Empowering Short Food Supply Chains:

Legal Proposals for Reforming Agricultural Market Organisation in the EU

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The transformation of the European food system, aimed at aligning it with planetary limits, requires changes to the fundamental structures of this field. The goal is to develop specific legislation that provides a regulatory framework for the actions of public authorities and private individuals, steering the production, exchange, and consumption of foodstuffs toward a truly sustainable path. Numerous measures—often contested—have been adopted in this regard. However, these measures focus primarily on practices related to food production and consumption without addressing the exchange process itself; that is, they do not ensure fair prices for producers and reasonable prices for consumers. In essence, the current market rules do not meet the needs of producers and consumers who wish to contribute to a sustainable food system. Without appropriate measures, it seems futile to encourage producers to change their practices if they lack guarantees of selling their products at fair prices. Similarly, urging consumers to choose sustainable products is pointless if they do not have easy access to them or the ability to purchase them at reasonable prices. Short food supply chains represent one viable solution among several for reconciling human food needs with planetary limits.

I. Introduction

Drawing on the social sciences, short food supply chains are defined as the production, exchange and consumption of foodstuffs within a limited geographical area.[1] These local initiatives, driven by people wishing to foster economic, social, cultural, political, and ecological connections, aim to promote fair distribution of economic benefits between producers and consumers, secure local food supply, and strengthen the economic, social, and territorial cohesion within their regions.[2] They contribute to the well-being and autonomy of communities, uphold ethical independence, support a sustainable agricultural production model, and respect cultural diversity.[3]

Within the European Union, firms engaged in short food supply chains are not exempt from EU competition rules or similar national laws.[4] This means that operators must avoid collusion to partition markets; specifically, they cannot agree to share markets or cus-

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1 Michael Winter, 'Embeddedness, the New Food Economy and Defensive Localism' (2003) 19 International Perspectives on Alternative Agro-Food Networks: Quality, Embeddedness, Bio-Politics 23; David Goodman, E Melanie DuPuis and Michael K Goodman, *Alternative Food Networks* (0 edn, Routledge 2012) <https://www.taylorfrancis.com/books/9781136641237> accessed 13 November 2024; Claudia Bazzani and Maurizio Canavari, 'Alternative Agri-Food Networks and Short Food Supply Chains: A Review of the Literature' [2013] [Economia agro-alimentare: XV, 2, 2013] <http://digital.casalini.it/10.3280/ECAG2013-002002>.

2 European Commission. Joint Research Centre. Institute for Prospective Technological Studies., *Short Food Supply Chains and Local Food Systems in the EU: A State of Play of Their Socio Economic Characteristics.* (Publications Office 2013) <https://data.europa.eu/doi/10.2791/88784> accessed 13 November 2024; Agata Malak-Rawlikowska and others, 'Measuring the Economic, Environmental, and Social Sustainability of Short Food Supply Chains' (2019) 11 *Sustainability*; Pierre Chiaverina and others, 'Does Short Food Supply Chain Participation Improve Farm Economic Performance? A Meta-analysis' (2023) 54 *Agricultural Economics* 400.

3 Gianluca Brunori and others, 'Are Local Food Chains More Sustainable than Global Food Chains? Considerations for Assessment' (2016) 8 Sustainability. Malak-Rawlikowska and others (n 3). Martin Collison and others, 'Transformation Trends in Food Logistics for Short Food Supply Chains – What Is New?' (2019) 121 Studies in Agricultural Economics 102. Yuna Chiffoleau and Tara Dourian, 'Sustainable Food Supply Chains: Is Shortening the Answer? A Literature Review for a Research and Innovation Agenda' (2020) 12 Sustainability.

4 Philippe Chauve, Antonia Parera, An Renckens, 'Agriculture, Food and Competition Law: Moving the Borders' (2014) 5 *Journal of European Competition Law & Practice* 304. *Competition, Market Power, Surplus Creation and Rent Distribution in Agri-Food Value Chains* (FAO 2020) <http://www.fao.org/docu-

tomers. For instance, agreements to jointly set the volume, variety, or price of foodstuffs offered directly to end consumers are intended to prevent competition restrictions among farmers in the marketplace.[5]

However, EU competition rules applied to food production and marketing are subject to a special regime established by the EU legislator, reflecting the objectives of the Common Agricultural Policy (CAP) to ensure a fair standard of living for agricultural communities, stabilize markets, secure supplies, and maintain reasonable consumer prices.[6] The Common Market Organization (CMO) regulation, which structures agricultural markets, includes certain derogations that allow for coordinated farmer behaviour due to its benefits for the internal market. Specifically, it seeks to concentrate agricultural supply and enhance production negotiation to benefit downstream operators in the value chain.[7]

In this context, the growth of short food supply chains depends significantly on the competitive structure of the EU food market.[8] Accordingly, this analysis will first examine the current competition regime for participants in short food supply chains (II) and then propose amendments to the CMO Regulation aimed at structurally transforming the food market (III).

II. Organisation of the Competition Regime Applicable to Participants in Short Food Supply Chain

Three groups of provisions within the CMO Regulation allow farmers certain derogations from competition rules to support the objectives of the CAP. The first group pertains to producer organisations and their associations (1), the second applies to all farmers (2), and the third concerns sustainability agreements (3).

