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## **COMMUNICATION FROM THE COMMISSION**

**Commission Guidelines on the application of the derogation from Article 101 TFEU for sustainability agreements of agricultural producers pursuant to Article 210(a) of Regulation 1308/2013**

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## 1. INTRODUCTION

### 1.1 General context

#### 1.1.1 Policy context

- (1) These guidelines aim to explain the conditions for applying Article 210a of Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products<sup>1</sup> (the ‘CMO Regulation’), which was introduced by Regulation (EU) 2021/2117<sup>2</sup> (‘Article 210a’).
- (2) Article 210a was introduced as part of the 2021 reform of the Common Agricultural Policy (‘CAP’), to support the transition to a sustainable EU food system.
- (3) Sustainable development is referred to in Article 3(3) and (5) and Article 21(2)(f) of the Treaty on European Union (TEU) and Article 11 of the Treaty on the Functioning of the European Union (TFEU). It is also a priority objective of EU policies in general. The Commission is also committed to implementing the United Nation’s Sustainable Development Goals (‘SDGs’)<sup>3</sup>. In line with this commitment, the European Green Deal sets out a growth strategy to transform the EU into a fairer and more prosperous society, with a modern, resource-efficient and competitive economy, in which there are no net emissions of greenhouse gases from 2050 onwards and in which economic growth is decoupled from resource use<sup>4</sup>.
- (4) Two central Green Deal strategies are relevant to the agri-food supply chain. The Biodiversity Strategy<sup>5</sup> sets the ambition of reversing biodiversity loss by investing in the protection and restoration of nature. The Farm to Fork Strategy<sup>6</sup> holistically addresses the challenges of sustainable food systems. This includes sustainable

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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, OJ L 347 (20.12.2013, p. 671).

<sup>2</sup> 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, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union, OJ L 435 (6.12.2021, p. 262).

<sup>3</sup> Resolution adopted by the General Assembly on 25 September 2015, 70/1, Transforming our world: the 2030 Agenda for Sustainable Development.

<sup>4</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of Regions - The European Green Deal, COM/2019/640 final.

<sup>5</sup> Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions EU Biodiversity Strategy for 2030 Bringing nature back into our lives, COM/2020/380 final.

<sup>6</sup> Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, COM/2020/381 final.

food production, processing and trade, but also sustainable food consumption, healthy diets, and food waste. A shift to a sustainable food system can bring environmental, health and social benefits and offer economic gains.

- (5) These two Green Deal strategies list a number of non-binding quantitative targets to improve the sustainability of agriculture by 2030, including targets for: (i) reducing the overall sales of antimicrobials used on farmed animals and in aquaculture; (ii) reducing the overall use and risk of chemical pesticides and the more hazardous pesticides; (iii) reducing nutrient losses due to the use of fertilisers; (iv) increasing the amount of land under organic farming; and (v) increasing the amount of land dedicated to high-diversity landscape features<sup>7</sup>. The strategies listed a number of actions, including legislative initiatives, to reach these targets.
- (6) Operators in the agri-food supply chain, including agricultural producers, play a key role in these strategies, respecting mandatory EU and national standards. They can also increase sustainability by exceeding mandatory EU and national standards.
- (7) This can be challenging for an individual producer of agricultural products (a 'producer') notably due to the resources required. Cooperation in the agri-food supply chain can stimulate the uptake of sustainable practices beyond what EU and national law requires.
- (8) Operators in the agri-food supply chain may be deterred from engaging in cooperation because of concerns about the application of Article 101(1) TFEU to such cooperation.

#### *1.1.2 Exclusion from Article 101(1) TFEU created by Article 210a*

- (9) Article 210a creates an exclusion from Article 101(1) TFEU. It was adopted by the European Parliament and the Council pursuant to Article 42 TFEU.
- (10) Article 210a covers agreements, decisions and concerted practices of producers of agricultural products that relate to the production of or trade in agricultural products and that aim to apply a higher sustainability standard than mandated by EU or national law. Such agreements may be either between producers ('horizontal agreements') or between producers and other operators at different levels of the agri-food supply chain ('vertical agreements').
- (11) For the purposes of these guidelines, the term 'sustainability agreement' refers to any type of agreement, decision or concerted practice involving producers (between producers or between producers and other operators at different levels of the agri-food supply chain) that relates to the production of or trade in agricultural products and that aims to apply a higher sustainability standard than mandated by EU or national law, irrespective of the form of cooperation.

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<sup>7</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Biodiversity Strategy for 2030 Bringing nature back into our lives, COM/2020/380 final, p. 7.

- (12) Sustainability agreements that fulfil the conditions in Article 210a are not prohibited, no prior decision by a public authority to that effect being required.

## **1.2 Legal context of the exclusion**

### *1.2.1 Article 210a is only relevant to sustainability agreements that restrict competition*

- (13) Article 101(1) TFEU contains a general prohibition against agreements, decisions and concerted practices and agreements of associations that restrict competition. In other words, an agreement that restricts competition within the meaning of Article 101(1) TFEU is automatically null and void (and may expose the parties to fines), unless it qualifies for an exemption under Article 101(3) TFEU or for a specific exclusion under Article 210a or another provision of EU law.
- (14) Article 210a creates an exclusion from Article 101(1) TFEU for certain types of sustainability agreements. Article 101(1) TFEU does not apply to sustainability agreements that meet the conditions laid down in Article 210a. This means that, under certain conditions, agreements relating to sustainability standards may restrict competition.
- (15) As with all exceptions to a general principle, the scope of Article 210a needs to be interpreted strictly<sup>8</sup>. The objectives of and conditions for the application of Article 210a and its limits derive exclusively from the CMO Regulation itself.
- (16) The types of sustainability agreements likely to be covered by Article 101(1) TFEU are explained in Section 4 of these guidelines.

### *1.2.2 Sustainability agreements that restrict competition and do not fulfil the conditions of Article 210a may benefit from other rules*

- (17) Sustainability agreements that do not fulfil the conditions of Article 210a may escape the prohibition laid down in Article 101(1) TFEU if they fall under other exclusions, such as those laid down in Articles 152, 209 or 210 of the CMO Regulation.
- (18) Sustainability agreements that restrict competition and that fall outside of the scope of Article 210a and other exclusions in the CMO Regulation are subject to Article 101(1) TFEU. Producers and operators should analyse such agreements in light of the Horizontal Guidelines<sup>9</sup> and the Vertical Guidelines<sup>10</sup>, and should

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<sup>8</sup> See to that effect Judgment of 24 October 1995, *Bayerische Motorenwerke*, C-70/93, paragraph 28; Judgment of 30 April 1998, *Cabour and Nord Distribution Automobile v Arnor "SOCO"*, C-230/96, paragraph 30; Judgment of 28 April 1998, *Javico*, C-306/96, paragraph 32; Judgment of 17 June 2010, *Commission v France*, C-492/08, paragraph 35; Judgment of 7 March 2017, *Marine Harvest v Commission*, Case T-704/14, paragraph 201.

<sup>9</sup> 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, 2011/C 11/01.

<sup>10</sup> Communication from the Commission Approval of the content of a draft for a Communication from the Commission – Commission Notice: Guidelines on vertical restraints 2021/C 359/02, C/2021/5038.

consider whether their agreements can be exempted under Article 101(3) TFEU, including under any block exemption regulation<sup>11</sup>.

### 1.3 Purpose and scope of the guidelines

- (19) These guidelines aim to provide legal certainty by assisting producers and operators in the agri-food supply chain in assessing their sustainability agreements. The guidelines also aim to provide guidance on the application of Article 210a to national courts and national competition authorities. They provide guidance on: (i) the personal scope of Article 210a and the products covered by the provision; (ii) the material scope of Article 210a; (iii) the types of restrictions of competition covered by the provision; (iv) the concept of indispensability under Article 210a; (v) the temporal scope of Article 210a; (vi) the procedure for requesting an opinion from the Commission as to whether a given sustainability agreement satisfies the requirements of Article 210a; (vii) the conditions for *ex-post* intervention by the Commission and by national competition authorities; and (viii) the burden of proof for demonstrating whether the conditions of Article 210a have been fulfilled. Given the potentially large number of types and combinations of sustainability agreements and market circumstances in which they may operate, it is impossible to provide specific guidance for every possible scenario. Therefore, these guidelines do not constitute a checklist that can be applied mechanically. Each sustainability agreement must be assessed in its specific economic and legal context.
- (20) The guidelines are intended to assist producers and operators at different levels of the agri-food supply chain who are considering whether to enter into a sustainability agreement, or who have already entered into such an agreement.

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<sup>11</sup> Regulation (EEC) No 2821/71 of the Council of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices, OJ L 285 (29.12.1971, p. 46); Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 335(18.12.2010, p. 36); Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 335 (18.12.2010, p. 43); Regulation No 19/65/EEC of 2 March of the Council on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, OJ 36 (6.3.1965, p. 533); Council Regulation (EC) No 1215/1999 of 10 June 1999 amending Regulation No 19/65/EEC on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices, OJ L 148 (15.6.1999, p. 1); Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 129 (28.5.2010, p. 52); Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 134 (11.5.2022, p. 4).



Only the Court of Justice of the European Union is competent to authoritatively interpret Article 210a.

## **2 PERSONAL SCOPE OF AND PRODUCTS COVERED BY ARTICLE 210A**

### **2.1 Definition of undertaking and sustainability agreement under Article 210a**

- (21) The Court of Justice has defined an ‘undertaking’ as ‘any entity of personal, tangible and intangible elements, engaged in an economic activity, irrespective of its legal status and the way in which it is financed’<sup>12</sup>. Any natural or legal person is an undertaking if it offers products or services on a market. An undertaking could be, for example, an individual farmer, a family-owned farm, an agricultural cooperative, a food processing company or a multinational chain of retailers. In some cases, public bodies are undertakings if they engage in an economic activity that is not a task that forms part of the essential functions of the state<sup>13</sup>.
- (22) Because the concept of ‘undertaking’ is an economic concept, a single undertaking may include multiple legal entities<sup>14</sup>. This means that an agreement between a parent and its wholly owned subsidiary, or between two wholly owned subsidiaries of the same parent company, cannot infringe Article 101(1) TFEU because the agreement is not between different undertakings<sup>15</sup>.
- (23) An ‘agreement’ encompasses any act in which two or more undertakings express a concurrence of wills to cooperate<sup>16</sup>. The form of this expression is irrelevant. A signed and notarised contract, a ‘gentlemen’s agreement’ or an exchange of emojis in text messages can all constitute an agreement.
- (24) An ‘association of undertakings’ refers to an entity, regardless of its form, that consists of undertakings of the same general type and makes itself responsible for representing and defending their common interests in relation to other economic operators, government bodies and the public in general<sup>17</sup>. Examples of associations are: trade associations, professional and regulatory bodies, as well as

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<sup>12</sup> Judgment of 16 June 1987, *Commission v Italy*, Case 118/85, ECLI:EU:C:1987:283, paragraph 7; Judgment of 18 June 1998, *Commission v Italy*, Case 35/86, ECLI:EU:C:1998:303, paragraph 36; Judgment of 12 September 2000, *Pavlov and Others*, C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 75; Judgment of 25 March 2021, *Deutsche Telekom v Commission*, C-152/19 P, ECLI:EU:C:2021:238, paragraph 72.

<sup>13</sup> Judgment of 18 March 1997, *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)*, C-343/95, ECLI:EU:C:1997:160, paragraph 22.

<sup>14</sup> The joint exercise of an economic activity is normally assessed by analysing the existence of functional, economic and organic links between the entities. See for example, Judgment of 16 December 2010, *AceaElectrabel Produzione SpA v Commission*, Case C-480/09 P, ECLI:EU:C:2010:787, paragraphs 47 to 55; Judgment of 10 January 2006, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 112.

<sup>15</sup> Judgment of 24 October 1996, *Viho Europe BV v Commission*, C-73/95 P, ECLI:EU:C:1996:405, paragraphs 15-18.

<sup>16</sup> Judgment of 6 January 2004, *BAI and Commission v Bayer*, C-2/01 P and C-3/01 P, ECLI:EU:C:2004:2, paragraph 97.

<sup>17</sup> Opinion of Advocate General Léger of 10 July 2001, *Wouters*, C-309/99, EU:C:2001:390, paragraph 61.

cooperatives that are not themselves economically active in the matter they coordinate. A ‘decision of an association’ is a broad concept that encompasses: (i) rules and regulations; (ii) formal decisions that are binding on one or more members; (iii) codes of conduct; and (iv) non-binding recommendations that reflect a resolve on the part of the association to coordinate the conduct of its members on the market in accordance with the terms of the recommendation.

- (25) A ‘concerted practice’ refers to a form of coordination between undertakings in which they have not reached an agreement but knowingly substitute the risks of competition for practical cooperation<sup>18</sup>. For example, intentional exchanges of confidential information between competitors could allow them to compete less vigorously, even if the competitors never explicitly discussed limiting competition between themselves.
- (26) In practice, the distinction between ‘agreements’, ‘decisions of associations’, and ‘concerted practices’ is artificial. The Court of Justice has held that the terms overlap and ‘are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves’<sup>19</sup>.

