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NOTE

From: To:	General Secretariat of the Council Delegations
N° Cion doc.:	ST 16779 2024 INIT
Subject:	Regulation amending the common market organisation (CMO) Regulation as regards the strengthening of the position of farmers in the food supply chain - Explanatory note from the Commission on the “un-recognised POs proposal”

Working document

Changes to Article 152 (1a) CMO (the so-called "un-recognised POs proposal")

Current CMO provisions

Currently the CMO provides in its Article 152 (1a) that recognised Producer Organisations (POs) are exempted from Article 101 TFEU and **may therefore plan production, optimise the production costs, place products on the market and negotiate contracts for the supply of agricultural products**, on behalf of their members for all or part of their total production. Such exception is subject to several conditions, among them:

- The recognised PO is **genuinely exercising at least one economic activity** (such as joint processing, joint distribution, joint use of equipment etc.);
- The recognised PO concentrates supply and **places the products of its members on the market** for all or part of their production.
- Members of the PO in question are **not members of another PO** for the same products

POs that merely provide services to their members, without genuinely exercising an economic activity, can be recognised, but do not benefit from the above explicit exception to competition rules.

Pursuant to Article 152 (1b) CMO, this exception to Article 101 TFEU also applies to Associations of producer organisations (APO). In this case the conditions of Article 152 (1a) CMO have to be complied with by the APOs. This means in particular that APOs have to **genuinely exercise at least one economic activity** (such as joint processing, joint distribution, joint use of equipment etc.), it follows that APOs that merely provide services to their members, without genuinely exercising an economic activity do not benefit from this explicit exception to competition rules.

Recognition to the POs is **granted upon request**; POs, however, have no obligation to ask for recognition.

In most sectors, **Member States ('MS') are not obliged to have a system of recognition** for POs ("MS may"). However, MS have, **in several sectors, an obligation to grant recognition to POs upon request when the PO fulfils the conditions set by the CMO Regulation** : fruit and vegetables, olive oil and table olives, silkworm, hops (Article 159 CMO) and milk and dairy products (Article 161 CMO) ("MS shall").

Consequently, in many sectors POs are **not recognised within the meaning of the CMO Regulation**, although many meet the necessary criteria for requesting and receiving recognition, and they plan production of their members or place on the market and negotiate contracts for the supply of agricultural products, on behalf of their members, without however benefiting from exceptions to competition rules.

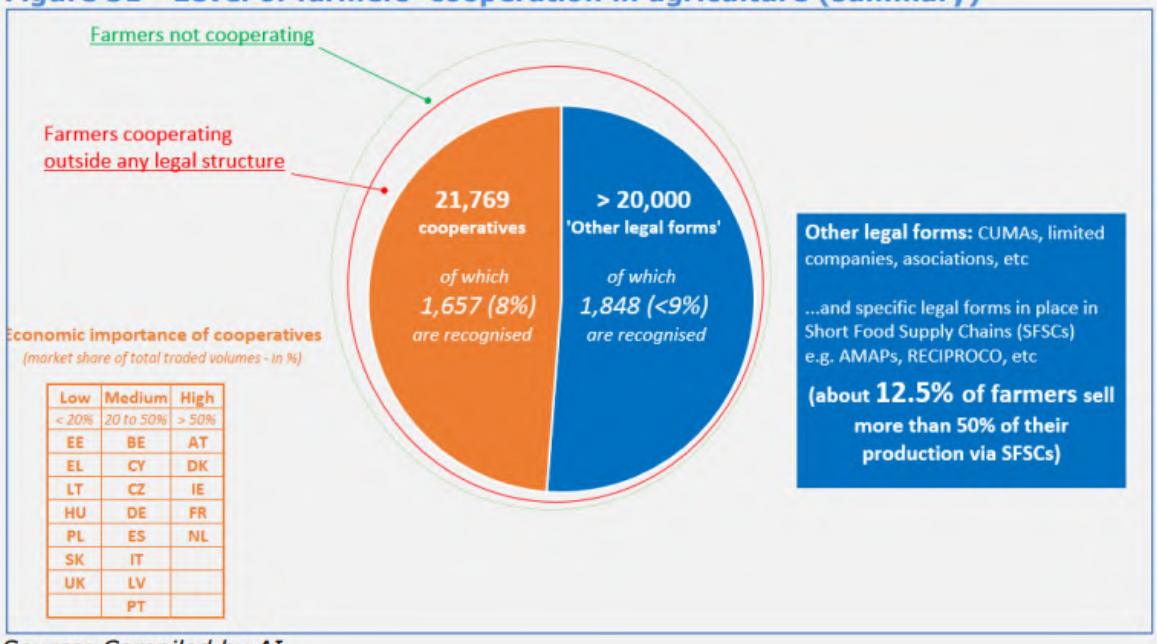
Who is concerned ?

