisoner’s dilemma.

As requested, and based on the elements presented in this report, we are presenting 16 possible proposals that, in our opinion, could deserve to be discuss by the AGRI Committee.

### 5.1. More transparent market data

#### **Proposal 1:** A single European Agricultural Market Observatory (EAMO)

As Tangermann (2011) underlined, “one fundamental ingredient in risk management on the farm is sufficient and reliable information”.

We have now 4 European Agricultural Market Observatories. In order to consolidate them, and to better take into account the interlinks between cereals and oilseed productions on one hand and meat and eggs productions on the other one, it make sense to merge them in a single European Agricultural Market Observatory (EAMO).

In addition, this new EAMO would be a perfect instrument in order to take on board “*the sectors that are not yet covered and develop further to offer reliable data and forecasts to market operators* (point 134 of the Resolution) system

#### **Proposal 2:** More statistical information on the structure of the whole industry

Until now, even if under budget pressure, there is a regular European agricultural structural survey. However, the statistical information on the other actors of the industry is limited.

On request of the European Parliament, the Commission published in 2012 a comprehensive study on agricultural cooperatives<sup>9</sup> that would deserve to be updated on a regular basis. Nothing similar exists for the food industry or the retailers... Detail studies and information of the structure of the whole chain are needed for the design of a comprehensive market management policy (Bardaji et al, 2016).

#### **Proposal 3:** Specific information on organic products

As the European Commission has explained, “*the organic sector in the EU has been rapidly developing during the past years. According to Eurostat data, the EU-28 had in 2015 a total area of 11.1 million hectares*

<sup>9</sup> [http://ec.europa.eu/agriculture/external-studies/2012/support-farmers-coop/fulltext\\_en.pdf](http://ec.europa.eu/agriculture/external-studies/2012/support-farmers-coop/fulltext_en.pdf)

*cultivated as organic, up from 5.0 million in 2002. During the last decade, organic area in the EU increased by about 500 000 hectares per year. The whole organic area represents only 6.2% of total utilized agricultural area in Europe. The organic area is cultivated by almost 185 000 farms across Europe. Around 306 500 organic operators (producers, processors and importers) were registered in the EU-28 in 2015” (EC, 2016b). Since then, the market has continued to grow.*

Therefore, on the best possible regular basis, the evolution of the organic markets and prices (and its comparison with the “standard” markets and price) should be included in the dashboards

**Proposal 4:** A Commission progress report

We have already acknowledged the significant progress done by the Commission on market and data transparency until now. Nevertheless, more can be done. For instance, more products could deserve to have a dashboard; not all the dashboards have the same quality and update; public dissemination of the results in social networks is limited...

The Commission could present an annual progress report (including future possible improvements) on market transparency and data reporting.

## 5.2. EU public intervention

**Proposal 5:** An early warning system and regular Commission reports

The Commission should implement an early warning system (Delahaye, 2016). It should “enable prompt and pre-emptive actions in the case of market disturbances with a view to preventing crisis” (point 134 of the Resolution).

It should be based on some objective criteria based on the dashboards that the Commission published now on a regular basis and the Short-term Outlook reports (Bardaji et al, 2016). It should take into account the evolution of imports and exports and of market prices as compared with a reference periods.

In addition, the Commission could be committed to present regular reports on the functioning of this alert system.

**Proposal 6:** The Commission could be invited to adopt, by the end of 2021, a proposal of regulation of the European Parliament and the Council to clarify, at least for the main agricultural products, when and how the Commission would activate public crisis management.

Predictability of EU public intervention is another key issue that should be addressed. Today, the Commission has a large margin of maneuver to intervene, amongst others, in case of “severe imbalances”. Bureau and Mahé (2015) underlined rightly “the Commission lack of independence from political pressure in the market management<sup>2</sup> and its “unpredictable behavior”.

This is why, for instance, recently 19 members of the European Parliament from 4 different Member States, have requested the Commission to activate the private storage for sugar, following their best understanding of the market situation.



### 5.3. More efficient and effective safety net

**Proposal 7:** The Commission could be invited to adopt, by the end of 2021, a report on the level of the current reference thresholds and their contribution to an efficient EU safety net. If needed, after a case-by-case analysis, the Commission should adopt the corresponding proposal of Regulation of the European Parliament and the Council.

Market orientation of the European agricultural sector and industry is one of the major achievements of the different waves of CAP reform. This is why, for instance, EU agri-food trade surplus is at record levels (EC, 2018).