**Example 1:** A producer begins certifying that all of its strawberries are pesticide free and charges a premium over the prices that its competitors charge. A competing producer observes that the first producer is selling out all of its strawberries at the higher price, and starts doing the same. Soon other producers start doing the same, and are able to charge a premium for certifying that their strawberries are pesticide-free. In this situation, there is no agreement: each producer is acting independently, taking into account the present or foreseeable conduct of its competitors.

**Example 2:** A group of producers meets to discuss ways to make strawberry cultivation more sustainable. They discuss how they would stop using pesticides on their strawberries, but are concerned that, if they do so on their own, other competitors will undercut them on price. They all state that they will not use pesticides the following season if the others agree on the same commitment. They do not produce a written document recording this. None of the producers use pesticides on their strawberries the following year. This is an agreement. Although it was not done in writing, the producers clearly expressed their intention to conduct themselves on the market in a specific way, both by their statements at the meeting and by actually doing what they said they would do.

## 2.2 Personal scope of Article 210a

- (27) Article 210a applies to sustainability agreements to which at least one producer of agricultural products is party and that are entered into with other producers (horizontal agreements) or with one or more operators at different levels of the food supply chain (vertical agreements), including at the distribution level and including with wholesalers and retailers.

<sup>18</sup> Judgment of 14 January 2021, *Kilpailu- ja kuluttajavirasto*, Case C-450/19, ECLI:EU:C:2021:10, paragraph 22.

<sup>19</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 131.

**Example:** A horizontal agreement may concern, for example, a commitment between competing producers to raise poultry only in accordance with certain animal welfare standards that are higher than what is mandated by EU or national law. A vertical agreement may concern, for example, a commitment between certain producers and distributors to only market poultry that is raised in accordance with certain sustainability standards that are higher than what is mandated by EU or national law.

- (28) Parties to sustainability agreements must include one or more producers of agricultural products. Parties can also include other operators at different levels of production, processing, and trade in the food supply chain, including distribution. These guidelines refer generically to parties to sustainability agreements as “operators”. In practice, operators are listed below:
- (a) Producers: these are producers of agricultural products as defined in Annex I to the TFEU and further detailed in Annex I to the CMO Regulation. This includes producers of raw agricultural products and producers of certain processed agricultural products that are listed in Annex I (such as sugar processors producing sugar, or millers producing flour).
  - (b) Operators at the ‘production level’: this includes suppliers of inputs (seeds, pesticides, equipment, works, etc.) to agricultural production, and suppliers of packaging, to the extent that all those suppliers aim to help attain the sustainability standard (as specified in Section 3.2) by implementing the sustainability agreement.
  - (c) Operators at the ‘processing level’: this includes operators (sometimes called processors, sometimes called manufacturers) that process agricultural products to produce other products not listed in Annex I, to the extent that those operators aim to help attain the sustainability standard (as specified in Section 3.2) by implementing the sustainability agreement.
  - (d) Operators at the ‘trade level, including distribution’: this includes traders, wholesalers, retailers and food service suppliers, and transport and logistics companies, to the extent that those operators aim to help attain the sustainability standard (as specified in Section 3.2) by implementing the sustainability agreement.
- (29) Parties to sustainability agreements may be individual operators and associations or other collective entities involving producers or other undertakings described above – regardless of their legal nature or whether they are formally recognised under EU or national law – if at least one of the parties to the sustainability agreement is a producer or an association of producers. Such collective entities can be, for example, producer organisations (‘POs’), associations of POs or interbranch organisations (‘IBOs’).

- (30) It does not matter whether a party to a sustainability agreement is based inside or outside the EU, as long as the sustainability agreement is implemented in the EU or has the potential to have a negative effect on competition in the single market<sup>20</sup>.
- (31) Mere compliance with a sustainability standard is not in itself sufficient to constitute an agreement for the purposes of applying Article 210a. For compliance with a sustainability standard to give rise to an agreement, another step is necessary, namely that the operators in the agri-food supply chain concerned express their intention to jointly implement the agreement (i.e. a concurrence of wills). In practice, the difference between an agreement on adopting a sustainability standard and mere compliance with a standard is that in the case of mere compliance the operator can decide unilaterally to stop applying the standard at any time.
- (32) An operator becomes a party to a sustainability agreement for the purposes of Article 210a when a concurrence of wills with other parties exists on an agreement. The concurrence of wills should constitute the faithful expression of the parties' intentions<sup>21</sup>.
- (33) To be covered by Article 210a(2), a sustainability agreement must have at least one producer as a party. Producers are thus essential parties to sustainability agreements. Producers that are party to an agreement at the time it is set up must be involved in the negotiation, adoption and implementation of the standard. This does not prevent producers from becoming parties to the agreement at a later stage without having taken part in the negotiation or adoption of the agreement, if there is a concurrence of wills that they be bound by the sustainability agreement.

**Example 1:** A number of different supermarket chains that collectively account for 70% of wholesale purchases of apples in a Member State agrees that they will only purchase apples that have been certified to be pesticide-free, to promote the sustainable cultivation of apples. Because this group accounts for such a large share of purchases, most apple producers feel that they have no choice but to follow the standard set by the group of supermarket chains. They stop using pesticides and certify their apples as pesticide-free, rather than risk being unable to sell their apple production. There is clearly an agreement between the supermarket chains. However, the apple producers are not parties to this agreement. Although these producers are supplying products that meet a sustainability standard, they themselves have not agreed with the supermarket chains on the content of the standard and their choice to comply with the standard is not conditioned on other apple producers complying with this standard. As a result, these producers will not be party to the agreement concluded among the group of supermarket chains. However, this will not prevent producers becoming party to a sustainability agreement with the supermarket chains in the future.

<sup>20</sup> See, to that effect Judgment of 6 September 2017, *Intel*, C-413/14 P, ECLI:EU:C:2017:632, paragraphs 40 to 45 and case-law cited therein.

<sup>21</sup> See, to that effect, Judgment of the Court of 26 October 2000, *Bayer AG v Commission*, T-41/96, ECLI:EU:T:2000:242, paragraph 69; Judgment of 13 July 2006, *Commission v Volkswagen*, C-74/04 P, ECLI:EU:C:2006:460, paragraph 39; Judgment of 30 April 2009, *CD-Contact Data GmbH*, T-18/03, ECLI:EU:T:2009:132, paragraph 48.

**Example 2:** In a slightly different scenario, a group of supermarket chains agrees that it will only purchase apples that have been certified to be pesticide free. An organisation of apple producers develops a certification mark certifying the pesticide-free nature of the products of its members. The organisation licenses the certification mark for use on the supermarkets' packaging and in their marketing materials. The licensing fees are distributed to the producers that are members of the organisation. In this case, the organisation is an association of producers that took a decision to adopt and supply the certification mark. That decision is a sustainability agreement between producers. In addition, the licensing agreement signed between the organisation and the supermarkets is a separate sustainability agreement between producers (through their association) and supermarkets.

### 2.3 Products covered by Article 210a

- (34) To be covered by Article 210a, a sustainability agreement must: (i) concern one or more agricultural products listed in Annex I to the TFEU other than fishery and aquaculture products ('Annex I products'), and (ii) relate to the production of that product or trade in these products. A sustainability agreement may also involve operators at levels of the supply chain other than agricultural production, to the extent that those operators agree to terms related to the production of or trade in agricultural products.
- (35) The limitation of Article 210a to agricultural products is a consequence of the scope of Article 1 of the CMO Regulation, which does not include non-agricultural food products ('non-Annex I products').
- (36) A sustainability agreement may concern both Annex I products and non-Annex I products without affecting the validity of the sustainability agreement itself. However, the exclusion under Article 210a will only apply to the part of the sustainability agreement that concerns Annex I products.

**Example 1:** An agreement relates to the sustainable packaging of both malt and beer. Article 210a would only apply to the part of the agreement concerning malt, as beer is a non-Annex I product.

**Example 2:** An agreement relates to biofuels and to products used to produce biofuels. Article 210a would only apply to the part of the agreement concerning the Annex I products that are used to produce biofuels.

**Example 3:** An agreement relates to the supply of sustainably produced poultry to catering services. The agreement involves poultry producers that supply poultry to prepared meal producers (that in turn prepare meals with the poultry) and an organisation representing food canteens that purchase prepared meals from the meal producers. Article 210a would only apply to the part of the agreement that relates to the supply of poultry to the meal producers, and not to part of the agreement relating to the supply of prepared meals to canteens. Only poultry products are products listed in Annex I to the TFEU.

**Example 4:** An agreement relates to the production of sustainable tomatoes for processing into pasta sauces. Article 210a would only apply to the part of the agreement concerning tomatoes because sauces are non-Annex I products.

### 3 MATERIAL SCOPE OF ARTICLE 210A

- (37) There is a need to distinguish between the sustainability objectives listed in Article 210a(3), sustainability standards (which are set to reach those sustainability objectives), and implementation measures provided for in a sustainability agreement in order to attain these standards.

**Example:** A sustainability objective could be to reduce the use of pesticides or the prevention of soil erosion. The sustainability standard that the sustainability agreement aims to apply could include setting measurable targets in form of quantitative or qualitative criteria going beyond a mandatory standard (e.g. reducing pesticides by 60% or using a cover crop in winter to avoid soil erosion). The agreement could include specific implementation measures, such as obligations to implement precision farming practices and pest monitoring, to use certain machinery or equipment, to implement risk management tools, or to support the dissemination of technical knowledge (including training, advice, cooperation and knowledge exchange), digital technologies or practices for sustainable management of nutrients.

#### 3.1 Sustainability objectives covered by Article 210a

- (38) To fulfil the conditions of Article 210a, a sustainability agreement must aim to attain a sustainability standard that contributes to one or more of the following sustainability 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;
  - c. animal health and animal welfare.
- (39) The examples of environmental objectives listed in Article 210a(3), point (a), are illustrative and may involve different types and variations. For example, any environmental objective pursued by an operator that has a positive effect on the environment in relation to the production or processing of agricultural products or on trade in agricultural products (including distribution) may constitute a sustainability objective covered by Article 210a. By contrast, the objectives listed in Article 210a(3), points (b) and (c), are exhaustive.

#### **Examples of sustainability objectives covered by Article 210a**

**Example 1:** While not explicitly mentioned in Article 210a(3), reducing air pollution and improving air quality is a type of environmental objective. It therefore falls within Article 210a(3), point (a).



**Example 2:** While not explicitly mentioned in Article 210a(3), avoiding plastics pollution is covered by the objective of the transition to a circular economy or the objective of pollution prevention and control. It therefore falls within Article 210a(3), point (a).

**Example 3:** The objective of the sustainable use and protection of landscapes, water and soil includes improving the resistance of soil to erosion, increasing soil biodiversity improving soil composition, and ensuring maritime protection, which are all different types of objectives relating to the sustainable use and protection of landscapes, water and soil. These are all objectives that fall within Article 210a(3), point (a).

- (40) A sustainability standard may aim to contribute to one or several of the objectives covered by Article 210a(3).
- (41) To facilitate the assessment of the compliance with Article 210a, the sustainability agreement should identify the sustainability objective(s) to which the sustainability standard aims at contributing.
- (42) If a sustainability agreement aims to contribute to multiple objectives, only some of which are listed in Article 210a(3), only the objectives listed in Article 210a(3) are relevant to assessing whether the sustainability agreement is covered by Article 210a.
- (43) If a sustainability standard aims to contribute to objectives that are not listed in Article 210a(3), such as social objectives (for example working conditions or healthy and nutritious diets) or economic objectives (for example development of brands or fairer remuneration of farmers), the aspects of the sustainability standard that aim to contribute to these objectives cannot be taken into account when assessing compliance with Article 210a (in particular as regards whether any restrictions of competition in the sustainability agreement are indispensable to attaining the sustainability standard, as discussed in Section 5).

**Example 1:** If cereal producers enter into an agreement with cereal processors pursuant to which the cereal producers will adopt improved landscape features (hedges, etc.), this may fall under the objective of protecting and restoring biodiversity and ecosystems under Article 210a(3), point (a), provided that the sustainability agreement aims to contribute to that objective.

**Example 2:** If honey producers and mead processors agree to market products that come from honey harvested from beehives that only use non-chemical products to fight varroosis, this may fall under the objective of animal health and animal welfare under Article 210a(3), point (c), provided that the sustainability agreement aims to contribute to that objective.

**Example 3:** If cereal producers agree to apply precision farming techniques to reduce the use of pesticides and fertilisers, this may fall under the environmental objectives under Article 210a(3), if the sustainability agreement aims to contribute to that objective.

**Example 4:** If dairy producers and processors agree to develop brands ensuring fairer remuneration of producers, this increase in income of dairy producers may

lead to an increase of investments pursuing environmental or animal welfare objectives. If the objective that the agreement aims to contribute to is to ensure a fairer remuneration of producers, this objective would not fall within the objectives listed in Article 210a(3).

**Example 5:** If dairy producers and processors agree to improve animal welfare and at the same time agree to ensure fair working conditions for farm workers, only the aspects of the agreement that aim to contribute to attaining the objectives listed in Article 210a(3), such as animal welfare, can benefit from the exclusion under Article 210a. By contrast, the other aspects, such as the fair working conditions for farm workers, cannot be taken into account in this assessment.