There are **no rules in the CMO concerning the legal form of POs**. De facto, different types of organisations and entities exist in the EU that fall under the notion of PO, according to a study ordered by the Commission[1].

Agricultural cooperatives are a common example of societary form. Cooperatives are generally regulated under commercial law at Member State level, and they may take the legal form of cooperative companies with limited or unlimited liability, of economic interest groupings, or of joint stock companies. For example, in France, the SCA (société Coopérative Agricole) is the main type but many other types e.g. the SCoP, SAPO, SCAEC, SCIC, SCE, SICA, UES, etc.) exist. There also exist cooperatives not controlled or initiated by farmers (such as for example, cooperatives of consumers or cooperatives of merchants) that would not qualify as POs in the sense of the CMO Regulation, although possibly active in the marketing of agricultural products. In total, the above-mentioned study estimates that **there are 21,769 cooperatives in the food supply chain.**

The same study estimates that there are **more than 20,000 POs with various other legal forms**, including groups sharing machinery (such as CUMA in FR), **associations** like Erzeugergemeinschaften (EZGs) in DE, networks of companies in IT, **producer groups and private companies** (for instance 'Sociedades Agrarias de Transformación' (SAT) in ES. The study also mentions 'non-profit organisations' in BE, 'entities governed by public law' in CY, 'economic clubs' in DE, 'economic associations', 'public profit organisations' in HU, and 'federations' in PL.

Figure 31 - Level of farmers' cooperation in agriculture (summary)