Nevertheless, the European Parliament has rightly underlined that “the historical market management tools of the CAP have a reduced and insufficient effect” (point 137 of the Resolution).

A balance approach in between those two concerns could be that, on a case-by-case basis, the level of the current reference thresholds could be revisited.

In some cases, they could be increased and in others, it could be the opposite. For instance, Jongeneel et al. (2018) concluded recently “*the intervention price level as it is currently defined for SMP may need reconsideration and be in need to be lowered*”.

### 5.4. Taking note of the “endive case” ruling

The following proposals, until the end of the report, aim to “further clarify and update the rules for Producers Organisations and Interbranch Organisations, particularly as regards competition policy, including with a view to the measures and agreements of Interbranch Organisations, in order to meet societal demand”, as requested by point 136 of the Resolution.

**Proposal 8:** The Regulation should clearly differentiate between Commercial POs and non-commercial POs. We propose to reserve the wording “Producer Organisations” to the first one and to call (for instance) “Negotiating Groups” the other figures

The “endive case” ruling of the European Court of Justice has clearly consolidated the “significant and general” derogation for commercial POs to the application of the antitrust discipline to arrangements and agreements, including the associations and the associations of associations. This derogation is not as general for “Negotiating Groups”.

**Proposal 9:** The Regulation should clearly take note of the endive ruling of the Court of Justice. Commercial POs and their associations are allowed to adopt measures to “ensure that production is planned and adjusted to demand, particularly in terms of quality and quantity” without any authorization of the Commission.

**Proposal 10:** The last paragraph of the current article 209.1 should be removed. POs and APOs should be able to build their own price policy as any other company

Commercial POs are companies. Many of them are cooperatives but others have adopted different legal structure. As any other enterprise acting on the market, they can arrive to all kinds of agreements with their clients and suppliers.

As Ecorys (2018) has found in its study for DG COMP, *“regarding the objective of stabilizing markets, the strongest statistical associations are found with activities of contractual negotiations, commercialization strategies and planning of quantities, together with distribution and transport. This finding is consistent with the notion that improved planning and coordination of supply and demand by Producer Organisations can lead to greater market stability”*..

Obviously, excessive market power and its abuse have to be avoided.

We do not deny the positive role that the Negotiating Groups can play, and already play, in rebalancing the market power inside the food chain. Some concrete examples were presented in the Conference on “The contribution of producer organisations to an efficient agri-food supply chain” organized by the Commission on 21 September 2018 in Brussels<sup>10</sup> (Duvaleix-Tréguer, 2018; Duvaleix-Tréguer et Gaigné, 2018; Wierzbicki, 2018). The single CMO provides for collective negotiation of contracts on behalf of farmers through the Negotiating groups and ensure legal security from competition authorities if certain limitations are respected.

However, they deserve a different treatment as far as competition policy is concerned. “Negotiating groups” are not covered by the “significant and general derogation”.

Therefore, the scope of article 222 has to be limited to “Negotiating groups”.

## 5.5. Improving the POs, APOs and Interbranch rules

As POs and APOs are key and central element of the single CMO regulation, their rules should be clarify and improved.

**Proposal 11:** Recognition of Producer ‘Organisations in new sectors

In order to reduce the red tape, Member States could be explicitly allowed to recognize as “Producer Organisations” all types of “Producer-owned-enterprise”.

**Proposal 12:** The regulation should explicitly define the figure of transnational PO and APO

All the regulation is based on a national basis. Each Member State recognizing its producer Organisations. In the fruit and vegetable sector, there are POs that have members in several Member States. The experience of this sector shows that transnational POs are a useful tool. Bijman et al (2012) found 15 recognised POs under the fruit and vegetable regime.

Firstly, trans-border collaboration between neighboring producers makes sense in many European regions such as Flanders or Catalonia. Secondly, in a single market, buyers are often transnational and can easily take advantage of the division amongst producers to decrease excessively market prices.

<sup>10</sup> [https://ec.europa.eu/info/events/contribution-producer-organisations-efficient-agri-food-supply-chain-2018-sep-21\\_en](https://ec.europa.eu/info/events/contribution-producer-organisations-efficient-agri-food-supply-chain-2018-sep-21_en)

Farmers are often building Europe on the ground and the regulation has to make it not only possible but also easier and has to support it.