### 3.2 Sustainability standards applied under Article 210a

#### 3.2.1 *The sustainability agreement must identify a sustainability standard relating to a sustainability objective*

- (44) A sustainability agreement that fulfils the conditions of Article 210a needs to identify a sustainability standard to be respected by the parties to the agreement in order to contribute to one or more of the sustainability objectives listed in Article 210a(3).
- (45) The sustainability standard must relate to one or more of the sustainability objectives covered by Article 210a.
- (46) The sustainability standard may be a pre-existing standard, a standard established for the agreement by the parties to the agreement or by third parties.
- (47) Sustainability standards may prescribe a target to be met, with or without imposing specific technologies or production methods. Consequently, adopters of sustainability standards may not only need to commit themselves to attaining the target(s) set by the standard but may also need to use a particular technology or production practice to attain that target (for example soil protection methods, practices relating to the grazing of animals, etc.).
- (48) Adopting a sustainability standard may lead to the creation of a voluntary label, logo or brand name for products that meet the requirements of the standard.
- (49) Only the part of the production that meets the sustainability standard can benefit from the exclusion under Article 210a.
- (50) In assessing whether a sustainability standard is covered by Article 210a, it is irrelevant whether the sustainability agreement is or has been supported by EU or national funding.

#### 3.2.2 *Sustainability standards should lead to tangible and measurable results, or where this is not appropriate, observable and describable results*

- (51) The sustainability standard may set quantified targets or may set specific methods or practices to be adopted (e.g. not using a certain input or agricultural practice).



- (52) Results obtained by the application of a sustainability standard need to be tangible and measurable. Where it is not appropriate to measure the results obtained in numerical terms, for example, because of the nature or object of the sustainability standard, the results obtained should nonetheless be observable and describable.

**Example 1:** If the sustainability objective is to reduce pesticides, then the particular sustainability standard could take the form of a reduction of pesticides by 40%. In that case, it would have to be possible to demonstrate that the application of the standard results in a measurable reduction in the use of pesticides.

**Example 2:** If a sustainability agreement aims to increase biodiversity through the cultivation of certain wild plants and original varieties that are insect-friendly, it may not be possible to measure the results in numerical terms. However, the efforts made and results attained must be describable (for example which plants should be planted, even if not necessarily in numerical terms).

### 3.2.3 *Sustainability standards must be higher than the relevant mandatory standard*

- (53) The sustainability standard that a sustainability agreement covered by Article 210a aims to apply, must be higher than what is mandated by EU or national law. This means that the sustainability standard must impose sustainability requirements that exceed what is required by an existing mandatory standard or must introduce sustainability requirements in cases where neither EU nor national law impose any sustainability requirements.
- (54) A mandatory standard is a standard set at EU or national level that establishes the levels, substances, products or techniques to be attained or to be avoided by individual producers or operators. Standards or targets that are binding on Member States but not on individual undertakings are not mandatory standards for the purposes of Article 210a.
- (55) Regardless of whether non-EU operators are parties to a sustainability agreement, mandatory standards are to be understood as EU standards or national standards by EU Member States.
- (56) If a mandatory national standard is more stringent or ambitious than the corresponding EU standard, producers and operators active in that Member State must respect that higher national standard. Depending on the constitutional law of each Member State, a mandatory standard may exist at the regional or local level. If an applicable mandatory national standard is set at regional or local level, that should constitute the relevant standard.
- (57) Sustainability agreements may involve quality schemes established by Regulation (EU) No 1151/2012 or quality labels that are subject to relevant national law, but only to the extent that those schemes and labels give rise to higher sustainability standards than what is mandated by EU or national law.
- (58) In the absence of mandatory standards at EU or national level, sustainability agreements aimed at increasing the *de facto* level of sustainability will go beyond

mandatory EU or national standards. The same applies to sustainability agreements aimed at accelerating the transition or early conversion to mandatory EU or national standards that have been adopted but have not yet entered in force.

- (59) Sustainability agreements will cease to be covered by Article 210a from the moment that equivalent or more ambitious EU or national standards enter into force (See the discussion in section 6.5).
- (60) Due to the number of types and combinations of mandatory sustainability standards at EU and national level for each of the sustainability objectives set out in Article 210a(3), it is not possible to establish an exhaustive list of sustainability standards mandated by EU or national law in these guidelines.
- (61) Similarly, it is not possible to indicate in these guidelines the minimum amount by which the adopted sustainability standard must exceed the mandatory sustainability standard. Rather, the amount by which the sustainability standard exceeds the mandatory sustainability standard will need to be assessed on a case-by-case basis, taking into account the restrictions of competition imposed by the sustainability agreement and whether they are indispensable (see Section 5).

**Example 1:** Under the EU Sustainable use of Pesticides Directive, the EU will set targets to reduce by 50 % both the use and risk of chemical pesticides overall and to reduce by 50 % the use of “more hazardous” pesticides by 2030. Assuming all other conditions laid down in EU law are respected, producers and processors in the field of fruit and vegetables agreeing to only market products that are the result of a programme to progressively reduce pesticide use by 60 % by 2030 would fulfil the requirement for a sustainability standard higher than mandated by EU or national law.

**Example 2:** Producers and operators agree to reduce by 50 % the volume of food wasted in producing and processing peas by optimising harvesting techniques, investing in more efficient storage capacity and improving packaging. There is no mandatory sustainability standard for food waste reduction set at EU level and no applicable national sustainability standard. In this case, the sustainability standard would de facto be higher than mandated by EU or national law.

**Example 3:** Producers of milk and retailers agree to support the conversion to organic milk production as specified in Regulation (EU) 2018/848 on organic production and labelling of organic products<sup>22</sup>. Although Regulation (EU) 2018/848 lays down production methods that farmers need to follow to be able to label their products as organic, those production methods are not mandatory standards at the EU or national level. In this case, a standard requiring the production of milk in accordance with organic production methods could be higher than the mandated by EU or national law.

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<sup>22</sup> Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 (OJ L 150, 14.6.2018, p. 1)

## 4 RESTRICTIONS OF COMPETITION

- (62) The purpose of this section is to understand the types of restrictions that are likely to be caught by Article 101(1) TFEU, and that could therefore potentially benefit from the exclusion under Article 210a if they fulfil the conditions of the latter.
- (63) This section does not consider whether particular restrictions of competition that are likely to be caught by Article 101(1) would be likely to satisfy the requirements for exemption under Article 101(3) TFEU. This section is also not intended to provide an exhaustive discussion of when sustainability agreements do or do not restrict competition.

### 4.1 What is a restriction of competition?

- (64) A key concept for understanding what constitutes a restriction of competition is the concept of “parameters of competition”. Businesses compete by providing an offer to customers that is more attractive than the offers of alternative suppliers in the given circumstances. Although price may be the most important factor for some purchasers, other factors can also play a role. For example, one supplier may offer a better quality product, better features, more variety, better service, or more innovation, etc. Certain factors may affect a supplier’s ability to reduce its price or improve features, such as the supplier’s ability to produce a given level of output at a lower cost than its competitors, more efficient production methods and technologies, supply sources, transportation and logistics, and so on. All these price and non-price factors are collectively referred to as “parameters of competition”.
- (65) An agreement restricts competition within the meaning of Article 101(1) if it is likely to have an impact on the relevant parameters of competition in a given market. An agreement can restrict competition because it contains an express or implicit obligation not to compete with respect to one or more parameters of competition, but can also restrict competition by reducing rivalry between the parties to the agreement or reducing rivalry between them and third parties<sup>23</sup>. Annex E provides an overview of some of the main types of restrictions of competition that may be found in sustainability agreements, together with how the different types of restrictions might be applied in practice.
- (66) In some cases, the very nature of a sustainability agreement is to restrict competition. For example, an agreement between a group of competing undertakings that they will each charge the same prices to their respective customers is inherently likely to restrict competition.
- (67) In other cases, while the nature of the sustainability agreement is not necessarily to restrict competition, the effect of the sustainability agreement may nonetheless

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<sup>23</sup> Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.04.2004, p. 97 (‘Guidelines on Article 101(3) TFEU’). The reference in the title to Article 81(3) is because the notice was issued before the adoption of the Lisbon Treaty. When the Lisbon Treaty was adopted, Article 81 of the Treaty establishing the European Community became Article 101 of the Treaty on the Functioning of the European Union.

be to restrict competition. In such cases, whether a sustainability agreement is likely to restrict competition will depend on several factors, including the share of the market that is affected by the sustainability agreement or whether there are other undertakings who would be able to begin producing competitive products. This is because, if there are enough producers who are not covered by the sustainability agreement, customers will continue to have competitive alternatives, and thus the sustainability agreement in question is unlikely to restrict competition.

- (68) A sustainability agreement may contain multiple restrictions of competition. For example, an animal welfare initiative might contain a specific agreement on a mandatory surcharge to be paid to farmers who meet certain animal welfare criteria (the agreement on the surcharge being an agreement on a component of the price). Those criteria might also include requirements for the amount of space available to individual animals, which could reduce the number of animals that can be reared (an output restriction), or might specify particular feeding requirements (an input restriction).
- (69) For a sustainability agreement to be caught by Article 101(1) TFEU, it is irrelevant how many restrictions of competition are contained in the sustainability agreement, provided that it contains at least one restriction of competition.

**Example 1:** In order to reduce pollution and protect water systems, soya farmers in a region want to stop using chemical fertilisers. However, because this would likely result in a reduction in crop yields, they are concerned that they will lose money if they adopt the initiative on their own. They therefore agree together that they will stop using the fertilisers and that they will increase their prices per ton in order to maintain the same level of profitability as before.

This sustainability agreement restricts competition by limiting the participants' ability to set their own selling prices.

**Example 2:** A group of farmers who wish to stop using chemical fertilisers create a quality mark for "sustainable soya" that has been produced without chemical fertilisers. Eliminating the use of chemical fertilisers is likely to reduce yields, and thus potentially to reduce farm incomes. The group therefore invests heavily in raising the awareness of consumers of the quality mark and of the environmental benefits of eliminating chemical fertilisers to convince consumers that "sustainable soya" is worth more than soya produced with chemical fertiliser. Any farmer that certifies that its soya has been produced without chemical fertilisers may participate in the scheme, and can leave the scheme at any time. Unlike in example 1, there are no provisions relating to the setting of prices.

In this example, the sustainability agreement is unlikely to restrict competition. It is possible that the scheme may have the effect of restricting competition if a large number of soya producers join the scheme, effectively limiting the ability of customers who do not want to purchase "sustainable soya" to do so. However, if only a limited number of soya producers join the scheme (e.g. producers who account for less than 10% of supply), any restriction of competition is likely to be insignificant, because the resulting reduction in output levels will not be

significant and customers will continue to have alternatives if they are unwilling or unable to pay more for sustainable soya.

## **4.2 What is not a restriction of competition**

- (70) Not all sustainability agreements between competitors are caught by Article 101(1) TFEU. Where such sustainability agreements do not affect parameters of competition, such as price, quantity, quality, choice or innovation, they are unlikely to restrict competition. The following examples are illustrative and not exhaustive.
- (71) First, sustainability agreements that do not concern the economic activity of competitors, but their internal corporate conduct, are unlikely to restrict competition. For example, competitors may seek to increase the overall reputation of the industry of being environmentally responsible and for this purpose, agree on measures to eliminate single-use plastics on their business premises, not to exceed certain ambient temperature in buildings, or to limit the number of printed materials per day.
- (72) Second, sustainability agreements on the creation of a database containing information about suppliers that have sustainable value chains, use sustainable production processes and provide sustainable inputs, or distributors selling products in a sustainable manner, without requiring the parties to purchase from those suppliers or to sell to those distributors, is unlikely to restrict competition under Article 101(1) TFEU.
- (73) Third, sustainability agreements between competitors relating to the organisation of industry-wide awareness campaigns or campaigns raising customers' awareness of the environmental footprint of their consumption, without such campaigns amounting to joint advertising of particular products, is unlikely to restrict competition under Article 101(1) TFEU.
- (74) Where a sustainability agreement does not impose a restriction of competition, Article 101(1) TFEU will not apply and therefore the sustainability agreement will not need to benefit from the exclusion contained in Article 210a. In those cases, parties to the sustainability agreement will be free to proceed with the implementation of the agreement.

## **5 INDISPENSABILITY UNDER ARTICLE 210A**

### **5.1 Introduction**

- (75) Article 210a(1) provides that Article 101(1) TFEU does not apply to agreements that relate to the production of or trade in agricultural products and that aim to apply a sustainability standard higher than mandated by EU or national law, if these agreements only impose restrictions of competition that are 'indispensable' to the attainment of this standard. Therefore, the indispensability condition is one

of the conditions that operators need to fulfil to benefit from the exclusion under Article 210a.

