

## Briefing

# Protecting farmers' ability to co-operate after Brexit

March 2019

## 1 Introduction

- 1.1 This paper sets out how important elements of the existing competition exemptions for agricultural co-operation are to be retained in UK law after Brexit. It also explains how interventions by Co-operatives UK have helped to deliver this outcome. Key points are:
- multi-sector farmer co-operatives will not be excluded out of hand by the high-level design of the new producer organisation (PO) and associations of producer organisation (APO) frameworks
  - a broad range of farmer co-operatives will still benefit from competition exemptions without having to be recognised as POs, APOs or inter-branch organisations (IBOs)
  - at least some of the UK's competition exemptions will still be grounded in Common Agricultural Policy (CAP) objectives as set out in TFEU39, in UK law, even after Brexit
- 1.2 However, this new legislative arrangement is not as clear, cohesive or secure as we would have liked. Some key exemptions are contained in secondary legislation, rather than primary legislation, which can at least in part be varied or revoked without an Act of Parliament. Furthermore, the Farming Minister has made a statement in the Commons that suggests at least some of these 'continuity measures' have a short shelf life in government's plans. We have asked Defra to give the sector more clarity and assurance.

## 2 Changes to the competition settlement

- 2.1 At present a complicated combination of UK and EU competition law provides permissive but measured competition exemptions for all types of co-operation between farmers.<sup>1</sup> Co-operative arrangements for inputs, production and outputs are all exempt from prohibitions preventing co-operation, so long as they support the objectives of the CAP and do not fix prices or abuse a dominant market position (**note:** co-operative joint selling has not been considered price fixing by UK competition authorities<sup>2</sup>).
- 2.2 The utility of these competition exemptions is in the simplicity with which farmers looking to co-operate can reassure themselves of their right and ability to do so. Without these exemptions, a lot of value-adding co-operation would come with higher costs and

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<sup>1</sup> A combination of TFEU 39 and 42, the CMO Regulation, Schedule 3.9 of the Competition Act (1998) and EU and UK case law

<sup>2</sup> Office for Fair Trading (2011) '[How competition law applies to co-operation between farming businesses: Frequently asked questions](#)'

increased uncertainty, which would deter too many already disinclined farmers.

- 2.3 It its Policy Statement, which encouragingly sets out a dynamic role for farmer co-operation, Defra gave a commitment to “*retain existing competition law exemptions*”<sup>3</sup> after Brexit. But the Agriculture Bill as introduced to Parliament appeared to establish a new competition settlement for farmer co-operation that was more exclusory and potentially more restrictive than the status quo. Under the Agriculture Bill, eligibility for exemptions from competition law prohibitions will be restricted to co-operative arrangements registered under new and yet-to-be-designed frameworks for POs, APOs and IBOs.<sup>4</sup>
- 2.4 Following consultation with members, we warned Defra and MPs that the Agricultural Bill as introduced to Parliament seemed to establish a new competition settlement that would increase uncertainty and regulatory risk for:
- co-operatives comprising farmers from more than one agricultural sector
  - co-operatives dealing with inputs and production
  - any other co-operatives that found themselves excluded from the yet-to-be designed PO, APO and IBO frameworks
- 2.5 We also expressed a concern that under the Agricultural Bill, the grounding of exemptions for farmer co-operation in legally established agricultural policy objectives (CAP objectives under TFEU39) would be lost. We warned that in the longer-term, farmer co-operation would be increasingly threatened by competition policy objectives without there being any protection from counterbalancing agricultural policy objectives.

### **3 Amendments to the Agriculture Bill**

- 3.1 In submissions to Defra and MPs we suggested that the new competition exemptions established in the Agriculture Bill should accommodate a diversity of new and existing co-operative arrangements. We said that the most straightforward way to do this was to design the new PO, APO and IPO frameworks in a way that is flexible and inclusive. Defra agreed that the provisions in Section 22 of the Agriculture Bill should not be unnecessarily prescriptive or bind government’s hand too tightly.
- 3.2 Thus we very much welcomed government amendments to the Agriculture Bill during Committee Stage, which removed unnecessarily prescriptive provisions requiring POs and APOs to only ever comprise farmers in the same sector. In practice there are many value-adding co-operatives that bring together farmers from different sectors and it would have been wrong to exclude these from the new competition exemptions out of hand. The Farming Minister specifically cited Co-operatives UK’s submissions to Defra when

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<sup>3</sup> <https://www.gov.uk/government/publications/the-future-for-food-farming-and-the-environment-policy-statement-2018/health-and-harmony-the-future-for-food-farming-and-the-environment-in-a-green-brex-it-policy-statement#our-ambition-for-the-future-of-food-farming-and-the-environment>

