

The Consumer Voice in Europe

## European Commission's consultation on Sustainability Agreements in Agriculture

BEUC's comments on the Guidelines on the Antitrust  
Derogation in Article 210a CMO



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EC register for interest representatives: identification number 9505781573-45



Co-funded by the European Union

Ref: BEUC-X-2022-048 – 23/05/2022

## Why it matters to consumers

Sustainability is a critical issue for European consumers. Consumers are increasingly concerned about the impact their consumption has on the environment and on communities across the world. While the agricultural sector is an integral part of the European economy, it has a marked impact on the environment. A more sustainable EU agricultural sector and agri-food supply chain is key to reaching the EU environmental and climate goals.

Consumers will benefit from a wider choice of products that are more sustainable and environmentally friendly. However, the wrong types of sustainability agreements have the potential to harm consumers, especially if they lead to greenwashing or unjustified and disproportionate price increases. Consumers need sustainable alternatives that are not only available but also affordable, attractive and convenient. While the transition towards more sustainable agriculture and food supply chains is to be promoted, the burden of this transition must not fall on consumers alone.

## Summary

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Regulation 2021/2117 introduced a new Article 210a into the Common Market Organisation Regulation 1308/2013 (CMO Regulation).<sup>1</sup> This article provides for a derogation to the illegality of agreements restricting competition set out in Article 101 Treaty on the Functioning of the European Union (TFEU) insofar as such agreements concern higher sustainability standards. While higher sustainability standards in food production are to be strongly supported, it is essential that such agreements do not lead to unacceptable restrictions of competition and thus to consumer harm.

Article 210a is to be complemented by guidelines. BEUC welcomes the opportunity to respond to the Commission's consultation on the guidelines foreseen in Article 210a(5), for the interpretation of Article 210a. Clear guidelines on the interpretation of Article 210a will be essential.

We recommend that when drawing up the guidelines that will help producers and operators self-assess their agreements to make the best use of this new derogation to promote sustainability, the Commission pays particular attention to and addresses the following points:

1. **Restrictive interpretation:** Since Article 210a is a derogation to the general principle prohibiting anticompetitive agreements laid down in the TFEU, the scope of this provision should be interpreted narrowly to avoid unintended harmful outcomes.
2. **Definition of sustainability standards agreements:** It is essential for the guidelines to clearly define what is meant by "sustainability standards agreements"

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<sup>1</sup> Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 [2013] OJ L 347/671.

and the scope of the objectives to which they must relate. The guidelines must provide sufficient examples and guidance to producers and operators to ensure legal certainty and avoid misclassification to enable them to make effective use of this sustainability derogation.

3. **Genuinely higher sustainability standards:** The guidelines should make clear that for the derogation to apply, sustainability standards agreements must pursue standards that are genuinely and materially higher than an existing mandated EU or national standard. An agreement that aims to apply a standard barely above the mandated level without clear sustainability benefits should not benefit from the derogation. Standards labelling must be clear to consumers.
4. **Genuine involvement of agricultural producers:** Producers of agricultural products should be genuinely involved in the adoption and implementation of the standards and not used as an “excuse” to allow operators in between the “farm and fork” to inappropriately benefit from the derogation to the disadvantage of both farmers and consumers. Horizontal measures at other levels in the food supply chain should be considered under Article 101 TFEU (see point 10 below).
5. **Non-EU based agricultural producers:** It may be more appropriate to consider sustainability agreements involving only agricultural producers located outside the EU under Article 101 TFEU and under other initiatives such as the proposed Directive on corporate sustainability due diligence or mirror clauses rather than under Article 210a.
6. **Production of or trade in agricultural products:** The guidelines should set out the exact scope of “production of or trade in agricultural products”.
7. **Indispensability of the restrictions:** The indispensability requirement in Article 210a will be key to ensuring that the benefits of the restrictions of competition contained in sustainability standards agreements outweigh the harms. It is critical that Article 210a does not become a blank cheque for producers and operators to restrict competition in ways that could have strong harmful effects on the internal market, on competition, on sustainability innovation, on greenwashing and ultimately on consumers. Only restrictions that are absolutely essential to achieve the higher sustainability standards can be permitted. The guidelines must set out in detail how this requirement is to be interpreted and where its limits are.
8. **No exclusion of competition or jeopardising the objectives of Article 39 TFEU:** Sustainability standards agreements must not lead to the exclusion of competition, especially the consumer price parameter of competition. Clear guidance, also respecting Article 12 TFEU, must be set out in the Commission’s guidelines on what is meant by exclusion of competition and what could jeopardise the objectives of Article 39 TFEU.
9. **Monitoring of Article 210a agreements:** To enable Article 210a agreements to be monitored, the guidelines should set out to whom and how stakeholders should provide information and complaints and how these will be processed to ensure effective and timely outcomes. Competition authorities should be encouraged to provide interpretative assistance to producers and operators contemplating sustainability standards agreements.
10. **Article 101 TFEU as a fallback regime:** For sustainability agreements that fall outside of the scope of Article 210a, the guidelines should recall that producers and operators should consider whether their agreements fall within Article 101(1) and can be exempted under Article 101(3) TFEU.<sup>2</sup>