1. Producer Organisations and Their Associations

Due to the imbalance in bargaining power between producers on one hand and the main purchasers of agricultural products (industry and supermarkets) on the other, EU law enables producers to form producer organisations and associations of producer organisations (POs and APOs). These entities help improve 'the marketing, planning, and adjusting of production to demand, optimizing production costs, and stabilizing producer prices'.[9]

Member States are required to regulate applications for the recognition of POs or APOs, setting minimum membership numbers and/or minimum production volume or value in a given area of activity. According to the EU legislator, national regulations must not 'prevent the recognition of producer organisations which are dedicated to *small-scale* production'.[10] In France, for example, a PO or APO must consist of at least five producers, with a minimum marketable production value of €1 million.[11] However, Pauline Lécole and Sophie Thoyer note that small farms typically have a Standard Gross Production[12] of under €25,000, with an average turnover of €38,600—compared to €231,800 for larger farms.[13]

ments/card/en/c/cb0893en> accessed 22 November 2024; Ioannis Lianos, Alexey Ivanov and DM Davis (eds), *Global Food Value Chains and Competition Law* (Cambridge University Press 2022); René Barents, *The Agricultural Law of the EU* (Second edition, Wolters Kluwer 2022) para 7.01.

5 There are numerous decisions relating to horizontal and/or vertical agreements on prices, volumes and/or the diversity of food products: for example, see Case COMP/C.38.279/F3 — French beef (OJ L 209, 19.8.2003, p. 12–41), §124-130 on an agreement 'which was concluded between farmers' and slaughterers' representatives and is aimed at setting minimum prices for the purchase of culled cows in France'.

6 Arts 39(1) and 42 of the TFEU.

7 Regulation (EU) 1308/2013, recital 131.

8 Ronan Le Velly, Frédéric Goulet and Dominique Vinck, 'Allowing for Detachment Processes in Market Innovation. The Case of Short Food Supply Chains' (2021) 24 *Consumption Markets & Culture* 313.

9 Regulation (EU) 1308/2013, recital 131.

10 Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, OJ L 435, 6.12.2021, p. 262–314, art 154(1)(b), emphasis added.

11 Art D551-8 of the French Code rural et de la pêche maritime.

12 The SGP is the potential turnover of each farm based on its utilised agricultural area (UAA).

13 Pauline Lécole and Sophie Thoyer, 'Performances Économiques et Environnementales Des Petites Exploitations Agricoles Françaises': (2022) *Juin Revue d'Économie Régionale & Urbaine* 431; The figures relate to 2018 and are more finely distributed between agricultural sub-sectors (for example, in market gardening, average turnover is around €49,400 on one side and €372,000 on the other). See also EC (2023), 'Explore farm incomes in the EU, Farm economics overview based on 2021 FADN data', November 2023; European Commission, DG Agriculture and Rural Development, Brussels. Maria Marino, Benedetto Rocchi and Simone Severini, 'Assessing the Farm–Nonfarm Households' Income Gap along the Income Distribution in the European Union' (2024) 62 JCMS: *Journal of Common Market Studies* 318.

Consequently, France's current criteria for minimum marketable production prevent a group of five small farms from obtaining recognition as a PO or APO.

PO and APO recognition also hinges on substantive requirements. These organisations must pursue specific goals, including production planning, adapting production to demand, concentrating supply, and marketing products—'including through direct marketing'—and stabilising producer prices.[14] While EU legislation allows PO and APO members to have direct contact with purchasers, such as end consumers, this contact must not 'jeopardise the concentration of supply and the placement of products on the market'.[15] Further restrictions also apply to POs and APOs.

In *Association des producteurs vendeurs d'endives*, the Court ruled that the specific derogation for POs and AOPs pertains solely to internal actions by members of a PO or APO. These actions 'may relate solely to the production and marketing of the products of the members of only the PO or APO in question' and not to 'practices established between such POs or APOs and, a fortiori, practices involving not only such POs or APOs, but also entities not recognised by a Member State'.[16] As with all derogations from primary law, the Court ruled that competition regulations specific to the agricultural sector must be interpreted strictly: on one hand, the measures adopted by POs or APOs must align with the objectives of Article 39 TFEU, and on the other, they must not produce anti-competitive effects beyond what is strictly necessary.[17]

The EU legislator also mandates that this derogation regime applies until a national competition authority, or the Commission issues a notification requiring the PO or APO to modify or suspend an activity if competition is compromised or the objectives of Article 39 TFEU are at risk.[18] While the CMO regulation does not specify the method for assessing exclusion of competition or threats to CAP objectives, relevant case law from the Court offers some guidance.

In *Association des producteurs vendeurs d'endives*, the Court found that achieving objectives such as production programming, demand adaptation, supply concentration, market placement, and price stabilisation inherently involves 'the exchange of strategic information between individual producers that are members of the PO or APO concerned' and justifies 'coordination between agricultural producers' regarding 'the quantities of agricultural products put on the market' as well as 'certain form of coordination of the pricing policy'.[19] On one hand, POs or APOs may negotiate supply contracts on behalf of members; on the other, they may not collectively set minimum prices, as this would prevent members from selling their products directly at lower prices if they choose.

As seen, POs and APOs benefit from a system of derogations from competition laws to carry out specific tasks aimed at structuring agricultural markets and ultimately fulfilling CAP objectives. However, while these organisations may directly market their members' products, they are not specifically mandated to establish or expand short food supply chains. Furthermore, EU law does not guarantee small farms the practical opportunity to gain recognition as POs or APOs, for instance, by providing objective criteria.

2. Farmers

To evaluate the compliance of farmers' coordinated actions in establishing and promoting short food supply chains from a competition law perspective, two key hypotheses must be considered. The first pertains to the application of Article 209 of the CMO Regulation (a), and the second relates to Article 101 of the TFEU (b).

a. Application of Article 209 of the CMO Regulation

Apart from POs or APOs recognised by Member States, farmers wishing to collaborate in the market can rely on Article 209 of the CMO Regulation. This provision stipulates that agreements concerning 'the

14 Regulation (EU) 2021/2117, arts 152(1)(c) et 156(1), emphasis added. The concentration of supply operation consists of negotiating and determining 'the essential elements of the sales, such as price, quality and volume': art 153(2) bis of the CMO regulation.

