Written evidence submitted by Co-operatives UK (AB64)

Agriculture Bill: changes to the competition settlement for agricultural co-operation

1 Summary

- We are the national association of co-operative businesses and are currently advocating on behalf of 32 of the UK's leading farmer-owned co-operatives that are members of ours
- We apologise for making a submission at this late stage but had to consult our members and make an assessment of the amendments government introduced first
- In this evidence we provide an impact assessment for changes to the current 'competition settlement' for agricultural co-operation contained in the Agriculture Bill, based on consultation with our members in recent weeks
- This **impact could best be characterised as an increase in uncertainty and regulatory risk** for existing co-operatives and for farmers exploring new co-operative options (see **part 3**)
- In order to ensure the new competition settlement works well for farmer co-operation in the UK, **we suggest an amendment to Schedule 2** of the Agriculture Bill, which we believe is in keeping with the rationale behind government amendments 9 and 11 (see **part 4**)

2 Changes to the 'competition settlement' for agricultural co-operation

2.1 The Agriculture Bill creates a new competition settlement for agricultural co-operation post-Brexit.

2.2 At present a combination of UK and EU law provides permissive but measured exemptions from the prohibitions on co-operation contained in Chapter 1 of the UK Competition Act and TFEU101, grounded in the objectives of the Common Agricultural Policy (CAP). This settlement covers co-operative arrangements that further the objectives of the CAP, a broad range of farmers' associations and registered producer organisations (POs), associations of producer organisations (APOs) and inter-branch organisations (IBOs). The Committee should note that the vast majority of agricultural co-operatives in the UK are not POs, APOs or IBOs.

2.3 Section 23 and Schedule 2 of the Agriculture Bill make changes to this settlement for agricultural co-operation. Under the new draft settlement, eligibility for exemptions from standard competition policy will be restricted to collaborative arrangements registered under a new and yet-to-be-designed framework for POs, APOs and IBOs. This will be a material change from the existing EU settlement.

2.4 The outlines of these new PO, APO and IBO frameworks are provided in Section 22 and Schedule 2 of the Bill. Section 22 of the Agriculture Bill gives government powers to create the detail of new PO, APO and IBO frameworks through secondary legislation.

2.5 In the most concise terms, the Bill will change competition law so that only registered POs, APOs and IBOs will benefit from special accommodations and exemptions. What is more the new competition settlement will not operate with any reference to broader policy objectives relating to commercially viable or ecologically efficient farm businesses.

3 Impact assessment

3.1 We have consulted our member co-operatives to understand what the real world impact of the draft legislative changes could be. The high-level detail in Section 22 and Schedule 2 of the Agriculture Bill suggests that at least some forms of farmer co-operation currently covered by the existing competition settlement could be excluded from the new PO, APO and IBO frameworks. In a scenario in which some co-operatives find themselves outside the new competition settlement – most likely because the design of the new PO, APO, IBO framework excludes them – the real world impact could best be characterised as **an increase in uncertainty and regulatory risk**.

3.2 This is because when co-operation is accommodated in the competition settlement, all that farmers and their agents need to do is evidence that their arrangements are eligible for the exemption. But outside the settlement they need to have a ready defence on grounds of economic efficiency and consumer benefit, which while very possible, is a much bigger task for farmers and their co-operatives.

3.3 There is some comfort in the fact that investigations and subsequent guidance published by the OFT in 2011 suggest that most examples of co-operation between farmers are seen by competition authorities as boosting economic efficiency, for the benefit of farmers, supply chains and consumers.[1] Thus it would be highly unlikely for such co-operation to be considered problematic from a competition law perspective.

3.4 But this is complicated by questions of interpretation. In the EU legal conceptions of economic efficiency have been grounded in Article 101 TFEU (3) but there has been some ambiguity as to how narrowly or widely Article 101 TFEU (3) should be interpreted. The most recent rulings suggest that in the acquis of EU law, a wide interpretation of 'economic efficiency' is allowed.[2] Just how this aspect of the EU *acquis*, which is essentially composed of CJEU rulings, will fare in UK law after Brexit is also uncertain.

3.5 Furthermore, investigations and subsequent guidance published by the OFT in 2011 suggests that, while in most cases joint selling through a co-operative is not considered a

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[1] Office for Fair Trading (2011) 'How competition law applies to co-operation between farming businesses: Frequently asked questions'

[2] Chalmers, Damian; Davies, GT; Monti, Giorgio (2014) 'European Union law' Cambridge University Press

form of prohibited price fixing, there could be a degree of ambiguity and uncertainty in interpretation here.[3] This could also be problematic and add risk.