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<sup>2</sup> In the case of horizontal agreements between undertakings, the European Commission has recently published draft revised Horizontal Guidelines. It is notable that in this draft, the Commission has introduced a new chapter dedicated entirely to sustainability agreements. See, European Commission, Annex to the Communication from

## 1. Introduction/general remarks

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BEUC welcomes the opportunity to comment on the European Commission's consultation on the adoption of guidelines on the derogation from competition law for certain types of sustainability agreements in the production of or trade in agricultural products introduced pursuant to Article 210a CMO.<sup>3</sup>

Whilst initiatives to promote sustainability are to be strongly welcomed, it is important that Article 210a does not undermine competition that will drive sustainability innovation or harm consumers through greenwashing or by burdening them disproportionately with the costs of transitioning to more sustainable agricultural practices and food supply chains.

In this regard, it will be important for the Article 210a guidelines to lay down clear and precise rules on the interpretation of this article.

## 2. Scope of Article 210a

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Article 210a(1) of amended Regulation 1308/2013 specifies that Article 101(1) TFEU shall not apply to 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 only impose restrictions of competition that are indispensable to the attainment of that standard.

This derogation applies to agreements between several producers of agricultural products or between one or more producers and one or more operators at different levels of the production, processing, and trade in the food supply chain, including distribution (Article 210a(2)).

A sustainability standard for the purposes of Article 210a is defined in Article 210a(3) as a standard which aims to contribute to one or more of the following objectives:

- (a) environmental objectives, including climate change mitigation and adaptation, the sustainable use and protection of landscapes, water and soil, the transition to a circular economy, including the reduction of food waste, pollution prevention and control, and the protection and restoration of biodiversity and ecosystems;
- (b) the production of agricultural products in ways that reduce the use of pesticides and manage risks resulting from such use, or that reduce the danger of antimicrobial resistance in agricultural production; and
- (c) animal health and animal welfare.

No prior approval is required for such agreements (Article 210a(4)). National competition authorities (or in the case of agreements covering more than one Member State, the European Commission) can require agreements to be modified or discontinued if this is necessary to prevent competition from being excluded or if they consider that the objectives set out in Article 39 TFEU are jeopardised (Article 210a(7)).

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the Commission: Approval of the content of a draft for a Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 1 March 2022, C(2022) 1159 final, [https://ec.europa.eu/competition-policy/system/files/2022-03/draft\\_revised\\_horizontal\\_guidelines\\_2022.pdf](https://ec.europa.eu/competition-policy/system/files/2022-03/draft_revised_horizontal_guidelines_2022.pdf).

<sup>3</sup> European Commission, Sustainability agreements in agriculture – guidelines on antitrust derogation (call for evidence and public consultation), [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13305-Sustainability-agreements-in-agriculture-guidelines-on-antitrust-derogation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13305-Sustainability-agreements-in-agriculture-guidelines-on-antitrust-derogation_en).