**Proposal 13:** Strategic plans should include transnational collaborations

The Commission proposes, on one hand, that the specific programs as those for fruit and vegetables or wine are included in the National Strategy. It proposes also that POs in other sectors that fruit and vegetables could implement operational programs and receive EU support from Pillar 1. In order to integrate in this new scheme the figure of transnational POs and APOs, the strategic plans should include the framework for transnational collaborations.

**Proposal 14:** APOs could be formed at the initiative not only of POs but also of APOs

Associations of POs are a positive step towards a more organized farming sector. Today (article 156), APOs are formed at the initiative only of recognized Producer Organisations. This limitation does not make sense as each year the level of concentration in retail and manufacturing sector is increasing.

**Proposal 15:** The regulation should explicitly define the figure of Association of Interbranch Organisations (AIBO)

As foreseen in article 157, Member States may recognize Interbranch Organisations in a specific sector. Once they are recognized, Interbranch Organisations should be free to interconnect with other national Interbranch Organisations or to other Interbranch Organisations for the same product in other Member States or at European level (Delahaye, 2016).

As it is the case for POs and APOs, they should be allowed to delegate powers or functions to their AIBO.

**Proposal 16:** The role of the Commission in controlling transnational POs, APOs and Interbranches could be explicitly define

*Today, in the fruit and vegetable case, «transnational POs need to have a recognition in one MS, that MS bears the full responsibility of compliance to the EU rules. While farmers from several MS benefit from the operational programme of the transnational PO, the authorities of only one MS need to do all the paper work for recognition, monitoring and evaluation. Thus, the financial responsibility, risk and liability are unequally divided over the MS involved. In addition, the recognizing MS relies on the other Member States involved for obtaining the proper information and doing some of the control activities. Here again, cultural differences (including public-private collaboration and consultation) may play a complicating role» (Bijman, 2015)*

It could be envisage that, if the transnational POs or APOs are of European relevance, for instance bigger than a fixed value of the marketed production or involving more than 2 Member States, it would be under the direct control of the Commission.

As far as the actions supported by the EU budget, it would be only relevant for the fruit and vegetable case but for all the other activities, it would be applicable to all sectors.

## 5.6. Preventive market measures

We have already agreed with the diagnostic of Mahé et al (2016) of the usefulness of preventive market measures and disagreed with their proposal of “an independent Administrative Authority for market measures”.

De Castro (2010) argued several time in favor of private prevention management market instruments as “calming market instruments”. During the discussion on CAP post 2014, the European Parliament supported the development and reinforcement of instruments “based on private supply management to increase the coordination of the various operators, and giving them the option of withdrawing a product during bad marketing conditions” (Matthews, 2012; Olper, 2014; Olper and Pacca, 2015).

The two following proposals aim to present an alternative which would allow to match also two concerns expressed by the European Parliament in its Resolution: the “voluntary milk supply reduction scheme” (point 125) and the “new self-help management tool for olive oil” (point 126).

**Proposal 17:** Preventive joint actions between POs and APOs should not only be allowed but be promoted

Several POs and/or APOs could be allowed to coordinate their actions in order to attain the aim of “*adjusting demand, particularly in terms of quality and quantity*”. This is clearly going beyond the current rules and the “endive case” ruling which allow this coordination inside the PO or the APOs and their members.

A regulation of the European Parliament and the Council could, at least for the main products, fix a **trigger market price 1** that allows POs and APOs to act on a coordinated way in order to achieve the objective of article 39, (b) “*to ensure a fair standard of living for the agricultural community*”.

It should also fix, in order to accomplish the objective of Article 39 (e) “*to ensure that supplies reach consumers at reasonable prices*”, two other trigger market prices.

The **trigger market price 2** would force the concerned POs and APOs to start putting an end to their coordinated action.

The **trigger market price 3** would put a complete end to the coordinated actions. The coordination between POs and APOs would then be illegal.

For instance, as only an illustration, if the intervention price for cereal is 100€/t, the trigger price 1 could be (120) €/t; the trigger price 2 (140) €/t and the trigger price 3 (160) €/t.

As it will not be possible to fix those trigger prices for all agricultural products, a general rule could be established based on, for instance, a percentage of the average market price of the last 5 years. This is what the Commission has done in the fruit and vegetable case, following the Russian embargo.

Annually, the POs and APOs concerned should prepare a report for their national authorities and the Commission on the use of this derogation.