15 Ibid., art 153(2) bis.

16 Judgment of the Court (Grand Chamber) of 14 November 2017, Président de l'Autorité de la concurrence v Association des producteurs vendeurs d'endives (APVE) and Others, Case C-671/15, ECLI:EU:C:2017:860, §57-59.

17 Barents (n 5) para 7.07.

18 Regulation (EU) 1308/2013, art 209.

19 Case C-671/15, §63-66.

production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products' are exempt from the application of Article 101(1) TFEU 'unless the objectives of Article 39 TFEU are jeopardized' or they 'entail an obligation to charge an identical price' or exclude competition.

In *Association des producteurs vendeurs d'endives*, the Court held that a 'practice adopted within an entity not recognised by a Member State in pursuance of one of those objectives cannot therefore escape the prohibition of the practices referred to in Article 101(1) TFEU'.[20] The Court followed the conclusions of Advocate General Nils Wahl, who found that the common organisation of the markets was the essential mechanism designed 'to govern all production of and trade in agricultural products in the Member States' and that the recognised POs and APOs were the 'key players'.[21] The question is therefore whether the practices in question have been adopted at the 'correct level'and by the 'correct entity', i.e., 'either a PO or an APO actually in charge of managing the production and marketing of the product concerned'.[22] For the Court, 'POs and APOs are the basic elements that ensure, at their level, the decentralised operation of common market organisations'.[23] This demonstrates that the system of general derogation is interpreted very strictly by the EU judiciary.

In the *Oude Luttikhuis* case, the Court specified that the application of the general derogation was subject to several 'cumulative conditions': in addition to the criterion concerning the personal scope of application, it had to be verified whether the agreements 'do not cover prices but concern rather the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of such products' and whether they 'do not exclude competition or jeopardize the objectives of the common agricultural policy'.[24]

Relying on the conclusions of Advocate General Guiseppe Tesauro, the Court held that the severance pay scheme outlined in the articles of association of a cooperative society, which binds members to the cooperative for long periods and limits their ability to engage with competing operators, risks jeopardising 'one of the objectives of the common agricultural policy, namely, as the Advocate General notes in point 38 of his Opinion, that of increasing individual earnings in the agricultural sector, in so far as those active in that sector will not be able to benefit from competition in purchase prices for raw materials paid by different processors'.[25]

In the *FNSEA* case, concerning an agreement limiting imports and setting minimum prices in the beef sector, the General Court found that the general derogation 'applies only if the agreement in question is conducive to attainment of all the objectives of Article 33' and 'must be 'necessary' for the attainment of those objectives'.[26] The Court held that 'the disputed agreement can be regarded as necessary only in relation to the objective of ensuring a fair standard of living for the agricultural community' but it would 'jeopardise the setting of reasonable prices for supplies to consumers' and, moreover, was not necessary for was not necessary for market stabilisation, supply availability, and increasing agricultural productivity.[27]

The Commission considers that 'even if an agreement can be considered necessary for the attainment of one or more of the CAP objectives, but is not necessary to fulfil another objective (or even jeopardises another objective), it cannot be covered by this derogation'.[28] In other words, the scope of the general derogation is drastically limited: parties must demonstrate that the agreement promotes all CAP objectives and does not cause undue harm to competition. As legal scholars observe, when a product 'is the subject of a common organisation of the market, this in itself is sufficient to achieve the objectives of

20 Ibid., §54.

21 Opinion of Advocate General Wahl delivered on 6 April 2017, Président de l'Autorité de la concurrence v Association des producteurs vendeurs d'endives (APVE) and Others, Case C-671/15, ECLI:EU:C:2017:281, §68 and 70.

22 Ibid., §93.

23 Case C-671/15, §51.

24 Judgment of the Court of 12 December 1995, H. G. Oude Luttikhuis and others v Verenigde Coöperatieve Melkindustrie Coberco BA, Case C-399/93, ECLI:EU:C:1995:434, §27: the general derogation was then contained in art 2(1) of Council Regulation 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products, OJ 1962, 30, p. 993.

25 Ibid., §28.

26 Judgment of the Court of First Instance (First Chamber) of 13 December 2006, Fédération nationale de la coopération bétail et viande (FNCBV) (T-217/03) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others (T-245/03) v Commission of the European Communities, Joined cases T-217/03 and T-245/03, ECLI:EU:T:2006:391, §199.

27 Ibid., §206.

28 Guidelines on the application of the specific rules set out in Arts 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors, OJ C 431, 22.12.2015, p. 1–41, §29.

Article 39 {so that an} agreement or cartel between operators almost suffers from a presumption of illegality'.[29]

In the absence of clarification from the EU legislator, Court, and Commission, it would appear that the derogation for POs and APOs applies foremost, since these entities, recognised by the Member States, are the 'basic elements'that ensure the decentralised operation of the CMO. Outside these entities, the actions of farmers are subject to general competition rules unless they can demonstrate that their role is practically equivalent to that of a PO or APO. Such a system does not support the establishment and growth of short food supply chains beyond the remit of POs and APOs.

b. Application of Article 101 of the TFEU

Where the regime set out in Article 209 of the CMO Regulation does not apply, standard competition law should instead govern, particularly Article 101 TFEU and corresponding provisions in national law. It has been established that an agreement among multiple farmers to jointly determine the volume, variety, and pricing of foodstuffs for direct sale to end consumers constitutes a restriction of competition. The question, therefore, is whether such an agreement may be justified under Article 101(3) TFEU and similar national provisions.