As can be seen from the above summary of the provisions of Article 210a, the exception to EU antitrust law for the relevant sustainability standards agreements covers both vertical agreements, between operators at different levels in the supply chain and horizontal agreements, i.e., agreements between competitors, (as long as these include at least one agricultural producer). The scope of the Article 210a derogation is thus potentially broad. Furthermore, Article 210a specifies that such agreements are not subject to any *ex-ante* control. Both of these factors make the drafting of clear guidelines essential to optimise sustainability standards agreements and to reduce the risk of unacceptable harms to the functioning of agricultural markets and to consumers.

In the following we set out some suggested principles for the guidelines.

### 2.1. Restrictive interpretation of Article 210a

As Article 210a of Regulation 1308/2013 exempts certain types of sustainability agreement between producers of agricultural products and operators in the food supply chain from the prohibition on anticompetitive agreements in Article 101 TFEU, it must be considered *lex specialis* to the general principle prohibiting anticompetitive agreements laid down in the TFEU. Therefore, as for all exceptions to a general principle, the scope of Article 210a should be interpreted restrictively.<sup>4</sup>

This is all the more important given the absence of an impact assessment on the effects of the introduction of this derogation on the functioning of agricultural markets and potential harm to consumers.<sup>5</sup>

### 2.2. Concept and examples of sustainability standards agreements

The concept of sustainability standards is at the centre of Article 210a; therefore, it is crucial that the guidelines clearly define this concept and provide sufficient examples to producers to help them assess their agreements. Does the concept of standards for example extend beyond production to marketing standards?<sup>6</sup> EU marketing standards for agricultural products are being reviewed<sup>7</sup> to encourage the supply of more sustainable products to consumers. Rather than agreements between producers of agricultural products and operators in the food supply chain, we would support increasing the level of ambition of mandatory marketing standards on sustainability. While Article 210a(3) defines in broad terms that a “sustainability standard” is a standard that aims to contribute to certain objectives, and then lists these objectives, concrete examples should be provided to ensure legal certainty for producers and operators. Further details should be provided on what precisely would fall within, and what would fall outside, the list of the objectives in Article 210a(3)(a)-(c). It would seem logical to align “sustainability standards” here with the “Farm to Fork” sustainability objectives.

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<sup>4</sup> See to that effect, Case C-70/93 *Bayerische Motorenwerke*, EU:C:1995:344, para 28; Case C-230/96 *Cabour and Nord Distribution Automobile v Arnor "SOCO"*, EU:C:1998:181, para. 30; Case C-306/96 *Javico*, EU:C:1998:173, para 32; C-492/08, *Commission v France*, EU:C:2010:348, para. 35; Case T-704/14, *Marine Harvest*, EU:T:2017:753, para. 201.

<sup>5</sup> The absence of any detailed assessment of a significant derogation from Treaty provisions designed ultimately to protect consumers (Article 101 TFEU) is particularly noteworthy in light of the requirement in Article 12 TFEU to take consumer protection into account in defining and implementing other Union policies and activities.

<sup>6</sup> Marketing standards are to be reviewed with a view to increasing the sustainability of the agri-food supply chain, [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12772-Agricultural-products-revision-of-EU-marketing-standards\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12772-Agricultural-products-revision-of-EU-marketing-standards_en).

<sup>7</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12772-Agricultural-products-revision-of-EU-marketing-standards\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12772-Agricultural-products-revision-of-EU-marketing-standards_en).