<sup>4</sup> <https://www.uk.coop/resources/changes-competition-settlement-agriculture-impact-assessment>

introducing these amendments.<sup>5</sup>

3.3 The Agriculture Bill is due for report stage and third reading in the Commons.

#### 4 Secondary legislation

4.1 Our response to the Agriculture Bill also led Defra to add to the secondary legislation it is making under the European Union (Withdrawal) Act 2018. Specifically, following our intervention, Defra has added provisions to statutory instruments that domesticate crucial parts of the CMO Regulation (Article 209) that provide competition exemptions for all types of co-operative arrangement, not just POs, APOs and IBOs, covering inputs and production as well as outputs. Furthermore, through this secondary legislation, these competition exemptions in UK law will still be grounded in the CAP objectives, even after Brexit.<sup>6</sup>

4.2 While this is very positive in one sense, we still have some concerns over the shelf life of these vital measures, because they are in the form of secondary rather than primary legislation, which can sometimes be more easily amended without an Act of Parliament.

4.3 For instance, government has the power to amend this secondary legislation within the parameters set by the European Union (Withdrawal) Act 2018, for up to two years from Brexit Day.

4.4 Furthermore, in so far as it deals with POs, APOs and IBOs, the domesticated CMO Regulation will be replaced by Section 24 and Scheduled 2 of the Agriculture Bill, when these are commenced, and when government makes use of delegated powers therein to set the detail of the new PO, APO and IBO frameworks. This will not be problematic so long as government continues to be flexible and inclusive in the design of these frameworks.

4.5 That this domestication of the CMO and its competition exemptions might have a short shelf life in government's plans was all but confirmed by the Farming Minister when the statutory instrument was considered by a Commons Delegated Legislation Committee, on 26 March:

*"With regards to future competition law as it relates to agriculture, the articles covering the EU producer organisation regime are being amended by the European Union (Withdrawal) Act in order to be made operable, but will eventually be repealed and replaced by domestic successor legislation using the powers in the Agriculture Bill."*<sup>7</sup>

4.6 Crucially, the Farming Minister's words and the powers in the Agriculture Bill he refers to only apply to the PO, APO and IBO frameworks. From this we could conclude that

<sup>5</sup> [https://parliamentlive.tv/event/index/792d75fe-e849-4cc6-a320-e6c90487e08d?in=16%3A13%3A00&out=16%3A14%3A02&fbclid=IwAR17FQBxmriPk3S-S54qaGllncHOpv24Ofg56FKQswex\\_0qOiqwn-INpVaY](https://parliamentlive.tv/event/index/792d75fe-e849-4cc6-a320-e6c90487e08d?in=16%3A13%3A00&out=16%3A14%3A02&fbclid=IwAR17FQBxmriPk3S-S54qaGllncHOpv24Ofg56FKQswex_0qOiqwn-INpVaY)

<sup>6</sup> <http://www.legislation.gov.uk/ukdsi/2019/9780111181096/regulation/66>

<sup>7</sup> [https://hansard.parliament.uk/Commons/2019-03-26/debates/55cb1e9c-a8c8-4d16-b805-4768ab67448e/DraftCommonOrganisationOfTheMarketsInAgriculturalProductsFramework\(MiscellaneousAmendmentsEtc\)\(EuExit\)Regulations2019DraftCommonOrganisationOfTheMarke](https://hansard.parliament.uk/Commons/2019-03-26/debates/55cb1e9c-a8c8-4d16-b805-4768ab67448e/DraftCommonOrganisationOfTheMarketsInAgriculturalProductsFramework(MiscellaneousAmendmentsEtc)(EuExit)Regulations2019DraftCommonOrganisationOfTheMarke)

government has no plans to change the other salient aspects of CMO Article 209, which provide exemptions for a broad range of co-operatives, with reference to CAP objectives. Indeed Defra officials have told us they know of no plans to do so. But we think government *could* use powers under the European Union (Withdrawal) Act 2018 to revoke CMO Article 209, once its new PO, APO and IBO frameworks are in place (for up to two years after Brexit Day). We do not think any other powers exist to vary or revoke CMO Article 209. We are seeking clarity and assurance on these points.

4.7 The statutory instrument is now in the final processes of being approved by Parliament.

## **5 Looking forward**

5.1 The combination of the Agriculture Bill and statutory instruments used by Defra to retain existing competition exemptions is not as straightforward as many stakeholders would have liked. To avoid unnecessary confusion, we have asked Defra to provide a clear summary of the legislative measures it has taken to retain existing competition exemptions. We will now also request for clarification on whether the domestication of CMO Article 209 can be varied or revoked by further secondary legislation, other than under the European Union (Withdrawal) Act 2018. And we will ask for assurance that there are no plans to revoke CMO Article 209 once the new PO, APO and IBO frameworks are in place.

5.2 Defra has assured us that it will consult openly and thoroughly on the detail of the new PO, APO and IBO frameworks before laying any secondary legislation in Parliament. This is really welcome and the co-operative sector will need to be ready to contribute to this process.

5.3 We have suggested that Defra and the CMA create some accessible guidance for farmers and their supply chain partners on how the competition exemptions will operate post-Brexit.

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