The Court has held that 'an undertaking has the option, *in all circumstances*, to assert, on an individual basis, the applicability of the exception provided for in Article 101(3) TFEU'.[30] Advocate General Nils Wahl further observes that conduct classified as a restriction by object under Article 101(1) TFEU 'might benefit from an exemption under paragraph 3 of that article, and in particular from a block exemption'.[31]

The Commission considers that agreements between farmers may fall under the category of specialisation agreements if certain conditions are met. An example provided includes several 'arable crop producers agreeing to jointly produce animal feed from rapeseed' for distribution to 'cattle producers' with joint price determination.[32] This type of agreement, despite involving price-fixing and an exclusive supply obligation, is covered under the Specialisation Block Exemption Regulation in the former Regulation 1218/2010.[33]

Does this practice among farmers, therefore, potentially fall within the scope of the specialisation block exemption in the new Regulation 2023/1067? The latter states that when 'two or more parties agree to produce certain products jointly', they may qualify for an exemption from Article 101(1) TFEU.[34] This exemption includes agreements with exclusive purchase or supply obligations or those where parties 'jointly distribute the specialisation products', provided their combined market share does not exceed 20% of the relevant market(s).[35]

Regulation 2023/1067 generally prohibits core restrictions such as price-fixing, production limits, and market allocation. However, it does allow an exception applicable to the establishment and development of short food supply chains. It permits, on the one hand, the 'fixing of prices charged to immediate customers' as well as 'the setting of sales targets in the context of joint distribution' and, on the other, the 'setting of capacity and production volumes in the context of a joint production agreement'.[36]

In this context, an agreement to organise the diversity, sufficiency, quality, and pricing of products for direct sale to consumers could potentially be viewed as a set of specialisation agreements. This

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29 Claude Blumann, *Politique agricole commune et politique commune de la pêche* (Éd de l'Université de Bruxelles 2011) 115. free translation. See also Barents (n 5) para 7.23.

30 Judgment of the Court (Third Chamber) of 13 October 2011, Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi, Case C-439/09, ECLI:EU:C:2011:649, §57, emphasis added.

31 Opinion of Advocate General Wahl delivered on 26 July 2017, Coty Germany GmbH v Parfümerie Akzente GmbH, Case C-230/16, ECLI:EU:C:2017:603, §119. See also Judgment of the Court (First Chamber) of 6 December 2017, Coty Germany GmbH v Parfümerie Akzente GmbH, Case C-230/16, ECLI:EU:C:2017:941, §59-61.

32 Guidelines on the application of the specific rules set out in Arts 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors, OJ C 431, 22.12.2015, p. 1–41, §21 and 26.

33 C Seitz, 'One Step in the Right Direction - The New Horizontal Guidelines and the Restated Block Exemption Regulations' (2011) 2 Journal of European Competition Law & Practice 452. Csongor István Nagy, 'The Doctrine of Ancillary Restrictions as a Delimitation Tool and an Absorption Principle: Twin Notions but Not Identical Twins' (2024) 15 *Journal of European Competition Law & Practice* 299.

34 Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of art 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 143, 2.6.2023, p. 20–26, art 1(1). See also Guidelines on the applicability of art 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 259, 21.7.2023, p. 1–125, §195-216.

35 Regulation (EU) 2023/1067, art 2(4) and 3(1). Guidelines on horizontal co-operation agreements, §192-193, 197-199 and 202-205.

36 Ibid., art 5 and §208-212.

could include, firstly, a joint production agreement in which participants commit to producing specific types and volumes of foodstuffs, and secondly, a joint distribution agreement under which they set sales targets and food prices. This arrangement implies mutual commitments by farmers to produce particular types of fruits and vegetables and jointly distribute these products directly to end consumers. Furthermore, as the Guidelines on Horizontal Cooperation Agreements state, 'in the case of joint production agreements there is no requirement that one or more parties must cease or refrain from producing any products'.[37]

It should be noted that meeting the criteria for this exemption appears to be simpler than for the application of Article 209 of the CMO Regulation. This observation highlights an apparent inconsistency in the EU legislative approach regarding competition rules for the agricultural sector versus the general rules for other economic activities. However, this framework does not directly pertain to the establishment and development of short food supply chains.

3. Sustainability Agreements

The CMO Regulation provides a third legal mechanism that enables actors in the food system to coordinate their activities—such as establishing and expanding short food supply chains—while avoiding the application of Article 101(1) TFEU and equivalent provisions in national law. Article 210a of the CMO Regulation states that Article 101(1) TFEU does not apply to horizontal and vertical agreements 'of producers of agricultural products that relate to the production of or trade in agricultural products and that aim to apply a sustainability standard higher than mandated by Union or national law, provided that those agreements, decisions and concerted practices only impose restrictions of competition that are indispensable to the attainment of that standard'.[38]

A sustainability standard must address at least one of the following objectives: climate change mitigation and adaptation, sustainable use and protection of landscapes, water and soil, transition to a circular economy, including the reduction of food waste, prevention and reduction of pollution, protection and restoration of biodiversity and ecosystems, production of agricultural products using methods that reduce pesticide use and manage the associated risks; reduction of the risk of antimicrobial resistance in agricultural production, and animal health and welfare.[39]

The reasoning of the Commission in its guidelines on the exclusion of Article 101(1) TFEU for sustainability agreements of agricultural producers under Article 210a of the CMO Regulation should be examined: the scope of this article (a), the restrictions of competition (b) and their indispensability (c) will be analysed.