Source: Compiled by AI

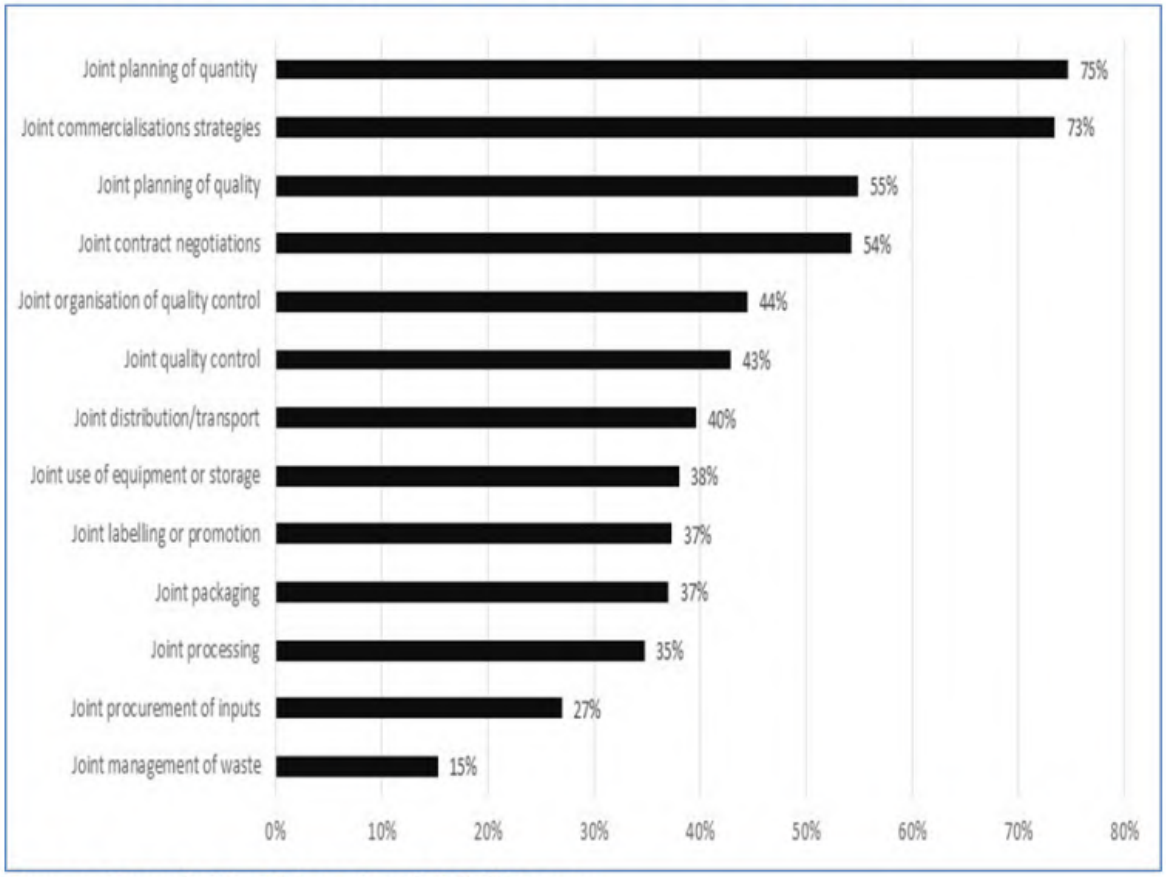
Table extracted from EC, 2018

[1] European Commission: Directorate-General for Agriculture and Rural Development, Montanari, F., Chlebicka, A., Szabo, G., Amat, L. et al., Study of the best ways for producer organisations to be formed, carry out their activities and be supported – Final report, {OPL}, 2019, https://data.europa.eu/doi/10.2762/034412

According to the same study, **only 8% of agricultural cooperatives and 9% of other legal forms of POs are recognised** in the meaning of the CMO. Only approximately 8% of EU farmers are members of a recognised POs, representing approximately 10% of the total value of the marketed production in the EU (mainly in the fruits and vegetables sector).[2] Recognised POs are concentrated in FR, IT, ES, and DE, which account for 73% of the total.

The remaining non-recognised entities **cannot therefore avail from the exception to competition rules laid down** in Article 152 (1a) of the CMO. **Over 50% of these non-recognised POs (see figure below) are engaged in planning of production or negotiation of prices on behalf of their members.**

Figure 30 - Activities of non-recognised POs (n=300)[58]



Source: Compiled by AI based on 2017 EC survey

Table extracted from EC, 2018

Another study[3] in three sectors (olive oil, beef and arable crops) suggests that in these three sectors, slightly less than 20% are recognised.

[2] MS ISAMM Notifications.

[3] European Commission: Directorate-General for Competition, Study on producer organisations and their activities in the olive oil, beef and veal, arable crops sectors, Publications Office, 2018, https://data.europa.eu/doi/10.2763/720686

Inventory of POs and APOs in the 28 Member States

	Number of recognised PO	Estimate of the number of non-recognised* PO	Number of recognised APO	Estimate of the number of non-recognised* APO
Olive oil	252	1161><1181	8	0><10
Beef and veal	178	633><673	2	10><20
Arable crops	189	1388><1438	3	12><22
Total	**619**	**3182><3292**	**13**	**22><52**

Table extracted from EC, 2019

Non-recognised POs enjoy no exception from competition rules under Article 152 CMO, this means that any collective pricing by such entities raises competition concerns. Depending on the activity the non-recognised PO engages in, they could still be exempted from competition rules, provided that they comply with other exceptions from competition rules under the CMO Regulation (notably Articles 209 or 210a CMO) or exemptions provided under the general competition rules (i.e. Article 101(3) TFEU).