Every year also, and based on those reports, the Commission should present the corresponding report to the Council and the European Parliament.

After 5 years of application, the Commission would launch an evaluation of the efficiency and effectiveness of this derogation. The results would be presented to the European Parliament and the Council with, if needed, relevant proposals of changes and improvements.

**Proposal 18:** To reinforce the allowed role of Interbranch Organisations in market crisis management

The Omnibus Regulation, in its new article 222, has included Interbranch Organisations in the list of possible beneficiary of an (temporal) non-application of Article 101(1) TFEU. This opens a new window of possible duties for those Organisations.

In some cases, an Interbranch Organisation (or an association of Interbranch Organisations) could be the most efficient and effective way to achieve the preventive joint actions proposed in the previous proposal-.

It would be an extension of what is already foreseen in article 167, but limited to the marketing rules to improve and stabilize the operation of the common market for wine.

This is why Proposal 16 could also be extended to Interbranch Organisations.

**Proposal 19:** To allow transnational POs, APOs and Interbranches to associate members from outside the EU

As explained by Compes et al (2013), *“there are already examples of transnational POs and APOs inside Europe. They could be extended to non-EU producers and contribute, for instance, to an increase transparency of the market and to the quantity and quality adaptation of production to the demand. These are two of the main goals of those organisations”*

The regulation should explicitly allow the possibility that European organisations have associated members from third countries: producers, Producer Organisations, Associations of Producer Organisation and Interbranches.

**Proposal 20:** To enlarge the scope of the current Article 150 which is today limited to “cheese with a protected designation of origin or protected geographical indication”

The first paragraph of Article 150 foresees that *“upon the request of a Producer Organisation recognised under Article 152(3), an interbranch organisation recognised under Article 157(3) or a group of operators referred to in Article 3(2) of Regulation (EU) No 1151/2012, Member States may lay down, for a limited period of time, binding rules for the regulation of the supply of cheese benefiting from a protected designation of origin or from a protected geographical indication under Article 5(1) and (2) of Regulation (EU) No 1151/2012.”*

The experience acquired since 2013 allows us to conclude that this rule, applied a limited number of times, has contributed positively to achieving a better balance between supply and demand.

There is no economic reason to not extend this possibility to the other products with a protected designation of origin or protected geographical indication.

## 5.7. Addressing the prisoner’s dilemma (the free rider issue)

This is the main argument against voluntary supply scheme and private crisis management. It is a real one that deserves to be addressed. Mahé et al (2016) express it very clearly when explaining why a spontaneous movement of supply reduction at the initiative of Producer Organisations was very unlikely to occur:

*“The reason is a common feature of economic situations whereby a public good may be produced to the benefit of everyone, but where no one has the incentive to start making a financial contribution. Since anyone will benefit from it anyway if the good is provided, and if one person starts contributing and is not followed, he/she will be the loser. These situations are known as prisoner’s dilemmas or coordination failures. In our case the public good is a better market price and the individual contribution to public good provision is own supply reduction. Clearly if better prices prevail on the market, it is impossible to deprive any producer from benefiting. Hence, every individual has an interest in waiting for others to cut supplies. Thus the non-participant will be able capture the gains from better prices without bearing the cost of cutting his own deliveries.*

*If a minority of producers enter the programme they will not get a benefit from higher prices since the positive price effect will be smaller than their negative volume effect. Hence, such a minority has no interest in being enrolled in a voluntary unsubsidized scheme. It will therefore not happen.”*

The concrete political impasse could be then the following: If it is preventive, it has to be voluntary and privately managed but the prisoner’s dilemma could make it not happen. If it is public, it would happen but would not be preventive.

**Proposal 21:** To enlarge the allowed scope for the extension of rules

The extension of rules could be a partial answer to this dilemma. The proposed preventive market measures should be included in the list of measures that can be extended by the Member State.

The Member State would be allowed to extend the disciplines adopted by the Producer Organisation (or the AOP) to all the producers, even to non-members, if the PO (or APO) is recognized as representative in its economic circumscription.

In case of an IBO, the same can be done in the territory, regional or national, for which it has been recognized.

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This study addresses the current rules both the current European rules applicable to the Common Agricultural Market Organisation and the recent proposal of the Commission in the CAP beyond 2020. It also suggests possible improvements of the proposal. It was presented to the Committee on Agriculture and Rural Development on 15 October 2018.

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