a. The Scope of Article 210A of the CMO Regulation

Firstly, the Commission states that the parties involved must 'express their intention to jointly implement' a sustainability agreement and, regarding the personal scope of application, it specifies that while the agreement must 'involve improvements in production', it may also concern 'trade in agricultural products'.[40] As for the material scope, the Commission explains that it is necessary 'to distinguish between the sustainability objectives listed in Article 210a(3), the sustainability standards required to reach those sustainability objectives, and the implementation measures set out in a sustainability agreement to attain those standards'.[41] The parties to the agreement must *specifically* target one or more objectives; they must also *define* the sustainability standard and the 'tangible and measurable' or 'observable and describable' results it produces; and finally, the 'sustainability standard must impose sustainability requirements that exceed what is required by an existing mandatory standard'.[42]

The Commission, noting that 'a mandatory standard may exist at the regional or local level', provides the example of milk producers and retailers who 'agree to support the conversion to organic milk production' in line with EU law. This is considered a higher sustainability standard, as these 'production meth-

37 §193.

38 Regulation (EU) 2021/2117, art 210a.

39 Ibid, art 210a (3).

40 Commission guidelines on the exclusion from art 101 of the Treaty on the Functioning of the European Union for sustainability agreements of agricultural producers pursuant to art 210a of Regulation (EU) No 1308/2013, OJ C, C/2023/1446, 8.12.2023, §34 and 38.

41 Ibid., §42.

42 Ibid., §56-57.

ods are not mandatory standards at Union or national level'.[43]

It is not enough to produce foodstuffs using more sustainable methods, such as agroecology, producers must explicitly express their intent to apply the standards set out in Article 210a of Regulation 1308/2013.[44] This requires not only awareness of and commitment to sustainable development objectives but also the establishment of the most stringent standards capable of delivering concrete results.

b. Restrictions Of Competition

The Commission explains that the concept of a restriction of competition refers to the impact of a practice 'on the relevant parameters of competition in a given market', particularly by 'reducing rivalry between the parties to the agreement or reducing rivalry between them and third parties'.[45] Annex E of the Commission's guidelines lists the main types of restrictive practices, which include practices that 'directly or indirectly restrict the freedom of a party to negotiate the price at which it buys or sells a product', those 'that restrict output', those 'that restrict choice with respect to inputs' and those 'that require an undertaking not to sell to certain customers or groups of customers, or not to sell outside of a certain territory or into certain territories {or} that require an undertaking not to buy from other suppliers or from other territories {or} that restrict the ability of competing resellers to sell to certain customers or territories or to buy from certain suppliers or territories'.

The Commission provides two examples of competition restrictions potentially associated with the development of short food supply chains. The first involves a regional development association that, by limiting access to an 'agritourism initiative'to farms within a border region of a single Member State, may affect the ability of participating farms to attract customers, thereby restricting competition with farms located just across the border.[46] The second example concerns a group of cooperatives that 'develops a code of good conduct, detailing steps for agricultural producers, processors, and retailers to reduce food waste', and requires participants 'to sell their produce only to retailers who have signed up to the code'.[47] This 'code is likely to restrict competition, as non-participating retailers would no longer have access to as broad a range of suppliers as they did before the sustainability agreement'.[48]

While reiterating, without extensive detail, the distinction between agreements that have the object or effect of restricting competition, the Commission outlines several types of agreements unlikely to distort competition if they do not impact parameters 'such as price, quantity, quality, choice or innovation'.[49] These include agreements 'that do not concern the economic activity of competitors, but rather their internal corporate conduct', those concerning 'the creation of a database of suppliers with sustainable value chains and production processes, or distributors selling products sustainably', and agreements regarding 'industry-wide awareness campaigns or campaigns raising consumer awareness about the environmental footprint of their consumption'.[50]

However, these explanatory developments remain limited, as most of the analysis related to the application of Article 210a of Regulation 1308/2013 focuses on the indispensability of the restrictions. Indeed, the aim of the derogatory competition regime in the agricultural sector is precisely to permit certain restrictions on competition where they align with the structural characteristics and policy objectives of this sector.[51]

c. The Indispensability of Restrictions of Competition

The condition regarding the indispensable nature of competition restrictions reflects the principle that the competition regime for the agricultural sector

43 Ibid., §61 and 66.

44 Olivier de Schutter, 'Report submitted by the Special Rapporteur on the Right to Food, Olivier de Schutter:addendum' <https://digitallibrary.un.org/record/704716/files/A_HRC_16_49_Add.3-ZH.pdf>. Stephen R Gliessman and others, *Agroecology: Leading the Transformation to a Just and Sustainable Food System* (Andrew Gerlicz ed, Fourth edition, CRC Press 2023).

45 Commission guidelines on the exclusion from art 101 of the Treaty on the Functioning of the European Union for sustainability agreements of agricultural producers, §69.

46 Ibid., Annex E, §7.

47 Ibid.

48 Ibid.

49 Ibid., §75.

50 Ibid., §76-78. See also Judgment of the Court (Third Chamber), 11 September 2014, Groupement des cartes bancaires (CB) v European Commission, Case C-67/13 P, ECLI:EU:C:2014:2204, §53 or Judgment of the Court (Fifth Chamber) of 2 April 2020, Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others, Case C-228/18, ECLI:EU:C:2020:265, §51.