- (76) This section explains how the concept of indispensability should be understood under Article 210a. It provides guidance on how the indispensability condition applies to various restrictions of competition depending on the sustainability standards that are pursued. The section does not aim to set out specific forms and types of restrictions that stakeholders may or may not adopt in their sustainability agreements, but rather to set out a methodology for assessing the circumstances in which the main types of restrictions would be likely to be indispensable to attaining a sustainability standards, and to illustrate this methodology using a set of non-exhaustive examples.
- (77) Before assessing whether a restriction of competition resulting from a sustainability agreement is indispensable, the parties must first establish whether a restriction of competition exists (as explained in the previous section). If the sustainability agreement in question does not restrict competition, there is no need to consider indispensability. In those cases, operators can directly proceed with implementing the sustainability agreement.
- (78) Finally, the indispensability of restrictions of competition under Article 210a must be assessed in relation to the attainment of the standard specified in the sustainability agreement. Attaining the sustainability standard could mean either producing or trading agricultural products in compliance with the standard.

## **5.2 The concept of indispensability**

- (79) The concept of indispensability is already used in EU competition law. Article 101(3) TFEU provides that the prohibition in Article 101(1) TFEU may be declared inapplicable to agreements that help improve the production or distribution of goods or help promote technical or economic progress while allowing consumers a fair share of the resulting benefits, and that do not: (i) impose restrictions which are *not indispensable* to the attainment of these objectives, and (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned.
- (80) The concept of indispensability under Article 101(3) TFEU is further explained in the Guidelines on Article 101(3) as well as in the case law of the Court of Justice of the European Union.
- (81) Due to the similar wording of Article 210a and Article 101(3) TFEU, the test for determining whether a restriction is indispensable under Article 101(3) TFEU is a useful starting point for the present guidelines on Article 210a. Nevertheless, as will be explained further below, there are certain key differences between the two articles, as a result of which the standard for indispensability necessarily differs between them.
- (82) The Guidelines on Article 101(3) TFEU set out a two-step test for determining whether restrictions of competition are indispensable. The first step of the test looks at whether *the agreement* itself (i.e. the agreement that is covered by Article 101(1) TFEU) is reasonably necessary to attain the efficiencies created by the

agreement, while the second step assesses whether *the individual restrictions* of competition that flow from the agreement are also reasonably necessary to attain those efficiencies.

- (83) Although the assessment of indispensability under Article 210a also applies a two-step test, this test cannot, however, be applied in the same way as the two-step test under Article 101(3) TFEU. The EU co-legislators (i.e. EU Parliament and the Council of the EU) adopted Article 210a to create a framework excluding the application of Article 101(1) TFEU<sup>24</sup>. Due to the importance of attaining certain sustainability standards in the realm of agriculture, the EU co-legislators considered that for a sustainability agreement to be able to benefit from the exclusion under Article 210a, it should meet different conditions than those required to benefit from an exemption under Article 101(3) TFEU. For example, the exclusion under Article 210a does not require that parties to an agreement ensure that consumers receive a fair share of the benefits resulting from the sustainability agreement in question as is the case in Article 101(3) TFEU. Therefore, the standard of scrutiny of the assessment of the nature and intensity of a restriction of competition under Article 210a is different than under Article 101(3) TFEU. This means, among other things, that under Article 210a, restrictions that would be considered to be serious restrictions of Article 101(1) TFEU (such as agreements on price fixing or reductions of output) may be considered as “indispensable”, if the conditions outlined below are satisfied, whereas such restrictions would be unlikely to satisfy the conditions of Article 101(3) TFEU.

### **5.3 Step 1 - The indispensability of the sustainability agreement**

- (84) The first step of the indispensability test under Article 101(3) TFEU looks at whether the sustainability agreement as such is reasonably necessary to attain the efficiencies created by the agreement. By analogy, under Article 210a, the first step assesses whether the sustainability agreement is reasonably necessary to attain the sustainability standard pursued. This means that the attainment of the sustainability standard should be “specific” to the agreement in question. What this entails in practice is explained in the present section dealing with “step 1”.
- (85) As a general consideration, the nature of Article 210a presupposes that a sustainability agreement would have one or more provisions. At the minimum, each sustainability agreement would have a provision by which operators agree to aim to collectively apply a sustainability standard that is higher than the mandatory EU or national rules. In addition to agreeing on the sustainability standard, operators may need to agree on one or more other matters related to the production of, or the trade in, agricultural products to effectively develop or implement the sustainability standard. Such provisions could relate to parameters of competition, for example, the price at which the product is sold, the price of the inputs needed for its production, the amount of the product that would be

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<sup>24</sup> Under Article 42 TFEU, the provisions of the chapter of the Treaty relating to rules on competition apply to production of and trade in agricultural products only to the extent determined by the European Union Parliament and the Council of the EU.

produced, how the product is distributed or marketed, the certification of the product, etc.

- (86) When assessing the indispensability of a sustainability agreement, one must assess each provision of the agreement on its own. For example, while for a certain sustainability agreement, provisions on price might be reasonably necessary to attain a given sustainability standard, further provisions (e.g. on output) might not be reasonably necessary. This is because the issue that the provision on output aims to address either can be effectively solved by the parties unilaterally rather than by means of a cooperation or because provisions that are less restrictive of competition would also effectively address the issue considered.
- (87) Nevertheless, operators must also look at the sustainability agreement as a whole to assess whether the implementation of the various provisions as a whole attains the sustainability standard in question. This is further discussed in Sections 5.3.1. and 5.3.2.
- (88) In addition, the more marginal the improvement of the sustainability standard that operators aim to attain (as compared to what is already mandated by EU or national law), the less likely it will be that operators would need to cooperate or that the restrictions chosen would need to be of a more serious nature or intensity.

**Example 1:** Producers of grapes operating on low margins and located in a certain region collectively decide to reduce chemical pesticide use by 52% whereas the standard mandated by law only requires a 50% reduction. They decide to achieve this reduction by purchasing organic pesticides instead. The additional costs that producers incur to purchase organic pesticides are slightly higher than the costs they would otherwise incur to purchase chemical pesticides. To attain the standard, producers collectively agree on a fixed price that they would charge for the more sustainable grapes. Given that the organic pesticides are slightly more expensive and that producers operate on low margins and have thus no incentive to individually incur those costs, cooperation is likely to be necessary. The collective agreement to charge a fixed price downstream is, however, unlikely to be necessary, given the marginal improvement in terms of sustainability that the agreement is aimed at. Even though agreeing on a fixed price would provide sufficient remuneration for the producers and ensure that the standard is attained, there appears to be a less restrictive alternative. In this case the mere agreement to collectively reduce pesticide use by an additional 2% appears to be the least restrictive way to attain the standard, given that the additional costs for purchase of organic pesticides are small and that all producers in the region would incur them. This would prevent a situation where some of the producers would no longer be competitive due to the additional costs incurred.

**Example 2:** To improve the welfare of chickens raised for meat, producers agree to carry out yearly checks of the quality of water consumed by the chickens. The aim of the checks is to assess the level of water contaminants such as heavy metals and chemicals, and to address excessive levels of such contaminants, if found. Under the agreement, the producers must carry out the checks themselves using equipment that is affordable and must be purchased only once and does not



require scientific expertise to be used. There is no specific EU or national standard mandating that such checks be carried out, beyond a general requirement that animals receive potable water. Due to the yearly water checks, the costs of production increase slightly. As a result, poultry producers agree on exclusive purchase obligations for poultry meat by purchasers in order to recover the additional costs by having security that their production would be purchased. The need of poultry producers to cooperate is unlikely to be necessary, given that the improvement in terms of animal welfare appears to be marginal. Each producer could effectively attain the standard on its own, as producers do not need the knowledge or expertise of other producers. Moreover, an individual producer could attain the sustainability standard without incurring significant additional costs that would otherwise put them at a disadvantage compared to other producers, who would also implement the standard. In addition, even if cooperation were deemed necessary, it is unlikely to be indispensable for producers to agree with purchasers on exclusive purchase obligations, given the relatively low costs producers would incur for testing the water quality.

- (89) Finally, the indispensability of the restriction needs to be assessed in the actual context in which the sustainability agreement operates, taking into account the structure of the market, the economic risks related to the sustainability agreement and the incentives facing the parties. The more uncertain the attainment of the sustainability standard covered by the agreement, the more likely it is that a restriction of competition may be indispensable to ensure that the standard will be attained.

*5.3.1 Can the sustainability standard equally be attained by acting individually?*

- (90) To assess whether a sustainability agreement is reasonably necessary in order to attain a sustainability standard, it is necessary to assess whether it is possible for the parties to attain the sustainability standard on their own, acting individually, rather than through cooperation. Therefore, operators must identify why they need to cooperate and what would prevent them from attaining the standard on their own. In making this assessment, they must take into account the market conditions and business realities facing them that are relevant for attaining the sustainability standard in question. In cases where a sustainability standard could be attained through individual action, but the operators could attain it more quickly and with less costs and effort through cooperation, cooperation may be reasonably necessary to attain the standard, although the operators would still need to ensure that any restrictions of competition contained in the agreement are also indispensable, as explained in section 5.4.2.
- (91) For example, if producers of agricultural products are unable to attain a sustainability standard because they lack the necessary experience or knowledge in a given area, then cooperation with other operators at different levels of the agri-food supply chain who have such experience or knowledge could be indispensable. However, if the producers of agricultural products could easily obtain such knowledge on their own without significant investment in time or money, it is unlikely that they will need to cooperate to attain the standard.

- (92) Likewise, if producers of agricultural products do not have the incentive to pay the necessary costs or make the infrastructure investment needed to attain the sustainability standard because they would be unable to recover these costs or this investment, or cannot incur those costs or investments on their own, then cooperation with other operators at different levels of the agri-food supply chain who are willing to co-finance the attainment of the sustainability standard could be indispensable to attain the sustainability standard. By contrast, if attaining the sustainability standard requires an investment whose amount does not materially add to the seasonal or yearly investment that producers would otherwise make for their conventional production, then cooperation between producers might not be indispensable.
- (93) Furthermore, if producing or trading a product in a more sustainable way is only profitable if more products are produced or traded sustainably then an agreement between operators that they will all produce or trade the given product sustainably could be considered as indispensable. An example would be the use of logos/labels to identify products that meet certain sustainability requirements, gaining more trust from consumers, or the use of a platform enabling producers to share innovative equipment and the costs for purchasing/maintaining such equipment, in order to produce in a more sustainable manner. In the first case, the more people that produce in a sustainable way and use the corresponding logo, the more likely it is that retailers and consumers will perceive that logo as trustworthy, which in turn enhances the potential economic return to producers who sell products carrying the logo. In the second case, the more producers agree to use the platform and make their equipment available to others, the more beneficial participation in the platform is for each individual producer.
- (94) There may be situations where operators need to cooperate because otherwise there would be a risk that without cooperation each operator would expend significant resources and time on developing different production methods to attain the sustainability standard.
- (95) By contrast, there may be situations in which the joint development of a production method does not create efficiencies and in which the individual development of a production method by a producer independently creates more added value by attaining the standard faster as a result of competing with other operators. There may also be situations in which cooperation would not allow operators to attain the sustainability standard with significantly less investment in the required time or resources as compared with attaining the standard individually. In such situations, cooperation might not be deemed indispensable.
- (96) There may also be situations in which operators need to cooperate to deal effectively with the lack of information consumers have about the sustainability qualities of the products they purchase. Individual action may be unable to draw effectively the attention of consumers to the issue and convince them to purchase more sustainable products. However, individual action may suffice in those cases where there is untapped consumer demand for a more sustainable product, but the existence of sustainability benefits is not presented clearly enough in the products

produced by individual producers and the provision of such information can easily be done by each producer acting independently.

- (97) If an operator acting individually would suffer from a first-mover disadvantage by adopting a method to attain the sustainability standard, cooperation may be necessary to prevent competitors from free-riding on the first mover's investment, because otherwise competitors could simply implement the method developed by the first mover without incurring any costs. However, if the first mover could prevent free riding through the use of intellectual property rights that would prevent competitors from using that method without compensating the first mover, it may be unnecessary for operators to cooperate in order to attain the standard.
- (98) An operator acting individually could also suffer from a first-mover disadvantage if it wishes to produce a more sustainable product whose price is significantly higher than that of the non-sustainable alternative. In such a case, the operator might have difficulties marketing the more sustainable product as its customers acting downstream may have no incentive to offer the higher-priced product to final consumers because those consumers would likely continue purchasing the cheaper alternative. This would make the entry of the sustainable product into the market unlikely. If that is the case, cooperation between operators might be necessary to ensure that at least some consumers purchase the more sustainable product, thereby attaining the standard.
- (99) In addition to identifying the reason why they would need to cooperate, operators must bear in mind that if the sustainability agreement relates to a sustainability standard, for the attainment of which they would individually receive remuneration or subsidies from a public authority, the indispensability of cooperating to attain the standard in question needs to be carefully assessed. If, on the one hand, the remuneration or subsidy in question is sufficient for operators to incur the expenditure necessary to attain the sustainability standard on their own, they may not need to cooperate to attain the standard. On the other hand, if the remuneration or subsidy covers only part of the costs that would need to be incurred in attaining the sustainability standard, operators may need to cooperate to cover the outstanding costs.
- (100) In some situations, consumers may place greater value on products that are of a more sustainable nature and may be willing to pay a higher price for those products than for less-sustainable alternatives. In such cases, cooperation among operators to attain the sustainability standard may be unnecessary because operators may be able to finance the necessary investments in producing or trading in the more sustainable products by charging higher prices to consumers.