### 2.3. A genuinely higher sustainability standard

The derogation in Article 210a only applies to agreements between producers or operators—provided that one producer is part of the agreement—that aim to establish and apply a sustainability standard that is higher than a standard mandated by EU or national law. To avoid producers gaming the system and side-stepping the general principle of the prohibition of anticompetitive agreements, the sustainability standards they seek to adopt and apply should be meaningfully or materially higher than the standard already legally mandated.<sup>8</sup> For example, the German consumer organisation, vzbv, has criticised the ‘Initiative Tierwohl’ developed by large German retailers and economic operators from the livestock sector.<sup>9</sup> Farmers participating in this initiative must implement certain animal welfare criteria and get a payment of a few cents in return. Meat from animals produced under the scheme is labelled with the initiative’s logo “Initiative Tierwohl”. Yet, the voluntary animal welfare standards promoted by this initiative are very low and barely exceed legal requirements. Furthermore, this very limited benefit is not necessarily clear to consumers, given the labelling used. Concern has been expressed by vzbv that the ‘Initiative Tierwohl’ could delay the introduction of a more ambitious method of production labelling scheme developed by the German government. This type of initiative should not benefit from the exemption under Article 210a since the impact on animal health and welfare would be negligible and such agreements can deter producers from taking meaningful animal welfare measures.

The Chicken of Tomorrow case is another good illustration of this issue. This initiative concerned an industry-wide agreement, comprising both suppliers and retailers, to improve the living standards of broiler chicken purchased by supermarkets. The agreement involved slightly higher animal welfare standards and at the same time, the removal of regular chicken meat from sale in supermarkets (accounting for 95% of poultry sales), leaving consumers with limited options and paying higher prices. In 2015, the Netherlands competition authority (ACM) did not allow this agreement—correctly as later studies of the market showed.<sup>10</sup> In 2020, the ACM published an analysis of the chicken meat market and found that in the meantime the different market participants had launched their own initiatives. Supermarkets offered differentiated levels of animal welfare, based on welfare classifications of their own, and also based on market-wide sustainability labelling. Chicken welfare standards of the chicken meat sold in Dutch supermarkets were higher than the planned standards of the ‘Chicken of Tomorrow’ and more sustainable and animal-friendly chicken meat was offered in supermarkets than ever before.<sup>11</sup>

The German competition authority (Bundeskartellamt) also found that a 2021 agreement in relation to milk did not lead to a meaningful sustainability benefit as claimed and was not therefore permissible.<sup>12</sup>

The guidelines should make clear that sustainability standards agreements must achieve a material improvement in standards for the objectives listed in Article 210a(3) and not be used as means to avoid greater sustainability improvements. To safeguard this, the guidelines should require that the parties to the agreement consult non-governmental organisations in the relevant area for the agreement, be it environmental, animal health,

<sup>8</sup> See also the requirement not to jeopardise the objective of Article 39(1)(e) as set out in detail in section 2.8 below.

<sup>9</sup> <https://initiative-tierwohl.de/en/>

<sup>10</sup> Authority for Consumers and Markets, Industry-wide arrangements for the so-called Chicken of Tomorrow restrict competition, Case 13.0195.66, <https://www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition>.

<sup>11</sup> Authority for Consumers and Markets, Welfare of today’s chicken and that of the ‘Chicken of Tomorrow’, August 2020, <https://www.acm.nl/en/publications/welfare-of-todays-chicken-and-chicken-tomorrow>.

<sup>12</sup> Bundeskartellamt, Surcharges without improved sustainability in the milk sector: Bundeskartellamt points out limits of competition law, January 2022, [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/25\\_01\\_2022\\_Agrardialog.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/25_01_2022_Agrardialog.html).



animal welfare, etc on the higher standard proposed. This essential aspect is further addressed in Section 2.7 below. Agreements among producers that would only marginally contribute to the achievement of one of the objectives could normally not be deemed “necessary” (indispensable) as required under Article 210a(1).

Where there is no sustainability standard mandated by Union or national law, Article 210a cannot apply. This would not be compatible with the wording of this article. Standards agreements in such circumstances would need to be considered under Article 101 TFEU.