51 Barents (n 5) para 7.01-7.06.

should be interpreted strictly.[52] Catherine Del Cont and Antonio Iannarelli highlight a misunderstanding, observing that while 'the legislative provisions relating to the CAP are to be strictly interpreted, they are by definition exempt from any appreciation and reading through the lens of the law and the logic of competition'.[53] According to these authors, the rationale underlying Article 101§3 TFEU, particularly the Commission's efficiencies test that exempts agreements from Article 101§1 TFEU if they are the least restrictive on competition, should not be applied by analogy in the agricultural sector.[54] They note that current Union legislation reflects a compromise between the European Parliament, which upholds the principle of a distinct logic for the agricultural exception, and the Commission, which seeks to integrate the competitive logic of Article 101§3 TFEU into the agricultural sector's derogation regime.[55] Article 209 of the Single CMO Regulation thus creates a competition exception in favour of farmers, provided their agreements do not entirely exclude competition. Article 210a specifies that sustainability agreements must impose only essential competition restrictions.

The reasoning in the guidelines on sustainability agreements among agricultural producers supports and extends the agricultural derogation regime's alignment with Article 101§3 TFEU: 53 paragraphs and an appendix detail the self-assessment steps operators in agricultural value chains must undertake to ensure their competition restrictions are essential. Referring to the guidelines on Article 101(3) TFEU and to Court of Justice case law, the Commission outlines a two-part test for evaluating whether restrictions on competition are indispensable. The first test 'looks at whether *the agreement* itself, that is to say the agreement that falls under Article 101(1) TFEU, is reasonably necessary to attain the efficiencies created by the agreement'; the second 'assesses whether *the individual restrictions* of competition that flow from the agreement are also reasonably necessary to attain those efficiencies'.[56]

Regarding the indispensability of the agreement, participants must first verify whether the sustainability standard can be achieved individually. For instance, 'producing or trading a product in a more sustainable way may only be profitable if a larger volume of products is produced or traded sustainably {so that} an agreement between operators that they will all produce or trade the given product sustainably could be considered as indispensable'.[57] Next, participants must examine 'whether the different provisions of the agreement, for example relating to price, output, innovation and distribution, restrict competition and, if so, whether they are indispensable to attaining the sustainability standard'.[58] For each sustainability issue, the question arises whether a clause regarding price, production, innovation, or distribution is the preferable approach.

The Commission provides an example involving the establishment of a short food supply chain by dairy producers in a region who agree to sell exclusively within their Member State. The Commission deems such an agreement 'will not be indispensable for the purpose of achieving the standard of reducing CO2 emissions associated with cheese production and trade since there is a less restrictive way to ensure the decrease of CO2 emissions, namely, the determination of an objective distance-based condition calculated from the area of production to the area of sale, for example 200 km'.[59]

Concerning the indispensability of the restrictions of competition, i.e. 'on whether the restriction of com-

52 Judgment of the Court of 15 May 1975, Nederlandse Vereniging voor de fruit- en groentenimporthandel, Nederlandse Bond van grossiers in zuidvruchten en ander geimporteerd fruit "Frubo" v Commission of the European Communities and Vereniging de Fruitunie, Case 71-74, ECLI:EU:C:1975:61, §22-26; Judgment of the Court of 12 December 1995, H. G. Oude Luttikhuis and others v Verenigde Coöperatieve Melkindustrie Coberco BA, Case C-399/93, ECLI:EU:C:1995:434, §25; Judgment of the Court (Grand Chamber) of 14 November 2017, Président de l'Autorité de la concurrence v Association des producteurs vendeurs d'endives (APVE) and Others, Case C-671/15, ECLI:EU:C:2017:860, §49.

53 Catherine Del Cont and Antonio Iannarelli, 'Research for AGRI Committee - New Competition Rules for the Agri-Food Chain in the CAP Post 2020' (European Parliament 2018) 37.

54 Ibid., 31-32.

55 Ibid. See also Barents (n 5) para 7.36-7.37.

56 Commission guidelines on the exclusion from art 101 of the Treaty on the Functioning of the European Union for sustainability agreements of agricultural producers, §86-88. In §89, the Commission nevertheless recognises the singularity of the agricultural sector in that 'for the purposes of art 210a restrictions that would be considered to be serious restrictions for the purposes of art 101(1) TFEU, such as agreements on price fixing or reducing output, may be considered as indispensable.'

57 Ibid., §100.

58 Ibid., §108. By way of example (§110(c)), if 'the issue relates to uncertainties about the commercialisation of the product, that is to say uncertainties about the volumes that could be sold, provisions that could be suitable to address the issue, depending on the individual circumstances of the case, may be offtake commitments by some customers, for example the purchase of a minimum amount of products per year; and specific distribution arrangements between producers or between producers and their customers, such as allocation of customers and exclusivity of supply or of purchases.'

59 Ibid., §112.

petition contained in each provision of the sustainability agreement is the least restrictive option to attain the standard in question', operators should also evaluate whether 'the nature of the restriction' is most suitable. This involves determining whether, for a specific issue, it is preferable to adopt a minimum or total price-setting clause, a price mark-up, or perhaps 'to agree on requirements to purchase a minimum volume against requirements to purchase a fixed volume or some other purchasing obligation'.[60] Participants should also consider the intensity of the restriction. This involves assessing its quantitative impact; for example, a price increase restriction should align with 'the estimated costs incurred and estimated income foregone', 'the level of certainty that the expected costs incurred and income foregone will materialise' and 'the likely return on investment relative to other alternatives' (e.g., whether a shorter restriction period would reduce the likelihood of achieving the sustainability standard).[61]

The seven stages of analysis summarised in Annex B of the Guidelines are to be followed by farmers and other food business operators who wish to enter into competition-restricting agreements to adopt higher sustainability standards than those required by the EU and Member States. For example, in the context of an agreement for developing a short food supply chain, clauses related to quality, diversity, and distribution area may prove less restrictive than price clauses.