### *5.3.2 Indispensability of the provision(s) of the sustainability agreement*

- (101) After having verified that the sustainability standard cannot be attained by the parties acting individually, parties to a sustainability agreement will need to consider whether the different provisions of the agreement, e.g. relating to price, output, innovation, distribution, etc. restrict competition and, if so, are

indispensable to attaining the sustainability standard. At this first step of the indispensability test under Article 210a, operators need to compare the types of provisions that they agree upon (e.g. price versus certification). The assessment of indispensability of the restrictions of competition resulting from a provision (e.g. price fixing versus price premium) is done in the second step of the test under Article 210a.

(102) In practice, to understand whether a particular provision is indispensable to attaining a sustainability standard, parties to a sustainability agreement need to identify the issues that prevent them from such attainment. For each such issue, operators must assess what would be a suitable provision to solve it in order to attain the sustainability standard in question. There may be situations where there are alternative provisions that could be suitable to address the issue in question to enable the attainment of the standard. If a choice exists between two or more such provisions, the indispensable provision will be the one that least restricts competition. There may also be situations where two or more suitable provisions are equally restrictive and/or where determining the provision that is the least restrictive can be highly complex, in which case operators are free to choose which provision they will use, subject to complying with the other elements of the indispensability test in Section 5.4.

(103) For example, operators may be faced with the following issues:

- (a) If the issue relates to a lack of consumer confidence in the sustainability standard, certain provisions can be suitable to address the issue, depending on the individual circumstances of the case. This can include a provision requiring the use of an independent certification system and the creation of a logo/label and/or a provision on the joint promotion and commercialisation of the products. By contrast, a provision relating to the price paid to producers or to the volumes of production made available to customers downstream would unlikely be suitable, because it would not increase consumer confidence in the sustainability standard.

If the two potentially suitable provisions identified above are the only suitable options addressing the consumer confidence issue, the provision on the use of an independent certification system and the creation of a logo/label is likely to be the one that restricts competition the least and thus be indispensable.

- (b) If the issue relates to a lack of knowledge and experience about more sustainable production methods, certain provisions can be suitable to address the issue, depending on the individual circumstances of the case. These could include a provision relating to exchange of information regarding production methods (e.g. the use of certain inputs or equipment, etc.), a provision relating to the pooling of certain activities, infrastructure, equipment, etc., or a provision relating to conducting joint research and development activities. By contrast, a provision relating to the volume of products that may be produced or to the distribution or promotion of the products would unlikely deal with the issue in question in a suitable manner because it would not

enhance the knowledge or experience of operators wishing to produce more sustainably.

If the three potentially suitable provisions identified above are the only ones available to address the issue of lack of knowledge and experience in production, the provision on joint research and development is likely to be the one that restricts competition the least and thus be indispensable. If the provisions on exchange of information regarding production methods and pooling of activities are the only two potentially suitable provisions, a detailed assessment of the circumstances of the case must be made. It is not possible to state which provision would be the least restrictive one without having such information.

- (c) If the issue relates to uncertainties surrounding the commercialisation of the product (uncertainties about the volumes that can be sold), certain provisions can be suitable to address the issue, depending on the individual circumstances of the case. These include a provision relating to off-take commitments by some customers (e.g. the purchase of a minimum amount of products per year) and/or a provision laying out specific distribution arrangements between producers or between producers and their customers (allocation of customers, exclusivity of supply or of purchases). By contrast, a provision relating to the price at which the products may be further resold downstream or a provision to cease production of alternative non-sustainable products would unlikely be suitable, because they address other issues than uncertainties in terms of volumes of commercialisation.

If the two potentially suitable provisions identified above (offtake commitments and distribution arrangements) are the only ones addressing the issue of uncertainties in volumes of commercialisation, a detailed assessment of the circumstances of the case must be made. It is not possible to state which provision would be the least restrictive one without having such information.

- (d) If the issue relates to covering the additional costs created by complying with the standard, certain provisions can be suitable to address the issue, depending on the individual circumstances of the case. These could include provisions relating to certain payments or price commitments by buyers or to commitments to purchase a minimum volume of products. By contrast, a provision prohibiting the development of other sustainable or non-sustainable products would unlikely be suitable, because it would not directly lower the costs of producing in accordance with the sustainability standard in question.

If the two potentially suitable provisions identified above (payments/price commitments by buyers and commitments to purchase a minimum volume of products) are the only ones addressing the issue of covering the additional costs created by complying with the sustainability standard, a detailed assessment of the circumstances of the case must be made. It is not possible to state which provision would be the least restrictive one without having such information.

- (e) If the issue relates to a lack of knowledge on the part of consumers regarding the value added by producing or selling the product in a more sustainable manner, a provision relating to the joint promotion of the product by

producers or by downstream customers can be suitable to address this issue. By contrast, a provision relating to customer or market allocation would unlikely be suitable, because it would have no positive effects on consumer's knowledge about the added value of producing or selling more sustainably.

In this situation, if there is only one provision (joint promotion) suitable to address the issue, it is also considered as the least restrictive and, thus, the indispensable provision.

- (f) If the issue relates to a first-mover disadvantage (in terms of competition with less sustainable alternative products that are less expensive), certain provisions can be suitable to address the issue, depending on the individual circumstances of the case. These include a provision relating to the joint promotion of the more sustainable product, a provision relating to a commitment by retailers to purchase a certain share of their requirements from the producers of the more sustainable product (as a percentage of all substitutable products), or a provision relating to a commitment by a certain number of retailers to purchase their requirements exclusively from the producers of the more sustainable product. By contrast, a provision on the exchange of information on production by producers is unlikely to be suitable because it does not address the issue related to substitution in the sales of products.

If the three provisions identified above (on joint promotion, on minimum purchases and on exclusive purchases) are the only ones suitable to address the issue of first-mover disadvantage in terms of competition with less sustainable alternative products that are less expensive, the provision that is likely to be the least restrictive one (and thus the indispensable one) is the one relating to the joint promotion of the more sustainable product. If the provisions on minimum purchases by retailers and on exclusive purchases by retailers are the only suitable options, the one on minimum purchases is likely to be the least restrictive and thus indispensable one.

- (104) In making the above assessment, operators need to consider realistic and not purely hypothetical alternatives to the provisions that could attain the sustainability standard.
- (105) If operators choose between alternative provisions one that is: (i) not suitable in addressing a given issue preventing them from attaining the sustainability standard in question and/or; (ii) is not the least restrictive one as compared to the others, the particular provision chosen by them would be found incompatible with Article 210a and thus fall outside of the exclusion. If the sustainability agreement contains also other provisions that deal with other issues preventing operators from attaining the sustainability standard, these provisions may nonetheless be indispensable and thus benefit from Article 210a if they, on their own without having recourse to the provision that would be invalidated, attain the sustainability standard in question.
- (106) Finally, operators must bear in mind that provisions restricting the free movement of goods or services and thus partitioning the EU internal market are in principle not considered as indispensable under Article 210a.

## 5.4 Step 2 - The indispensability of the restrictions of competition

- (107) If entering into a sustainability agreement is reasonably necessary to attain the sustainability standard in question, one must then determine whether each restriction of competition imposed by the agreement is indispensable to the attainment of the sustainability standard.
- (108) For the purposes of Article 210a, a restriction of competition is indispensable to the attainment of a sustainability standard if the restriction is reasonably necessary to attain the sustainability standard in question. This in turn depends on both the nature of the restriction and intensity of the restriction.

### 5.4.1 *Nature of the restriction*

- (109) The concept of the nature of a restriction relates to the parameter of competition that is restricted by the provision(s) of the sustainability agreement (such as price, output, quality, choice or innovation). In step 1, the analysis focused on whether the type of provision was suitable to addressing the impediment to attaining the sustainability standard and whether there were alternative provisions that would suitably address the issue in a less restrictive manner. By contrast, in step 2, the analysis focuses on whether the restriction of competition contained in each provision of the sustainability agreement is the least restrictive one whilst attaining the standard in question.
- (110) Determining the “nature” of a restriction requires a consideration of: (i) the way in which a specific parameter of competition is restricted through an individual provision and (ii) whether a realistic less restrictive alternative exists. Such a realistic alternative should be capable of attaining the desired sustainability standard with a lesser negative effect on competition. Parties to a sustainability agreement need to choose the restriction that has the least negative effect on competition while attaining the sustainability standard.
- (111) If a provision relates to prices, assessing the nature of the restriction may require operators to choose whether to agree on a restriction in the form of price fixing, minimum pricing, a price premium, or some other restriction on the setting of prices. For example, if complying with the sustainability standard would impose costs on operators that are easily separable from the other costs that they would normally incur, a price premium may be an appropriate restriction. This is because a price premium would reflect the costs that operators incur by complying with the sustainability standard without affecting the other costs that they would incur independently of the standard.
- (112) An example in this regard would be a provision that requires payment of a given amount to compensate chicken producers for the use of organic feed rather than conventional feed. An alternative to this provision could be to fix the price at which processors are able to purchase the chicken at a level that compensates producers for the additional costs from using organic feed. In this case, fixing the price at which processors are able to purchase chickens would likely be more restrictive than agreeing on an additional payment that is separate from the purchase price, because the latter restriction only affects one component of the overall price paid for poultry meat, thereby leaving scope for competition on the other components that determine the overall price of the chicken (e.g.

infrastructure, land management, provision of water, electricity, etc.). By contrast, if attaining the sustainability standard would impose additional costs throughout the entire production process, fixing the price at which producers are able to purchase chickens may be reasonably necessary. For example, this could be the case where the sustainability standard relates to overall higher animal welfare requirements for chickens encompassing the provision of more sustainable food, more space in cages, more time spent outside, etc.

- (113) In the case of a provision relating to how much of their requirements purchasers obtain from producers who are party to the sustainability agreement, assessing the nature of the restriction may require operators to choose whether to agree on requirements to purchase minimum volumes against requirements to purchase a fixed share of volumes or some other purchasing obligation. If producers need to have certainty that they are able to sell a sufficient quantity of their products to be able to cover their costs, but do not know the exact volume needed, agreeing on minimum volumes could be the least restrictive provision to attain the sustainability standard. For example, if a sustainability standard aims to reduce antimicrobial resistance by prohibiting the use of antimicrobials and employing instead alternatives (e.g. vaccines, probiotics, prebiotics, etc.) in the raising of ducks, producers may need to ensure that they are able to sell a minimum amount of duck meat per year to cover the additional costs resulting from using alternatives to antimicrobials. However, if the amount of meat that can be processed is limited, then an exact or maximum figure may be reasonably necessary to ensure that all of the duck meat produced is effectively processed.

#### *5.4.2 Intensity of the restriction*

- (114) Determining the intensity of a restriction entails an assessment of the quantitative level of the restriction (on price, output and possibly quality, choice and innovation) and of the duration of the restriction.

##### *5.4.2.1 Quantitative level of the restriction*

- (115) The concept of the quantitative level of the restriction refers to the extent to which the restriction in question is likely to affect the relevant parameters of competition. The quantitative level of a restriction will be indispensable if agreeing on a lower level of the restriction would make it less likely that the parties would attain the sustainability standard.
- (116) If the restriction in question would directly or indirectly lead to a coordinated price increase or decrease, the analysis should focus on what would the level of price increase or decrease be that would be reasonably necessary for the operators to be able to attain the sustainability standard in question. That analysis should include a number of different factors, such as: (i) the investment and other costs that the operators will incur by participating in the agreement, the likelihood that they will recover these costs; (ii) the level of certainty that the sustainability agreement will be commercially successful; (iii) and the likely return on investment relative to other investment alternatives. Given that the analysis will depend on a number of uncertain factors, operators cannot be expected to calculate the precise price level at which they would be able to attain the sustainability standard. It is therefore permissible in case of doubt between two



estimates to factor in a return on investment sufficiently high enough to provide for an incentive for operators to attain the standard. However, if the final result of the calculation of the price under the agreement is not reasonably proportionate to the costs and the risks associated with implementing the agreement, the restriction is unlikely to satisfy this step of the indispensability analysis.

**Example:** Retailers see that there is demand for pesticide-free strawberries, but at the same time consumers are unwilling to pay more for these than for conventional strawberries. Producers in a region continue to use pesticides because producing pesticide-free strawberries would require additional investment in equipment and create additional labour costs. Moreover, even if producers incur these additional costs, there is a risk that a greater proportion of the strawberries that they produce will be blemished, such that consumers will refuse to buy them. A group of producers and retailers develop an initiative under which retailers agree to pay participating farmers an additional EUR 0.70 per kilogram of pesticide-free strawberries. The additional payment is based on a study that found that: (1) the additional labour costs for pesticide-free strawberries production averaged EUR 0.30 – 0.50 per kilogram; (2) producers could recover their investment in equipment within 5 years with a surcharge of EUR 0.10 per kilogram; (3) blemishing is likely to affect 10-20 % of the harvest; and (4) producers could obtain an equivalent return on investment of EUR 0.60 per kilogram by shifting to a different mix of pesticides, without the increased risk of blemishing. Although the additional payment of EUR 0.70 per kilogram is higher than the EUR 0.40 – 0.60 per kilogram, that would be necessary to recover the increased labour costs and the investment, the amount is likely to be reasonably necessary taking into account the risk of losses due to blemishing and the fact that producers could obtain a more certain return of EUR 0.60 per kilogram. However, if the additional payment were EUR 1.00 per kilogram instead of EUR 0.70 per kilogram, the amount would be higher than reasonably necessary to secure the necessary incentives for producers to invest in attaining the sustainability standard.