Finally, in addition to agreements needing to involve genuinely higher sustainability standards, the guidelines should state that it is essential that the labelling of such standards is clear for consumers, as identified by the Bundeskartellamt in its review of agreements in relation to animal welfare.<sup>13</sup>

#### **2.4. Genuine involvement of producers**

Article 210a(2) states that agreements can either be among producers or among operators at different levels in the food supply chain as long as one or more producers are involved. This provision could be abused by undertakings active higher up in the food supply chain (e.g., processing level, packaging level, distribution level) where the operators would take advantage of the derogation provided by Article 210a by simply taking one producer on board to satisfy the condition under (2). This “loophole” in Article 210a could potentially allow for “sham” sustainability agreements that would avoid normal competition rules and scrutiny under Article 101 TFEU. Clarification could help prevent operators active higher up in the food supply chain from misusing the derogation under Article 210a since the spirit of Article 210a is to encourage producers of agricultural products (i.e., farmers) to be more sustainable in their activities. Operators that wish to benefit from the exemption under Article 210a should demonstrate that their agreement genuinely and directly involves producers of agricultural products. Article 101 TFEU may however provide alternatives for horizontal sustainability agreements above the producer level in the food supply chain.

#### **2.5. Only EU based agricultural producers**

It is important to consider whether the benefit of Article 210a should only apply to sustainability agreements concluded by producers (or operators) located inside the European Union or also to producers located outside the EU.

On the one hand, if the derogation under Article 210a is extended to producers located outside the EU, this would allow those producers to adopt and apply sustainability standards that could generate positive externalities and help achieve one of the objectives listed in Article 210a(3). For example, the derogation would allow coffee bean producers in Brazil to adopt a sustainability standard that leads to a reduction in the use of pesticides or to develop growing techniques that use less water. These improvements could be significant for the protection of the environment.

On the other hand, extending the scope of the derogation to producers in third countries could potentially lead to challenges. For example, it may not be easy to monitor compliance with the agreed standards outside the EU as can be done within the EU. Non-EU producers will be subject to local law, including competition law, with appropriate local safeguards in place, including for consumers.

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<sup>13</sup> Bundeskartellamt, Achieving sustainability in a competitive environment – Bundeskartellamt concludes examination of sector initiatives, January 2022, [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18\\_01\\_2022\\_Nachhaltigkeit.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html).

It may be more appropriate to consider sustainability agreements involving only agricultural producers located outside the EU under Article 101 TFEU (assuming effects in the EU) or under other initiatives such as the proposed Directive on corporate sustainability due diligence<sup>14</sup> or any proposed mirror clauses<sup>15</sup> rather than under Article 210a.

## 2.6. Meaning of “production of or trade in agricultural products”?

The guidelines should set out the exact scope of “production of or trade in agricultural products”. Could this for example include an agreement solely on packaging, logistics or marketing?

## 2.7. Notion of indispensability

To benefit from the derogation under Article 210a, this provision foresees that a sustainability standard agreement must not involve restrictions of competition that are not indispensable to the achievement of that standard. This criterion is likely to raise questions on the part of producers and operators; therefore, the guidelines should clearly define the concept of indispensability and provide examples to ensure legal certainty for the undertakings involved.

Article 210a provides a derogation to the normal rules on competition, hence the concept of indispensability contained in Article 210a should be defined and understood in the competition sense of the term. In addition, it should be interpreted narrowly to ensure that only agreements (and the restrictions they contain) that are genuinely indispensable are exempted. Otherwise, consumers could lose protection without gaining anything in return.

In line with the Guidelines on the application of Article 101(3) TFEU<sup>16</sup> and transposing them to Article 210a, the indispensability criterion would imply a two-fold test: (1) the restrictive agreement must be reasonably necessary in order to achieve the sustainability standard, and (2) the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the standard.<sup>17</sup> In each case, there must be no other economically practicable and less restrictive means of achieving these benefits. In this context, a restriction is indispensable if its absence would prevent or severely limit the likelihood that the sustainability standard and the related objectives will be achieved.<sup>18</sup> The Chicken of Tomorrow case mentioned above<sup>19</sup> is a good illustration of a proposed agreement that was not indispensable. In fact, it would ultimately have been counterproductive to the achievement of higher animal welfare standards.