In this way, farmers can support, to some extent, the local marketing of products produced using agroecological methods, although without guaranteeing fair remuneration. The competition logic tied to the indispensability of restrictions does not facilitate the CAP's main objectives—namely, ensuring fair prices for producers and reasonable prices for consumers. Furthermore, the framework for sustainability agreements entails transaction costs that burden already financially strained food producers. Unlike other economic actors, farmers often lack the financial resources for economic and legal advisors or the time for the analysis outlined above.[62]

As such, the absence of an economic incentive in sustainability agreements, while supporting competition, reduces the attractiveness of Article 210a of the CMO Regulation for producers. Indeed, without fair compensation, what is the benefit of agreeing to sustainable practices and short food circuits? However, the sustainable transformation of agriculture inevitably involves considering the economic dimensions of this sector.[63]

Thus, the current structure of the competitive market for agricultural products, regulated by the CMO and directed at farmers, does not fully support the development of short food supply chains within the EU. Although farmers may freely choose this marketing model, the current food market, largely organised by POs and APOs which 'constitute the basic elements ensuring, at their level, the decentralised operation of common market organisations', offers limited opportunities for short circuits.

III. Proposals to Amend the CMO Regulation in Order to Structurally Transform the Foodstuffs Market

We have noted that the way in which the competition regime is organised in the agricultural sector does not encourage the establishment and growth of short food distribution channels within the EU. Developing these channels requires a reconfiguration of the networks that facilitate the exchange of foodstuffs from production to consumption.[64]

The objective is to use tailored public instruments to reshape the agricultural products market in accordance with the needs of stakeholders involved in short food supply chains.[65] To achieve this, a series of measures should be proposed, *de lege ferenda*, to amend the CMO Regulation (1), particularly the provisions relating to the competition regime (2).

60 Ibid., §115, 118 and 121.

61 Ibid., §125 and 129.

62 Blandine Mesnel, 'Les Agriculteurs Face à La Paperasse: Policy Feedbacks et Bureaucratisation de La Politique Agricole Commune' (2017) VOL. 6 *Gouvernement et action publique* 33.

63 Pierre Boulanger, Kirsten Boysen-Urban and George Philippidis, 'European Union Agricultural Support 'Coupling' in Simulation Modelling: Measuring the Sustainability Impacts' (2021) 13 *Sustainability* 3264; AZ Bi and others, 'Economic and Environmental Sustainability of Agriculture Production at the Crop Level' (2024) 10 Global Journal of Environmental Science and Management <https://doi.org/10.22034/gjesm.2024.03.29> accessed 22 November 2024.

64 Le Velly, Goulet and Vinck (n 9).

65 Michel Callon, 'How to Design Alternative Markets': in Gerda Roelvink, Kevin St. Martin and JK Gibson-Graham (eds), *Making Other Worlds Possible* (University of Minnesota Press 2015) <http://www.jstor.org/stable/10.5749/j.ctt130jtq1.17> accessed 13 November 2024; Ronan Le Velly and Ivan Dufeu, 'Alternative Food Networks as 'Market Agencements': Exploring Their Multiple Hybridities' (2016) 43 *Journal of Rural Studies* 173.

1. Integrating Short Food Supply Chains into the Common Organisation of the Markets in Agricultural Products

To establish a coherent framework, the definition and objectives of short food supply chains should be integrated into the CMO Regulation, with specific criteria outlined for those wishing to establish and develop such chains within the EU. In essence, the aim is to encourage a widespread transformation of the European food system towards a more sustainable model.[66] Achieving this will require the inclusion of a dedicated article in Chapter 1 of Title 2 of Part 2 of Regulation 1308/2013 on the marketing of foodstuffs (Articles 73 and following).

As for the definition, short food supply chains should be characterised as supply chains involving no more than one intermediary between the producer and the final consumer, such as retailers and catering service providers. In addition, they should also be characterised as chains that value geographical and/or relational proximity. The objectives should be defined as follows: short food supply chains aim to enhance producers' incomes while ensuring reasonable prices for consumers; to secure a stable food supply while promoting public well-being, particularly in terms of health; to bolster citizens' autonomy while fostering social acceptance of innovations aimed at transforming the agricultural model into a sustainable, nature-respecting system; and finally, to honour the diversity of cultural expressions while contributing to the Union's economic, social, and territorial cohesion, notably through the inclusion of vulnerable populations.

Regarding the criteria, it is essential to highlight that the prohibition of discrimination on grounds of nationality is a fundamental principle of EU law, integral to the integration project.[67] Accordingly, it is appropriate to stipulate that any criteria undermining this principle are strictly prohibited. For instance, in the context of establishing and expanding short supply chains, discrimination based on the nationality, residence, or place of business of customers, professionals, and stakeholders participating in these supply chains should be explicitly forbidden.

In summary, incorporating the concept of short food supply chains into EU legislation on the common organisation of agricultural markets is necessary to formally recognise, protect, and provide equitable treatment for this distinct system of food production, exchange, and consumption. The goal is to ensure legal certainty for actors involved in short food supply chains, thereby establishing the legitimacy and supporting the expansion of such chains within the EU. This concept should now be integrated into the competition provisions of the CMO Regulation.

2. Specific Competition Rules Applicable to Short Food Supply Chains

We have identified three mechanisms within the competition regime applicable to the agricultural sector that, albeit in a very limited way, allow participants in short food supply chains to develop their activities: sustainability agreements (a), agreements between farmers (b), and producer organisations (c) are tools that enable coordination among farmers and help to structure the food market.