3.6 And the pre-2011 OFT investigations mentioned above also demonstrate that there can be uncertainty and contention about how competition authorities define the relevant market in which farmers are co-operating. Again this adds complexity, uncertainty and risk.

3.7 Established co-operatives that might find themselves outside the new settlement are likely to manage most of this uncertainty and risk quite well. And where there is a challenge a robust defence will be possible in most cases. The biggest risk for some established co-operatives is perhaps in relation to uncertainty about how the CMA might interpret famers' joint selling arrangements.

3.8 But making such a defence will come with a cost and this has the potential to increase the transactional costs of collaboration. And this degree of uncertainty, risk and possible cost has the potential to make new collaborative options considerably less attractive to farmers. Unless steps are taken to mitigate this, it may well prove more difficult to encourage new collaborative behaviour among farmers, who are already culturally disinclined to co-operative. This could be especially so where such collaboration might achieve concentrations of buying or selling power, or shared ownership and control of downstream processes in supply chains.

3.9 Farmers in the UK co-operate much less than their competitors in most other advanced economies. If this is going to change, then among many other things farmers will need a degree of clarity and certainty on questions of competition policy.

4 Recommended amendment

4.1 Parliament should ensure that to the fullest extent possible and appropriate, the new competition settlement contained in this Bill accommodates a diversity of new and existing co-operative arrangements.

4.2 The most straightforward way to do this is to design the new PO, APO and IBO frameworks in a way that is flexible and inclusive. This means that the provisions in Section 22 and Schedule 2 this Bill should not be unnecessarily prescriptive or bind government's hand too tightly.

4.3 Thus we very much welcome government amendments 9 and 11, which take out unnecessarily prescriptive provisions about the farmer-members of POs and APOs always having to be in one agricultural sector. In practice there are many value-adding co-operatives that bring together farmers from different sectors and these should not be excluded from the new competition settlement out of hand.

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[3] Office for Fair Trading (2011)

4.4 While we welcome government amendments 9 and 11, we believe this same logic and rationale should also be applied to Schedule 2,1 (2). Specifically we recommend that Parliament **omits** the following part of Schedule 2,1 (2):

'(1B)Condition A is that—

(a)in the case of a PO, the PO concentrates supply and places the products of its members on the market, whether or not there is a transfer of ownership of agricultural products by the producers to the PO, or

(b) the case of an APO, the APO concentrates supply and places the products of the members of the POs it represents on the market, whether or not there is a transfer of ownership of agricultural products by the producers to the APO or to any of the POs the APO represents.'

4.5 **Explanation:** It is vital that policy supports farmer co-operation in inputs and processes - especially in data, intellectual property and innovation adoption - rather than just downstream activities like 'concentrating supply'. Indeed this is a core aspiration for co-operation in Defra's Policy Statement. The Bill should leave room for PO and APO frameworks that support co-operation in these aspects of farmers' businesses and thus should not restrict POs and APOs to only supporting downstream collaboration ('concentrating supply') as '*Condition A'* would require. The omission we suggest removes unnecessary restrictions that *'Condition A'* imposes.

4.6 It suffices that Schedule 2, (2) *'(1A)'* details the forms of co-operation POs and APOs might facilitate and here crucially *"optimising production costs"* is listed. Thus we believe our amendment would improve the coherence of the Bill, both in terms of the design of the PO and APO frameworks and the level of prescription it imposes in primary legislation.

4.7 Crucially, government amendments 9 and 11 leave room for POs and APOs of farmers in multiple sectors and this cross sectoral co-operation is more likely to be on inputs than outputs. Thus we think government's amendments would make more sense if '*Condition A'* was omitted from Schedule 2*,* as we propose above.

5 Other policy recommendations

5.1 To further mitigate the potential negative impacts of the changes to the competition settlement contained in the Agriculture Bill, we make the following recommendations:

- Defra should consult openly and thoroughly on the detail of the new PO, APO and IBO frameworks before laying any secondary legislation in Parliament
- Defra and the CMA should commit to creating an accessible and comprehensive suite of guidance materials for farmers and their supply chain partners on how to make the most of their collaborative options, both inside and outside the new competition settlement; this could include the most recent interpretations of 'economic efficiency' in the EU *acquis*; this could also include some useful guidance on how markets might be defined by product and geography outside the

EU; this could also include guidance on how different joint selling arrangements through a co-operative could be interpreted

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