Some sustainability standards agreements or individual restrictions may only be indispensable for a limited period of time.<sup>20</sup>

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<sup>14</sup> [https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex\\_en](https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en); The consumer checklist on the upcoming EU due diligence legislation, [https://www.beuc.eu/publications/beuc-x-2021-024\\_the\\_consumer\\_checklist\\_eu\\_due\\_diligence.pdf](https://www.beuc.eu/publications/beuc-x-2021-024_the_consumer_checklist_eu_due_diligence.pdf).

<sup>15</sup> Call for Evidence - Imports of agricultural and food products – applying EU health and environmental standards (report), [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13371-Imports-of-agricultural-and-food-products-applying-EU-health-and-environmental-standards-report\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13371-Imports-of-agricultural-and-food-products-applying-EU-health-and-environmental-standards-report_en).

<sup>16</sup> Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, OJ C 101/97.

<sup>17</sup> Guidelines on the application of Article 81(3), paras 73-76.

<sup>18</sup> On the indispensability criterion under Article 101(3) TFEU see by analogy, Richard Whish and David Bailey, *Competition Law* (Seventh edition, Oxford University Press 2012).

<sup>19</sup> See section 2.3.

<sup>20</sup> See by analogy, Guidelines on the application of Article 81(3), paras 81. For a specific reference to Article 210a see, Bundeskartellamt, Increasing animal welfare in milk production – Bundeskartellamt tolerates the introduction of the QM+ programme, March 2022, [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/29\\_03\\_2022\\_Milch\\_Nachhaltigkeit.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/29_03_2022_Milch_Nachhaltigkeit.html).



Finally, it is important to clarify in the guidelines that the burden of proof should be on the parties to the agreement and that they should demonstrate that the restrictions of competition are indispensable to achieve the sustainability standard in question.

### 2.7.1. Elements that are not indispensable

This section lists (non-exhaustively) elements or restrictions of competition which should not be considered indispensable to the attainment of a sustainability standard agreement under Article 210a. These should thus be included in the guidelines to guide producers' and operators' agreements.

First, opaque and closed procedures to develop and adopt a sustainability standard would not be indispensable to achieve that standard. Therefore, such procedures should by default be transparent and open for any producers or operators to participate. In addition, once a standard has been adopted, restricting effective access to the outcome of the sustainability standardisation procedures or restricting the use of the adopted standards and related sustainability labels to producers that participated in the adoption process and refusing any new participants or discriminating between participants would not be indispensable. Such a refusal or discrimination would limit the potential uptake of the standard by producers, thereby limiting the beneficial impact of that standard.

Second, imposing obligations on producers or operators that do not wish to comply with a sustainability standard is not indispensable. Sustainability standards should be voluntary.<sup>21</sup> Obligations could also take the form of retaliatory measures (e.g., a coordinated boycott) against producers that refuse to participate in the adoption process—or leave that process—or decide not to comply with the adopted standards.

Third, simply replicating private sector standards already found in the market cannot be considered indispensable. If such standards already operate, an agreement to achieve them is by definition not indispensable.

Fourth, prohibiting producers from adopting higher sustainability standards also cannot be considered indispensable. In addition, producers should be able to participate and comply with different, but compatible, sustainability standards.

Fifth, exchange of commercially sensitive information would normally not be indispensable to the achievement of sustainability standards, neither at the stage of the development and adoption of the standard, nor at the stage of compliance and monitoring.<sup>22</sup> This is particularly the case for information that could lead directly or indirectly to price-fixing.

Sixth, mandating specific rules and methods that producers should respect to be able to claim they abide by the sustainability standard and to be able to affix the agreed label on their products should generally not be considered as indispensable. Producers and operators should remain free to use any specific production method or technology of their choice, where this production method is not an inherent part of the sustainability standard requirements themselves, (for example organic production cannot involve the use of specified substances, free range must involve livestock being outside). Sustainability standards should in principle impose an objective on producers while leaving it up to them to decide on methods or means to achieve that objective. For example, farmers could agree to reduce the water used for their crop by 2% on an annual basis. Where this could be

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<sup>21</sup> For example, the Bundeskartellamt reviewed an agreement on living wages in the banana sector, see Bundeskartellamt, Achieving sustainability in a competitive environment – Bundeskartellamt concludes examination of sector initiatives, January 2022, [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18\\_01\\_2022\\_Nachhaltigke.it.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigke.it.html).