However, these provisions appear not only overly restrictive but also somewhat incoherent. Therefore, they should be revised to better align with the legal requirements of those involved in short food supply chains.

a. Sustainability Agreements

We know that farmers wishing to enter into sustainability agreements must assess these agreements independently: the indispensability of any restrictions is determined through a dual test, evaluating whether the agreement itself, as well as each individual restriction it imposes, is reasonably necessary to achieve the efficiencies it creates. This seven-step analysis generates transaction costs that place a significant burden on farmers' activities. Moreover, this approach fails to meet the CAP's economic objective of establishing a price that is both remunerative for producers and reasonable for consumers.

In this context, an exception should be introduced to support the establishment and growth of short food supply chains, alongside the existing derogation

66 Massimo Monteduro and others (eds), *Law and Agroecology: A Transdisciplinary Dialogue* (Springer Berlin Heidelberg 2015). Manuel González de Molina and others, *Political Agroecology: Advancing the Transition to Sustainable Food Systems* (CRC Press 2020) 143–166.

67 Koen Lenaerts, Piet Van Nuffel and Tim Corthaut, *EU Constitutional Law* (First edition, Oxford University Press 2021) 77–131.

for sustainability agreements. This would involve creating a framework that provides a legal guarantee that a sustainability agreement aligns with Article 210a of Regulation 1308/2013, while simultaneously incorporating an economic incentive. Under such a system, farmers would commit to achieving one or more sustainability objectives by applying specific sustainability standards, while being authorised to market their produce through the development of short food supply chains.

Furthermore, to ensure coherence within the agricultural sector's competition regime, these rules should be applied universally. They should include farmers who, under Article 210a of Regulation 1308/2013, commit to transitioning to more sustainable production practices, as well as those who have already adopted such practices, and those considering doing so, whether or not they coordinate with others. Accordingly, it is necessary to examine the legal mechanisms to ensure that short food supply chains comply with competition rules governing farmers' conduct.

b. Agreements Between Farmers

The system established in Article 209 of the CMO Regulation is challenging to implement, as EU judges prioritise the specific derogation for producer organisations (and their associations), which are recognised by Member States as the essential elements underpinning the decentralised operation of the CMO.

In this context, the provisions of Article 209 of the CMO Regulation should be framed with greater rigour to strengthen the legal certainty surrounding its application. A specific category of agreements related to the establishment and development of short food supply chains by farmers should therefore be introduced.

To this end, the general competition regime for the application of Article 101(3) TFEU to specialisation agreements, as outlined in Regulation 2023/1067, is utilised. Farmers and their associations should be permitted to enter into joint production and distribution agreements aimed at establishing and expanding short food supply chains within the EU. These agreements may include clauses on capacity setting, volume control, pricing, and sales targets for foodstuffs marketed directly to end consumers or, indirectly, to other intermediaries, particularly retail distributors.

c. Producer Organisations

POs and APOs, which have the authority to structure the food supply and negotiate its sale on the market, may offer their members' production directly for sale. It should also be noted that Member States have the power to regulate applications for recognition of POs and APOs by establishing minimum requirements, such as membership numbers and/or production volume or value within a specific activity area.

To promote the establishment and development of short food supply chains on a larger scale, provisions for joint production and distribution agreements should be incorporated into the framework governing POs and APOs. Like farms, producer organisations and their associations should have the capacity to create and expand short food supply chains within a regulatory framework that ensures the legal certainty of their activities concerning competition rules. This would assign a new role to POs and APOs, which, beyond their goals of production planning and supply concentration, would support the functioning of agricultural markets through the expansion of short food supply chains.

Furthermore, the criteria for recognising POs and APOs across Member States need to be harmonised to prevent obstacles for farms engaged in small-scale production. For instance, a minimum number of farmers could be required (such as five farms), along with a minimum total value of Standard Gross Production (for example, 125,000 €).

To systematise the creation and growth of short food supply chains in the EU, it is worth noting that Article 164(4) of the CMO Regulation allows the agreements, decisions, and concerted practices of POs and APOs to be made binding, for a limited period, on other operators in the same geographical area where these organisations are considered representative of the production, trade, or processing of a given product.[68]

Additionally, the Commission is authorised to adopt delegated acts to encourage actions by POs and APOs, particularly to 'promote better organisation of

68 Art 164(3) of Regulation 1308/2013 stipulates that an organisation or association is considered representative of a geographical area when it accounts for, in terms of production, trade, or processing volume, at least 60% of the total volume in the fruit and vegetable sector, and two-thirds in other sectors. Similarly, these entities are regarded as representative when they involve at least 50% of producers.

production, processing, and marketing' and to establish 'the specific aims which may, must, or must not be pursued by such organisations and associations, and, where applicable, added to those laid down in Articles 152 to 163'.[69]

It therefore seems appropriate to make the agreements of POs and APOs regarding the establishment and expansion of short food supply chains binding, for a limited period, on operators active in the same geographical area where these organisations are considered representative. Furthermore, it would be suitable for the Commission to adopt one or more delegated acts to encourage POs and APOs to inform operators in the same geographical area about establishing and expanding short food supply chains, due to the beneficial impact of these chains on the European food system.

IV. Conclusions

In the EU, the regulation governing the common organisation of agricultural markets serves as the primary legal instrument for overseeing the exchange of foodstuffs within Member States, particularly in relation to competition among farmers and the competitive pressures they encounter in food value chains. Amending the CMO Regulation to include measures for establishing and expanding short food supply chains is a necessary step towards transforming the European food system. This system, which aims to ensure fair prices for producers and reasonable prices for consumers, is a crucial complement to initiatives targeting reform in both production and consumption. In other words, this involves aligning market mechanisms with the ecological principle that human needs must operate within planetary limits, including in the realm of food.

69 Arts 166 and 173(1)(a) of Regulation 1308/2013.