According to the judgment of the European Court of Justice in the Oude Luttikhuis Case, while agricultural cooperatives must comply with competition rules, certain competition restrictions are permissible, if those are necessary for the cooperative's functioning and are proportionate.[4]

The proposal

With **the current proposal**, **such exception to competition rules under Article 152.1a CMO would be extended to all POs, whether recognised or not recognised according to the CMO Regulation**, as long as they meet the conditions for recognition, both the general ones, as well as the specific ones for fruit and vegetables (Article 160 CMO) and milk and dairy products (Article 161 CMO), and the conditions laid down at national level pursuant to Article 154 CMO (e.g., minimum number of members).

In absence of such exception provided for them in the CMO Regulation, POs that have not been recognised will in principle be subject to competition rules (Article 101 TFEU) and risk to be fined accordingly if their activities would be contrary to competition rules and would not be exempted according to other rules providing for exemptions from competition rules (for example Article 209 or 210a CMO as explained above). The proposal would therefore increase the degree of legal certainty for all the entities mentioned above when they are placing on the market the products of their members and protect them better from the risks of being considered to be in breach of competition rules.

The claim that this proposal would be **a discrimination for recognised POs** is not substantiated by the fact that according to the abovementioned study (EC, 2019), the "segmentation between recognised vs. non-recognised organisation should not be

[4] Case C-399/93 Oude Luttikhuis and Others v Verenigde Coöperatieve Melkindustrie Coberco BA [1995] ECR I-4515, ECLI:EU:C:1995:434.

considered as central in the analysis of the structure of any supply chain. (…) farmers do not create recognised POs, they decide to group themselves in an entity that has a legal form for one or several objectives; and, then, reflect whether or not the legal entity should get recognised by the competent authorities."

There will still be incentives for POs to request recognition:

- Recognition remains a condition for access to sectoral interventions under the CAP Strategic Plan Regulation (EU) 2021/2115,
- Recognition remains a condition for access to exceptions to competition for APOs not genuinely exercising economic activities (new proposal under Article152(1b) CMO),
- Recognition remains a stronger protection than self-assessment in case of any complaint including arising from buyers or competitors in another MS or for cross-border commercial activity.

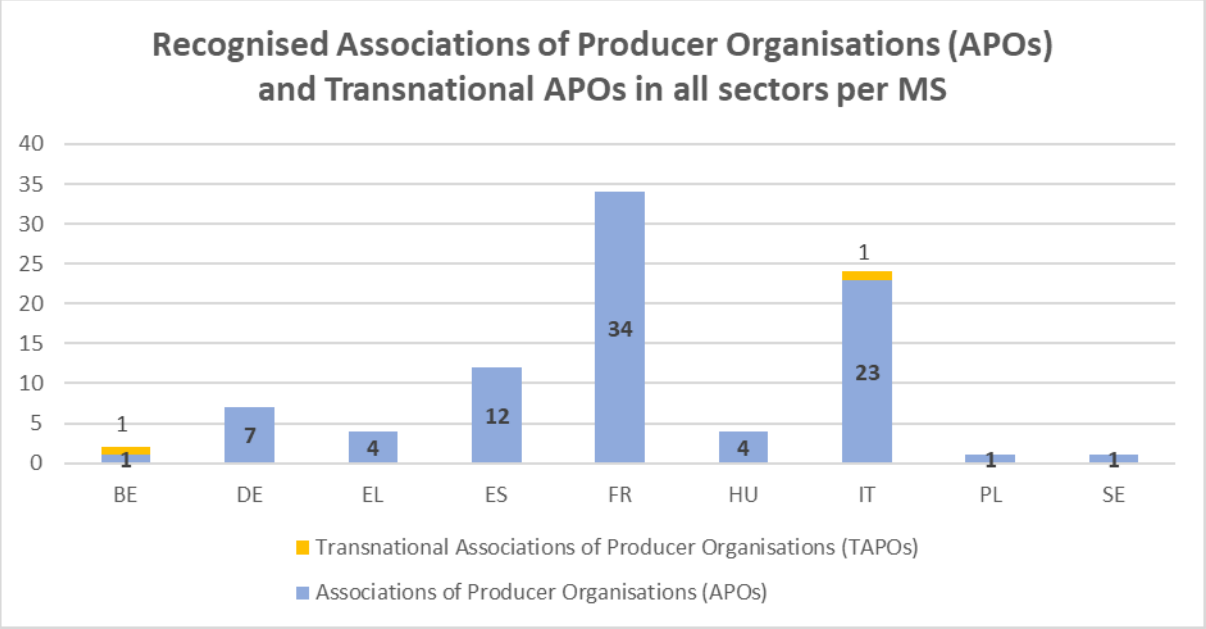
The proposal is a **substantial simplification**, as granting recognition as PO in the meaning of the CMO Regulation to unrecognised POs only for competition law reasons would create workload to administration and POs. It would also duplicate in many cases the process of recognition of cooperatives at national level.