#### 5.4.2.2 Duration of the restriction

- (117) When assessing the duration of the restriction, i.e. the number of months or years the restriction would be in place, the relevant question is whether a shorter duration of the restriction would make it less likely to attain the sustainability standard. On the one hand, where the costs of implementing the sustainability standard arise throughout the lifetime of implementation, the restriction may need to be in place throughout the duration of the sustainability agreement. This may be the case where producing a more sustainable product requires the purchase of a more costly input that the buyers of the product would need to finance continuously throughout the existence of the sustainability agreement. On the other hand, where the investment needed to attain a sustainability standard is one-off, the restriction may only be necessary for the period of time necessary to secure the return on this investment.

**Example:** Retailers agree to pay watermelon farmers a premium in order for them to purchase innovative irrigation tools. Payment of this premium is needed for a period of time of 1 year as farmers do not have the required sum upfront. After 1 year, the farmers will have managed to recover the costs incurred for purchasing the equipment and will start saving on water usage by using the tools. Therefore, continuing the price payment after 1 year would not be indispensable in terms of duration.

#### 5.4.2.3 No requirement to assess the market coverage of the restriction

- (118) When drafting Article 210a, the co-legislators aimed to ensure as wide adoption of sustainability standards by operators as possible. In order to incentivise operators to attain standards higher than mandated by Union or national law, they created a specific balance between: (i) the *ex-ante* conditions for the determination of indispensability; and (ii) the possibility for *ex post* intervention. This stimulates the wide-scale adoption of sustainability standards without the risk of intervention by competition authorities unless a certain high degree of negative market effects are experienced.
- (119) Therefore, unlike under Article 101(3) TFEU, under Article 210a it is not necessary to analyse the market coverage of a restriction of competition to determine whether the restriction is indispensable. By contrast, market coverage may lead to *ex-post* intervention by competition authorities in cases where it leads to a high degree of negative effects on the market, as discussed in Section 8.

### 5.5 Examples of application of the indispensability test

**Example 1:** A certain rice cultivation technique uses less water than traditional rice cultivation techniques; it does not use artificial fertilisers and is pesticide-free. The use of this technique contributes to the sustainable use and protection of landscapes, water and soil, and to reducing pesticide use. The technique, however, requires additional investment of financial resources and time by the rice producers and it is only profitable if carried out on a medium to large scale. The technique is adopted by three rice cooperatives, which agree with a retailer to produce rice in line with the criterion ('sustainable rice'). The retailer agrees to purchase a certain quantity of the sustainable rice – 100 tonnes a year for 3 years (*restriction relating to output*).

The three cooperatives have calculated that they would need to produce at least 95 tonnes of rice a year for 3 years in order for their investment to reach the necessary economies of scale to attain the sustainability standard and receive a reasonable return on investment. To encourage consumers to buy the sustainable rice, the three cooperatives and the retailer agree that the retailer's resale price will not be more than 15% above the average price that the retailer charges for conventional rice. However, given the cost of inputs and labour, the sustainable rice would be sold at a price 30% higher (*restriction relating to price*).

Most other buyers in the market (retailers, manufacturers, wholesalers, etc.) are predominantly interested in buying conventional rice, sold at a lower price.

Consumers show interest in buying more sustainable rice, but are unaware of the extent to which the production of conventional rice implies using fertilisers and pesticides and the amount of water consumed for this purpose.

### **Step 1:**

#### **Can the sustainability standard also be attained by acting individually?**

The rice cooperatives would be unable to finance the production of sustainable rice individually, as they would have no certainty that they could market the rice, given that most buyers are interested in purchasing conventional rice, which is sold at a lower price. Individually, the three cooperatives cannot therefore effectively adopt the standard. In that case, an agreement with a retailer that the retailer would purchase a minimum 100 tonnes of the sustainable rice a year is likely to be indispensable.

A separate assessment must be made of the agreement that the retailer's resale price for sustainable rice would not be more than 15% above the average price of conventional rice. Sustainable rice would be sold at a price 30% higher than conventional rice and there is a risk that consumers would purchase insufficient quantities of the rice. An agreement to promote the sustainable rice is therefore likely to be indispensable given that, otherwise, the retailer would be unable to keep purchasing from the three cooperatives. Individually, each of the three cooperatives and the retailer cannot promote the rice, as they need each other's assistance to do so, given that the production and sale of the sustainable rice are interlinked.

#### **Indispensability of the provision of the sustainability agreement**

The agreement to purchase a certain quantity of sustainable rice a year is likely to be indispensable, because there is only one retailer participating in the sustainability agreement and producing sustainable rice implies additional costs. Another type of provision might be that the retailer would merely promote the sustainable rice without committing to purchase it. This would however not provide enough certainty for the three cooperatives, because conventional rice is 30% cheaper and consumers are not generally aware of the implications of conventional rice production.

In the case of the agreement on charging a resale price for sustainable rice that is not more than 15% higher than that of conventional rice, there is a less restrictive way to promote the purchase of sustainable rice. Since the issue is the lack of consumer awareness of the benefits of sustainable rice, the three cooperatives and the retailer could conclude a certification agreement, e.g. through the services of a third party to develop a label for the sustainable rice. The third party would assess compliance of the rice with the sustainable production methods and testify to its conformity. It could also inform consumers about the environmental impact of conventional rice production. The retailer would therefore be free to determine the resale price of sustainable rice while using the label would be able to effectively meet consumer demand for sustainable rice.

### **Step 2: Indispensability of the nature and intensity of the restriction**

When assessing the nature of a commitment to purchasing 100 tonnes of sustainable rice a year, an alternative could be a commitment by the retailer to purchase all sustainable rice needed for resale from the three cooperatives. However, this would not attain the sustainability standard, as the three cooperatives would have no certainty that the retailer would effectively purchase the necessary quantity of rice produced. This is because it might not need all 100 tonnes of sustainable rice in a given year and the cooperatives would therefore have no incentive to make the necessary investment.

When assessing the intensity of the restriction to commit to purchasing 100 tonnes of sustainable rice a year for 3 years, the restriction appears indispensable as the three cooperatives need to produce at least 95 tonnes of sustainable rice per year for 3 years in order to receive a return on their additional investment. Due to the novelty and uncertainty of the sustainability standard, the additional 5 tonnes of sustainable rice purchased by the retailer aims to provide a safety net if there is a miscalculation. The commitment to purchase 100 tonnes of sustainable rice is therefore likely to be indispensable to attaining the sustainability standard at stake.

**Example 2:** There is a regional initiative to improve the living conditions for pigs. Participating farmers agree with a slaughterhouse and two meat processors, covering, 30% and 25% of the market respectively, to increase the amount of space per pig on their farms above the legal minimum. Due to local laws, it is difficult for most farmers to increase the amount of space for raising pigs. As a result, participating farmers will be financially disadvantaged compared to farmers who do not participate in the initiative.

The initiative therefore provides for the processors to pay the farmers an additional EUR 1 per kilogram of meat sold to compensate them for their reduced output and increased costs (*restriction relating to price*). The additional payment corresponds to the profit that farmers would have otherwise made had they reared more pigs in the conventional way. One processor would have been able to process the farmers' entire production and cover the related financial burden. However, a second processor has joined the initiative since it would like to tap into the market for more sustainable products (*restriction relating to customers, suppliers or territories*). The initiative also sets out that the slaughterhouse involved would exclusively slaughter pigs reared in line with the animal welfare standards concerned to avoid that their meat gets mixed with that of animals reared conventionally.

### **Step 1:**

#### **Can the sustainability standard equally be attained by acting individually?**

The first alternative that needs to be considered is whether the sustainability standard could be attained by the participants in the agreement acting individually rather than together. A farmer that would individually increase the amount of space per pig on its farm would lose a part of its income and possibly also access to their buyers to other farmers due to the decrease of its supply in quantity or the increase of its selling price. At the same time, while farmers acting together without the involvement of processors would compete against each other on equal terms, they

would still suffer from a disadvantage compared to farmers who opted not to participate in the sustainability agreement. They would also have difficulties finding buyers who would agree to pay a higher price for the meat from the animals reared sustainably. Therefore, an agreement between the farmers themselves and between the farmers and the processors as buyers of the meat products is likely to be indispensable, unlike unilateral action.

### **The indispensability of the provision of the sustainability agreement**

Next, regarding the additional payment, an alternative could be that the processors commit to purchasing all meat originating from pigs reared in line with the initiative at the price of conventional pigs. Farmers do not normally face problems finding buyers and would easily be able to sell the meat products originating from their pigs. However, if they were to apply the sustainability criteria, they would have to sell at a loss. An additional payment is therefore likely to be indispensable.

As regards the commitment by the slaughterhouse to slaughter only animals reared in line with the sustainability standard, an alternative could be for farmers to request the different slaughterhouses to separate and identify clearly the meat that comes from their pigs. This would likely lead to some additional costs, but it would let the slaughterhouses achieve a higher turnover by also slaughtering animals not meeting the standard in question and thus compensate them for the costs of separating the two types of meat for processing. The agreement with the slaughterhouse to only slaughter animals reared sustainably is therefore unlikely to be indispensable.

### **Step 2: Indispensability of the nature and intensity of the restriction**

In the case of the additional payment, an alternative restriction could be an agreement on a fixed price or on a minimum price for the meat products. Agreeing on a fixed price would bind the processors to a price that would otherwise be subject to changes resulting from lower or higher input prices, weather events, diseases, etc. A minimum price could ensure that producers are compensated for their effort as it would be set at a sufficiently high level that the costs for the sustainability improvement are accounted for, but ignore the possibility that the price of the pig meat may be below the initial level due to elements of the price becoming significantly lower (inputs, infrastructure, seasonality of the product, etc.). The restriction is likely to be indispensable because the additional payment corresponds to a loss of profit that farmers incur by rearing fewer pigs and keep the possibility that other price components may freely fluctuate subject to changes in the market.

Setting the additional payment at EUR 1 per kilogram of meat produced is also likely to be indispensable, if the payment reflects the loss of profit that farmers would incur by not having the same output had they reared pigs conventionally.

In terms of coverage, there is no need to make an assessment of this as section 5.4.2.3. explains.

**Example 3:** A group of three dairy cooperatives develops a quality mark for cheeses. It requires producers to certify that the milk used in their cheese is exclusively produced using organic methods. The quality mark requires that all milk production in the dairy is carried out using organic methods to guarantee that there is no mixing of organic and other types of milk (*restriction relating to inputs*). This method of production implies additional costs for producers and also reduces their competitiveness as they can no longer offer conventional milk for cheese products. Similar production methods already exist on the market and are used by other producers. Consumer demand for organic cheese on the market is high and consumers are willing to pay a higher price for this product, provided that the sustainability benefit is clearly shown to them.

**Step 1: Can the sustainability standard equally be attained by acting individually?**

The market for organic cheese is already well developed and some producers have already individually attained higher sustainability standards higher than the law. Cooperatives would also be able to develop the standard individually and meet the increasing consumer demand for sustainable cheese. The need to cooperate does not therefore appear to be indispensable.

**Example 4:** At certain times every year, the volume of certain vegetables available exceeds demand. As a result, between 7% and 15% of the yearly harvest of spinach is wasted. Cooperatives have tried to implement different strategies individually to plan or store the excess produce, but they have not managed keep their losses below the average 7%. They have also tried to dry the spinach and sell it, but there is no consumer demand for such a product.

To reduce this waste, a group of spinach cooperatives decides to exchange information on the weekly deliveries of spinach to customers so that they can plan the supply and demand more accurately (*restriction in relation to information exchanges*). The cooperatives justify this by stating that they will put in place a rotational system where the different cooperatives take turns every month in reducing their production by a certain percentage in order to match the expected demand for spinach the following month.

**Step 1:**

**Can the sustainability standard equally be attained by acting individually?**

The need for cooperation appears to be indispensable as individual action to address food waste has failed.

**The indispensability of the provision of the sustainability agreement**

In terms of the indispensability of the type of agreement as compared to other types of sustainability agreements, the manner in which the spinach cooperatives are aiming to attain the standard is via an exchange of information on supply and demand. While an alternative could be that to agree on volumes i.e. each cooperative would produce less. However, that would not address the issue as it would be difficult to anticipate with certainty how much the cooperative should



decrease its production. In addition, there would still be periods where demand is higher and so the cooperatives would be unable to fulfil their customers' orders. Moreover, an agreement on production volumes would be more restrictive than one on exchanging information.

The agreement to exchange information tackles this issue by providing regular information about the state of the market and enables precisely adjusting the supply more or less in the following month. It therefore appears to be reasonably necessary to attain the standard of reducing food waste.

### **Step 2: Indispensability of the nature and intensity of the restriction**

In terms of the indispensability of the restriction of competition that flows from the agreement, exchanging information on a parameter such as the weekly deliveries to customers is a significant restriction of competition. A less restrictive and realistic alternative could be to share aggregate information on a monthly basis rather than on a weekly one. Due to aggregating and compiling the data less frequently, individual cooperatives' sales to individual customers would not be identifiable. Producers would also still be aware of the market demand for spinach in the preceding month so they could adjust their production the following month.