<sup>22</sup> Ibid.

achieved in different ways by different farmers, mandating a specific method would not be indispensable and would limit innovation. Another example would be a standard to reduce plastic packaging materials for foodstuffs. If a standard specified that a specific trademarked packaging must be used because it is more sustainable and environmentally friendly, it could foreclose competing manufacturers of alternative, better quality, more innovative and potentially cheaper sustainable packaging materials.

Seventh, agreeing on prices of a product following the adoption and implementation of a sustainability standard (and possibly associated label) would not normally be considered indispensable to the attainment of that standard.<sup>23</sup> Sustainability standards should not be used as a covert way for producers to substantially increase prices solely on the grounds that their agricultural products are more sustainable. In addition, a significant reduction in the diversity of products, for example, following the forced removal of certain products that do not comply with the new sustainability standard, would unnecessarily reduce consumer choice and would not normally be indispensable for the attainment of the objectives listed under Article 210a(3).

Eighth, any restrictions of competition that do not lead to genuine sustainability agreements but rather to greenwashing cannot be considered indispensable. Producers' and operators' agreements must result in genuinely higher standards and not preclude them. This might also require a monitoring system to ensure compliance with the standards. A lack of (independent) monitoring could allow producers to flout the rules and the requirements of a standard while still using the sustainability standard label on their products. They would benefit from that label (which might increase sales and prices) while not respecting the requirements and incurring the potential costs (for example, higher quality fodder or more space for animals). The free riding by producers would lead to a downward spiral where the standard and its label would become meaningless and would deceive consumers, i.e., greenwashing. Nonetheless, monitoring should not become a covert way to exchange commercially sensitive information or a way to carry out other practices that negatively impact competition.

## **2.8. No exclusion of competition or jeopardising the objectives of Article 39 TFEU**

While Article 210a allows sustainability agreements to restrict competition, such agreements cannot lead to an exclusion of competition. Article 210a(7) provides that national competition authorities and, in the case of agreements covering more than one Member State, the Commission, can intervene to require agreements to be modified, discontinued or not take place at all in order to prevent competition from being excluded or if they consider that the objectives set out in Article 39 TFEU are jeopardised.

This is a critical provision which must be reflected and explained upfront in the Commission's guidelines, even though intervention will be *ex post*.

First, sustainability standards agreements must not exclude competition from products with higher sustainability standards than those foreseen by the agreements. This would be completely counterproductive to European sustainability objectives.

Second, in order to protect consumers, in particular the least affluent, it is imperative that agreements between private market operators are not permitted to exclude different parameters of competition, in particular price competition. If producers and operators can exclude competition and are thereby free to determine only one available quality choice for consumers or set one (higher) price for the entire market for a particular

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<sup>23</sup> Ibid.

agricultural/food product, the only choice for consumers will be an overpriced food product or not buying the agricultural product at all.<sup>24</sup>

In light of Article 12 TFEU (which requires consumer protection to be taken into account in defining and implementing other Union policies and activities), and Article 39(1)(e) (which includes as an objective of the common agricultural policy “to ensure that supplies reach consumers at reasonable prices”, it cannot be compatible with the Treaty to enable private operators to make agreements leading to unlimited profits and impose excessive prices on consumers who have no choice in the absence of any competing products. Affordable food is a basic necessity for consumers.

As the Call for Evidence notes, agreements under Article 210a must not lead to excessive prices, significant reduction of supplies, or other outcomes which would endanger the functioning of the agricultural markets in terms of supply and demand or that eliminate the competitive process.<sup>25</sup> The guidelines must therefore set out clear parameters on what is and what is not permissible under Article 210a in terms of market coverage and other harmful outcomes.

Given that Article 210a refers to competition not being “excluded” rather than “eliminated” (as set out in Article 101(3)) and the fact that Article 210a provides no other protection to consumers, “exclusion” must be interpreted to create a stricter standard than the Article 101(3) elimination standard to comply with the constitutional requirements of the TFEU. Going beyond this in terms of market coverage would only be permissible by means of legislation.