Such proposal is **not creating any new obligation of control**. Already, non-recognised POs can exist and carry out their activities without any control. If they engage in anti-competitive behaviour, they might be subject to investigations or measures from the relevant national competition authority .

Changes to Article 152(1b) of the CMO Regulation

Currently, Article 152 (1b) CMO states, in its only subparagraph, that for the purpose of Article 152, Associations of Producer Organisations (APOs) are treated as POs mutatis mutandis. This means APOs benefit from the explicit exception to competition rules under Article 152(1a) CMO, by which they may plan production, optimise the production costs, place on the market and negotiate contracts for the supply of agricultural products, on behalf of their members (POs) for all or part of their total production. Such exception is subject to several conditions, among them, the recognised APO is genuinely exercising at least one economic activity, the recognised APO concentrates supply and places the products of its members on the market for all or part of their production, and members (POs) of the APO in question are not members of another APO for the same products.

Currently, there are around 88 recognised APOs (BE, DE, EL, ES, FR, HU, IT, PL, SE) mainly in fruits and vegetables sector (59) and milk sector (8).[5] In addition, there are two recognised Transnational Associations of Producer Organisations (TAPOs). This shows that the current provisions do not incentivise POs in other sectors to form APOs and strengthen their bargaining position.



The proposal of the Commission is not amending this subparagraph. **All APOs that genuinely exercise an economic activity (existing ones or newly created ones) will continue to be able to plan production and negotiate contracts on behalf of their members, without any limit to their size or market share.**

The proposal of the Commission **is adding a second sub-paragraph that brings an additional derogation** to the first subparagraph and to Article 101 TFEU . This new exception concerns APOs that **do not genuinely exercise an economic activity themselves, but which members (POs) genuinely exercise an economic activity**.

Such proposal is **inspired by and similar to Article 149 CMO that is currently applied in the milk sector. According to Article 149**, APOs may negotiate on behalf of their members, without a condition concerning the genuinely exercised economic activity or

[5] MS ISAMM Notifications 2023.

concerning the concentration of supply and placing of the products on the market, provided that their market share does not exceed a certain limit.

The difference for APOs between the Article 149 CMO and the newly proposed Article 152(1b) CMO is that the new Article 152 (1b) CMO proposal would apply to all sectors and that the members of the APOs, the POs, would need to genuinely exercise economic activities under the newly proposed Article 152 (1b) CMO.

Similar as for Article 149 CMO in the milk sector, the proposal for the Article 152(1b) CMO limits the market share of such collective negotiations exercised by recognised APOs not exercising genuinely an economic activity, to 33% (i.e. 1/3) of the national production.

This condition should not prevent transnational APOs to benefit from this exception.