As a result, the agreement would fail to meet the second step of the indispensability test.

## **6 TEMPORAL SCOPE OF ARTICLE 210A**

### **6.1 Sustainability agreements concluded before the publication of the guidelines**

- (120) Article 210a entered into force on 8 December 2021. Sustainability agreements entered into before this date may benefit from Article 210a after its entry into force. For the period before the entry into force of Article 210a, sustainability agreements cannot benefit from Article 210a and are subject to the competition rules in force at the time.
- (121) Any sustainability agreement entered into in the period between the entry into force of Article 210a (8 December 2021) and the publication of these guidelines should be promptly aligned with Article 210a and Article 101 TFEU as of the date of publication of the guidelines.

**Example:** Several producers enter into an agreement before the publication of the guidelines. They commit to stop using an authorised herbicide, which is frequently detected in drinking water supplies. To finance the transition towards a more sustainable method of production, they agree to temporarily fix prices at EUR 0.50 per kilogram produced.

After publication of the guidelines, it is clear to the parties that a price premium would have been sufficient to reach the standard; therefore, the agreement does not fulfil the second step of the indispensability test. As a result, the parties should update their agreement in order to comply with Article 210a, by replacing the price-fixing by a price premium as soon as the guidelines are issued.

## 6.2 Force majeure

- (122) If some terms of the agreement that are instrumental for the applicability of Article 210a are temporarily no longer met due to *force majeure*, the agreement can still benefit from the exclusion for a certain period provided that: (i) the parties take all the necessary steps without delay to restore the term in question; and (ii) the other requirements of the exclusion are complied with.
- (123) *Force majeure* is not limited to absolute impossibility but must be understood in the sense of unusual circumstances, outside the control of the producer or the operator. Its consequences, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice<sup>25</sup>. For example, this could be an unexpected flood in land, or a fire in storage facilities.

## 6.3 Transitional period

- (124) A sustainability agreement may benefit from the exclusion for a certain period after its conclusion and before the sustainable activity actually starts.
- (125) This can only be the case where a certain timeframe is necessary to implement the sustainable activity, and provided that the restriction of competition during this transitional period is indispensable. This means that the sustainable activity is less likely to occur if the restriction of competition is not applied during this period.

**Example:** Several agricultural producers agree in January 2023 to change their production method to stop using an authorised polluting herbicide. As some time is needed to change the production method, the launch of the final less-polluting product is due in September 2023. The producers agree to apply a premium price on the product using the problematic herbicide as of January 2023, to finance the investment necessary for the transition.

The premium price may be applied as of January 2023 if the producers are not able to cover their investment costs by only setting up the premium price in September 2023 (after the launch of the alternative product). The reason for this is that they would otherwise not consider taking the sustainable initiative. However, if the parties are able to cover their investment costs by only setting the premium price in September 2023, then applying the premium price before this date is not indispensable.

## 6.4 Failure to attain the standard

- (126) In the absence of *force majeure*, if the parties fail to attain the sustainability standard, they cannot continue to benefit from the exclusion.
- (127) Failure to attain the standard can happen for example where the parties do not manage to attain the standard in the planned timeframe. It could also happen where, due to an initial miscalculation, applying the standard would represent an

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<sup>25</sup> For further information on Force majeure, see (by analogy) the Commission notice concerning “force majeure” in European agricultural law, C(88) 1696.



unaffordable expense for the parties. It could also happen that implementing the standard is not possible in practice due to a factor that does not amount to force majeure, such as unexpected economic difficulties of the parties, or a shortage of an essential input.

- (128) In such cases, the parties cannot continue to benefit from the exclusion and should stop applying the restriction of competition. The exclusion remains valid for the period before the attainment of the standard is not possible anymore. If the immediate withdrawal from the agreement has significant economic consequences for the parties, they may keep applying it for a necessary transitional period, following the rules described in Section 6.5 concerning the ongoing and continuous review of the indispensability condition.
- (129) The parties may decide to reduce the level of ambition they aim for with the standard. In this case, they should adapt the level of restriction or modify the type of restriction, as required by the indispensability criterion.

**Example:** Two producers have agreed to invest in research and development together on a new production method that promises to be more sustainable. This implies fixing prices to finance this new investment. Due to the start of an economic crisis after they have concluded the agreement, the parties are no longer able to finance the research, and decide to stop the research investment.

Since the parties have failed to implement the standard (due to a reason unrelated to force majeure), they cannot continue restricting competition, i.e. fixing prices.

## 6.5 Ongoing and continuous review of indispensability

### 6.5.1 *In which cases is indispensability likely to be no longer fulfilled?*

- (130) Passing the indispensability test under Article 210a at an initial stage of the process does not guarantee that the test will also be passed also at later stages, in particular where there are material changes in the economic and legal context in which the sustainability agreement operates. Therefore, the parties must continuously review whether the condition is met throughout the agreement's implementation.
- (131) Where a sustainability agreement or the restrictions of competition that it contains can no longer be indispensable, Article 210a no longer applies. The restrictions of competition that the parties uphold after this point in time are no longer covered by Article 210a.
- (132) An example of a change in material circumstances that makes a re-assessment of the indispensability of a sustainability agreement or a restriction necessary is the change in the cost of developing or implementing the sustainability agreement or sustainability standard. Changes in costs may call into question the indispensability of the agreement or of the specific restrictions of competition initially decided upon by the participants.

**Example:** Producers and retailers agree on growing a new sort of maize that is more resistant to pests and so requires using less pesticides than conventional maize. The seeds for the new crop are however more costly (EUR 6 per kg). Retailers agree that they will finance buying the more expensive seeds by setting a price premium for the maize grown. In the later stages of implementing the sustainability agreement, the cost of the seeds drops to EUR 1 per kg as the crop becomes more widely sought after, and there are more seeds on the market.

This change in the price of seeds, which are an input for the maize, means the parties must reassess how much the price premium should be and whether retailers need to support the agreement through a premium at all.

- (133) Another change calling for a re-assessment of the indispensability of a restriction would be a regulatory intervention that raises the previously existing sustainability standard in the given area to a higher level of ambition. In such a case the indispensability of the agreement or the restrictions it contains should be reassessed as they were initially decided upon based on a different mandatory legal framework. Once the mandatory rules impose a higher standard, the agreement or restrictions may need to be changed to accommodate the now lower level of ambition of the initial agreement. The need for cooperation may no longer be indispensable and a different restriction in terms of ‘nature’ or ‘intensity’ may be more appropriate. In certain cases, the reassessment may lead to the parties concluding that a restriction of competition is no longer indispensable.

**Example:** Producers, processors and retailers agree on paying a certain price premium for rearing of animals without using cages. The law requires each animal to have at least 0.2 m<sup>2</sup> of space. Sometime after that, the mandatory legislation is amended and imposes a new requirement of 0.5 m<sup>2</sup>.

The sustainability standard imposing the requirement that animals be reared in ‘free-range’ might still justify applying a price premium. However, as the law has raised the mandatory standard, the level of the price premium needs to be reassessed, which in certain cases could lead to a lower price.

- (134) Another example is when the parties wish to change the sustainability standard that the agreement aims to attain. The parties may wish to set a sustainability standard that is still higher than the mandatory EU or national rules, but less ambitious than the sustainability standard initially agreed on. In this case, the agreement itself or the restrictions that were initially put in place may no longer be indispensable to attain the newly-set standard. An adjustment of the agreement or of the restrictions may therefore be warranted.
- (135) Consumer’s positive engagement with and awareness of the product covered under the agreement could also constitute a material change in circumstances. Demand for a sustainable product could increase because of the sustainability agreement or other factors (e.g. an environmental campaign increases consumer awareness). As a result, the whole market or a large part of it could have a strong incentive to switch to the sustainable production method and/or trade of that

product. If the lack of consumer demand was one of the main issues justifying the need to cooperate and/or impose a certain restriction of competition, the parties should reassess the indispensability of the agreement or the restriction.

**Example:** In the previous example, consumers may be concerned about the animal's rearing conditions. They may demand better animal welfare conditions and be prepared to pay more for it, including free-range rearing. As producers can tap into the newly created demand, the price premium paid to them may no longer be indispensable as producing free-range animals may be profitable without the need for financial compensation.

- (136) Innovations in production or distribution processes may also necessitate reassessing the indispensability of a restriction in an agreement. This may be the case where the agreement had been necessary to jointly develop a certain product or process or to jointly introduce certain product in the market, but where, after some time and investment, the parties would be able to produce and market the goods without the need for cooperation.

**Example:** An agreement between a PO and manufacturers enables the manufacturers to invest in AI technology which provides for the early detection of diseases in plants leading to higher yields. The manufacturers agree to purchase the technology for the producers as well as cover the operating costs of the technology through a minimum price. In return, the agreement requires the members of the PO to licence the technology, to ensure that there are enough licensees (and thus licence fees) to cover the costs of the investment.

Once the technology has been tested and leads to higher yields, the indispensability of the price premium will have to be re-assessed by the producers. As they are now producing more, they may be able to cover the technology's operating costs themselves.

### 6.5.2 *What are the parties' options where restrictions are determined no longer to be indispensable?*

#### 6.5.2.1 Option 1: amendment of the sustainability agreement

- (137) Where a sustainability agreement ceases to be indispensable, one option that the parties to the sustainability agreement have is to amend it. For example, if the issue is that the agreed sustainability standard is no longer attainable, they could agree to attain a different sustainability that is still higher than mandated by EU or national law. If the issue is that the type of agreement is not indispensable to attaining the sustainability standard, they could adopt a type of agreement that is indispensable. Similarly, if the issue is that the specific restrictions that the agreement imposes are no longer indispensable to attaining the sustainability standard, they could amend the restrictions to make them indispensable or simply repeal those restrictions altogether.

### 6.5.2.2 Option 2: termination of the sustainability agreement

- (138) If the parties are unable, or do not wish, to amend their sustainability agreement so that it continues to fulfil the requirements of Article 210a, they should terminate the agreement as soon as it ceases to be indispensable.
- (139) However, where parties made investments in reliance on the existing restrictions of competition that were indispensable to attaining the sustainability standard at the time they were made, Article 210a does not prevent them from recovering all costs that they had incurred in developing or implementing the sustainability standard at stake. Therefore, a sustainability agreement may still benefit from the exclusion in Article 210a for the period necessary to unwind the agreement and recoup their investments. This would nonetheless not be the case where a sustainability agreement ceases to be indispensable due to a regulatory change establishing a mandatory EU or national standard equal or higher than the standard laid down in the agreement and the entry into force of the mandatory standard was foreseeable at the time of the conclusion of the agreement (or where there is sufficient time between the adoption of the regulation and its entry into force).

**Example:** Local chicken farmers jointly agree to provide more living space per chicken. In order to reduce their transition costs, they enter into an agreement with their buyers, by which the latter buy chicken meat at a fixed price premium, in order to cover the additional cost corresponding to the new sustainability standard. The agreement is signed in March 2024, with a one-year formal notice period in cases of unilateral termination. New local legislation is adopted in June 2024 and applies as of December 2024. It requires all agricultural production in that region to allocate the exact same amount of space to animals as provided for in the agreement.

As the minimum space becomes a legal obligation as of December 2024, in theory they cannot continue to benefit from the exclusion in Article 210a since the restriction of competition is no longer indispensable. However, terminating the agreement with the buyers before the end of the formal notice period could have serious financial consequences for the parties, which have acted in good faith since the applicability of the said law was not foreseeable at the time of the conclusion of the agreement. They can, therefore, continue to benefit from the exclusion until the formal notice period comes to end, i.e. June 2025 in this example.

## 7 OPINION SYSTEM UNDER ARTICLE 210A

### 7.1 Applicants of the request

- (140) As of 8 December 2023, Article 210a(6) allows producers or associations of producers to request an opinion from the Commission on the compatibility of their sustainability agreements with Article 210a. Parties to the sustainability

agreement who are not producers may join the request. IBOs may submit requests for opinion under Article 210a(6), provided that at least one producer member is involved in the sustainability agreement.

(141) Producers or associations of producers may request an opinion any time after the sustainability agreement has been concluded, including before its implementation.

(142) The request must be submitted to {to be determined}. Alternatively, the request may be sent to the following postal addresses {*Commission européenne / Europese Commissie*}.

## 7.2 Content of the request

(143) There is no standard form for a request for opinion under Article 210a(6).

(144) However, to be assessed, the application should contain:

- (a) the identities of all parties to the agreement including, where appropriate, their registration number;
- (b) a single point of contact (including name and e-mail and/or postal address) for all communications with the Commission;
- (c) a copy of any document setting out the terms of the sustainability agreement or, if it is an oral agreement, a detailed written explanation of the agreement (including the market coverage of the agreement if available, its duration and the restrictions of competition imposed);
- (d) a description of the sustainability objective(s) pursued;
- (e) an explanation of the sustainability standard adopted within the sustainability agreement and reference to existing mandatory standards, including explanations and evidence as to why the sustainability standard is higher than mandated by EU or national law;
- (f) a detailed explanation of compliance with each of the conditions laid down in Article 210a(1), (3) and (7);
- (g) information on ongoing proceedings before a national court or national competition authority regarding compliance of the sustainability agreement to which the request refers with Article 210a or Article 101 TFEU;
- (h) any references and sources, including webpages, where the applicant has made public the terms of the sustainability agreement or parts of it;
- (i) any other information or documents relevant for the assessing the sustainability agreement.