The guidelines should also provide clear examples of what types of agreement would jeopardise the objectives in Article 39 TFEU.

In the event that agreements do *de jure* or *de facto* exclude competition or jeopardise Article 39(1)(e), national competition authorities must immediately intervene to prevent prolonged harm to agricultural markets and consumers.

## 2.9. Monitoring

It is noted in the Call for Evidence that *ex post* intervention by national competition authorities and the Commission will rely on provision of information and complaints by stakeholders (as well as *ex officio* monitoring). The guidelines should set out to whom and how stakeholders should provide information and complaints and how these will be processed to ensure effective and timely outcomes.

Where competition authorities decide that sustainability standards agreements are to be modified pursuant to Article 210a(7), the guidelines could suggest that if agreements have blatantly excluded competition or jeopardised the objectives set out in Article 39 TFEU, modification could include appropriate restorative measures.

In order to maximise the effectiveness of Article 210a and minimise harms, the guidelines could encourage producers and operators to voluntarily submit their proposed sustainability standards agreements to competition authorities and encourage competition authorities to provide interpretative assistance to producers and operators contemplating such agreements.

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<sup>24</sup> See also BEUC, Climate action as an opportunity for all – How the green transition should and can benefit consumers’ daily lives, November 2021, p. 11, <https://www.beuc.eu/publications/beuc-x-2021-098-how-the-green-transition-should-and-can-benefit-consumer-daily-lives.pdf>.

<sup>25</sup> European Commission, Call for evidence for an initiative, February 2022, Ares(2022)1483285, p. 2, [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13305-Sustainability-agreements-in-agriculture-guidelines-on-antitrust-derogation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13305-Sustainability-agreements-in-agriculture-guidelines-on-antitrust-derogation_en).

Finally, the guidelines could also consider provision for a retrospective, sector inquiry-style review of agreements under Article 210a after a specified period (for example two years) to determine whether this provision is working as intended.

### **2.10. Article 101 TFEU**

Article 210a only covers agreements that aim to apply a sustainability standard higher than mandated by Union or national law. This means that agreements between producers of agricultural products that do not aim at applying a higher sustainability standard would not benefit from the derogation under Article 210a and would need to be assessed under Article 101(1) and (3) TFEU. It is important that producers of agricultural products and other operators are aware of this limitation and that outside of Article 210a, Article 101 should be carefully considered. The guidelines should draw attention to this.

## **3. Conclusion**

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While Article 210a has been in force since December 2021, the guidelines that the Commission plans to adopt by December 2023 have the potential to significantly impact and shape the application of this article and the use by producers and operators of the derogation it contains. It is essential for the agricultural sector and the food supply chains, to move towards more sustainable agricultural products and production processes, to transition to a circular economy, including the reduction of food waste and to be more environmentally friendly to ensure the EU can meet its Green Deal objectives. One way of achieving those goals, as indicated in the rationale for Article 210a, is to allow producers and operators to enter into agreements on higher sustainability standards. Other, and potentially better suited and more effective ways to tackle these objectives, would include ongoing EU policy initiatives in relation to mandatory marketing standards and corporate sustainability due diligence law.

In any event, as set out above, sustainability standards agreements should not be misused by parties to restrict competition beyond what is absolutely necessary to implement the agreed standards and attain the underlying objectives, nor to facilitate greenwashing. Consumers will benefit from products that are more sustainable but that should not be to the detriment of effective competition which underpins the European economy and consumer welfare and will benefit sustainable development itself. Therefore, the guidelines must strike the appropriate balance between, on the one hand, promoting sustainability and the protection of the environment, and on the other hand, maintaining a healthy degree of competition that promotes innovation and quality and ensures that consumers have a choice of sustainable products at affordable prices.

END



*This publication is part of an activity which has received funding under an operating grant from the European Union's Consumer Programme (2021-2027).*

*Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or EISMEA. Neither the European Union nor the granting authority can be held responsible for them.*