### **7.3 The Commission's assessment and content of the opinion**

- (145) The Commission will assess the request on the basis of the information provided. It may also ask the applicant for additional information necessary to assess the request.
- (146) The Commission may share the information submitted to it with national competition and agricultural authorities or ministries, as appropriate, provided that these authorities and ministries are subject to the obligation to use that information only for the purpose for which it was acquired by the Commission. The Commission may also invite and receive input from those authorities and ministries.
- (147) An applicant can withdraw its request at any point in time. However, the Commission may retain any information supplied in the context of a request for an opinion under Article 210a(6) and may use that information in any proceeding for the enforcement of Article 210a or Article 101 TFEU.
- (148) The opinion will state whether or not the sustainability agreement is compatible with Article 210a and provide reasons for that statement.
- (149) The Commission will notify the single point of contact of the opinion.
- (150) An opinion that the sustainability agreement is not compatible with Article 210a does not prejudice whether the sustainability agreement is compatible with Article 101 TFEU or other provisions of EU law.
- (151) If appropriate, the Commission may state that the opinion is valid only for a certain period or that the opinion is based on the existence or absence of certain facts.
- (152) The opinion will be published on the Commission's website, having regard to the legitimate interest of the applicant(s) in protecting their business secrets. The Commission will agree with the applicant(s) on a non-confidential version before it publishes the opinion.

### **7.4 Time limit for delivering an opinion**

- (153) The Commission will send the applicant(s) the opinion within four months of receiving a complete request, i.e. after the receipt of all information needed to assess the request. That period will begin on the day following the receipt of a complete request.

### **7.5 Change in circumstances after the adoption of the opinion**

- (154) The Commission will issue the opinion based on the information provided by the applicant.
- (155) Article 210a(6) requires the Commission to declare that Article 101(1) TFEU must apply from that moment on to the agreement in question, and inform the producers accordingly, if it finds at any time after issuing an opinion that the

conditions referred to in Article 210a(1), (3) and (7) are no longer met. The Commission can make such a finding on its own initiative or at the request of a Member State.

- (156) Where the Commission has reason to believe that an applicant has submitted inaccurate information, the Commission may request additional information from the applicant.
- (157) After the entry into force of EU or national legislation, the Commission may have reason to believe that the sustainability standard that the sustainability agreement aims to attain is no longer higher than mandated by EU or national law. The Commission may then invite the applicant to demonstrate that the standard which the sustainability agreement aims to attain is in fact higher than mandated in EU or national law. If an applicant fails to do so, the Commission may inform it that the opinion is no longer valid, and publish its finding on its website.

## **7.6 Effects of an opinion**

- (158) Under the fifth paragraph of Article 288 TFEU, opinions have no binding legal force. They are intended instead to help operators carry out a self-assessment. However, national competition authorities and national courts may take account of opinions issued by the Commission as they see fit in the context of a case.
- (159) An opinion cannot prejudice the assessment of the same question by the Court of Justice, courts or national competition authorities.
- (160) Where a sustainability agreement has formed the factual basis for an opinion, the Commission is not precluded from subsequently examining that same agreement in a procedure under Regulation 1/2003<sup>26</sup>. In that case, the Commission will take its previous opinion into account, subject in particular to: (i) changes in the underlying facts; (ii) any new aspects discovered by the Commission or raised in a complaint; (iii) developments in the case law of the Court of Justice; or (iv) wider changes of the Commission's policy and developments on the markets concerned.

## **8 EX POST INTERVENTION BY THE COMMISSION AND NATIONAL COMPETITION AUTHORITIES UNDER ARTICLE 210A(7)**

- (161) Article 210a(7) sets out a safeguard mechanism by which either a national competition authority or the Commission (the 'relevant competition authority') may decide, after the conclusion or the implementation of a sustainability agreement, to modify, discontinue or prevent it from being implemented. This decision may be necessary to prevent competition from being excluded in the market or where the objectives of the CAP, as set out in Article 39 TFEU, are jeopardised.

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<sup>26</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 (4.1.2003, p. 1).

## 8.1 CAP objectives are jeopardised

- (162) In line with Article 42 TFEU, competition rules only apply to the production of, and trade in, agricultural products, to the extent determined by the co-legislators in accordance with Article 43(2) TFEU, account being taken of the five objectives of the CAP set out in Article 39 TFEU<sup>27</sup>.
- (163) Based on this, Article 210a(7) gives competition authorities the power to intervene where a sustainability agreement, which has been entered into or implemented, jeopardises the five objectives set out in Article 39 TFEU. When doing so, the relevant competition authority must consider the effect of the sustainability agreement on all five objectives. In some cases, it will be sufficient for one of the five objectives to be jeopardised for the objectives set out in Article 39 TFEU to be jeopardised within the meaning of Article 210a(7). However, in cases where some objectives may be negatively impacted but other objectives are positively impacted, it will be necessary to reconcile those five objectives<sup>28</sup>.
- (164) The first objective of Article 39 TFEU, increasing agricultural productivity, could be jeopardised in cases where the sustainability agreement reduces parties' incentives to innovate. This might be the case for example if the sustainability agreement establishes a sustainability standard that decreases the parties' incentive to invest in new technologies that could help attain an even higher sustainability standard, or if the sustainability agreement covers such a large part of the market that it also affects the incentives of other market participants to innovate.
- (165) The second objective of Article 39 TFEU aims at ensuring a fair standard of living for farmers. In determining whether this objective could be jeopardised, the relevant competition authority should assess how the sustainability agreement affects the living standards of all farmers, not only those farmers who are parties to the sustainability agreement.

**Example:** To reduce pesticide use by more than what is mandated by EU and national law, three maize producers (representing only one small part of the number of producers on the market) agree with a feed producer that they will switch to organic production methods. As this will increase their costs, they jointly agree that the three maize producers will fix prices for a period of two

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<sup>27</sup> Those objectives are:

- (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
- (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
- (c) to stabilise markets;
- (d) to assure the availability of supplies;
- (e) to ensure that supplies reach consumers at reasonable prices.

<sup>28</sup> Judgment of 14 May 1997, *Florimex and VGB v Commission*, joined cases T-70/92 and T-71/92, ECLI:EU:T:1997:69, paragraph 153, confirmed on appeal by Judgment of 30 March 2000, C-265/97 P, ECLI:EU:C:2000:170.



years. After one year of implementation of the sustainability agreement, the three maize producers realise that they underestimated the extent to which the switch to organic production would increase their costs, and that the price premium does not cover the extra costs. The three maize producers therefore reduce their revenue in order to cover this cost, as they cannot increase the price fixed.

Here, the reduction of revenue is merely due to a miscalculation by the three maize producers. In addition, it only concerns a limited number of producers. As a result, it is unlikely to jeopardise the objectives set out in Article 39 TFEU.

- (166) The final three objectives set out in Article 39 TFEU relate to stability of markets, the availability of supplies and ensuring reasonable prices for consumers. These objectives are often related.

**Example:** Several grain producers, making up 80% of the grain produced in the relevant geographic area, agree to stop selling seeds treated with a certain type of chemical pesticide during the time necessary to modify their production process and to sell off their existing stock of grain. Because the producers account for a large share of seed production, this creates a shortage of inputs for processors that use the grains, and this instability leads to an increase in the price of bread. This would be likely to jeopardise the objectives of ensuring the availability of supplies and reasonable prices for consumers.

- (167) The threshold under Article 210a(7) for jeopardising the objectives set out in Article 39 TFEU should be high. It would be against the spirit of Article 210a and the case law of the Court of Justice of the European Union on the need to reconcile the five CAP objectives if those objectives would be jeopardised any time a sustainability agreement has even a slight impact on one of those objectives.
- (168) Moreover, the objective of availability of supplies is distinct from self-sufficiency<sup>29</sup>. Security of supplies relates to food security, not necessarily through the largest diversity of segments for the same foods. If a sustainability agreement results in a reduction of the market shares of less sustainable segments of the same agricultural products, this does not necessarily jeopardise the objective of security of supply. Similarly, the 'reasonable prices' objective should not be understood as referring to the lowest price possible<sup>30</sup>.
- (169) Jeopardising the objectives set out in Article 39 TFEU is also distinct from the exclusion of competition. An exclusion of competition in some situations may occur without jeopardising the objectives set out in Article 39 TFEU. Moreover, those objectives may be jeopardised even if competition is not excluded.

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<sup>29</sup> Judgment of 15 July 1963, *Germany v Commission*, Case 34/62, ECLI:EU:C:1963:18.

<sup>30</sup> Judgment of 14 July 1994, *Greece v Council*, C-353/92, ECLI:EU:C:1994:295.

## 8.2 Exclusion of competition

- (170) Article 210a(7) also allows national competition authorities and the Commission to intervene once a sustainability agreement has been entered into or implemented, where necessary in order to prevent competition from being excluded.
- (171) The assessment by the relevant competition authority of whether a sustainability agreement excludes competition is distinct from the assessment of whether the sustainability agreement is indispensable to the attainment of the sustainability standard. This means that a restriction of competition in a sustainability agreement may be indispensable to attaining a sustainability standard, but still exclude competition. However, it cannot be that every restriction of competition necessarily excludes competition, since that would render nugatory the exclusion in Article 210a(1). It therefore follows that the exclusion of competition must be sufficiently serious to override the fact that the sustainability agreement fulfils the indispensability test of Article 210a(1).
- (172) As explained above, the concept of exclusion of competition is also distinct from the concept of jeopardisation of the objectives set out in Article 39 TFEU, in particular those related to reasonable prices and availability of supplies. Therefore, the threshold for exclusion of competition should be high, in order to avoid the overlap between the two distinct grounds for *ex post* intervention.
- (173) There can be an exclusion of competition within the meaning of Article 210a(7) if a sustainability agreement leads to the exclusion of competing products that could meet a substantial part of demand expressed by consumers. This includes products that attain a higher sustainability standard than the one set out in the agreement, or products that do not attain as high a sustainability standard (regardless of whether the restriction affects goods supplied by the parties to the sustainability agreement or by third parties).
- (174) For example, this could be the case if a sustainability agreement prevents the introduction of alternative products that comply with a higher sustainable standard than the one that was established by the sustainability agreement and for which there is substantial consumer demand.
- (175) There can also be an exclusion of competition within the meaning of Article 210a(7) if a sustainability agreement excludes food products with a lower standard than those of the sustainability agreement, but that comply with mandatory food standards and for which there is substantial consumer demand.
- (176) However, the fact that products that comply with lower sustainability standards are withdrawn from the market does not imply an exclusion of competition within the meaning of Article 210a(7) if the products were withdrawn because consumers increasingly demand more sustainable products. It is therefore necessary to assess whether the exclusion of competition is due to consumer preferences for sustainable products or whether instead the sustainability agreement has forced the withdrawal of a product for which there is substantial unfulfilled consumer demand.

- (177) In principle, the risk of exclusion of competition is related to the level of concentration in a market. Whether competition is excluded also depends on the degree of competition that existed before the sustainability agreement. Where competition was already weak (e.g. because of a relatively small number of competitors or because of the existence of barriers to entry), even a small reduction of competition caused by the sustainability agreement could exclude competition.
- (178) The market coverage of the sustainability agreement is likely to be a factor in deciding whether to intervene under Article 210a(7). Where the combined market shares of the parties to the sustainability agreement do not exceed 15% in the case of horizontal agreements and 30% in the case of vertical agreements, the agreement is unlikely to exclude competition<sup>31</sup>.
- (179) Where the combined market shares of the parties to the sustainability agreement exceed the above-mentioned thresholds, the assessment of whether a sustainability agreement excludes competition should be undertaken on a case-by-case basis, depending on the extent to which consumer demand is unfulfilled. The mere fact that a sustainability agreement covers the entirety of the market will not in and of itself necessarily lead to an exclusion of competition.

**Example 1:** Poultry producers making up around 50% of the market agree to enter into a purchase agreement in order to jointly purchase higher quality feedstuff for poultry. Thanks to the cost savings of the joint purchase, the producers manage to maintain a feed price that is more or less equal to the price of feed for poultry not covered by the sustainability agreement. They also agree to finance an advertising campaign together to raise awareness about how better-fed poultry is better for human health and animal welfare. As a result of this campaign, most consumers decide to switch to buying better-fed poultry meat. This increase in demand creates an incentive for other producers to join the agreement and change their production methods. In particular, the joint purchase attracts smaller producers to the higher standard as they could not otherwise have afforded to buy the higher-quality feedstuff. As a result, producers representing more than 90% of total supply switch to the more sustainable standard.

Although the agreement removes from the market virtually all less sustainable chickens, it is unlikely to lead to an intervention from the relevant competition authority. Article 210a(7) does not aim to prevent agreements that are so effective at delivering sustainability benefits that most consumers wish to purchase products with the same sustainability standard and other operators in the market adopt that standard.

**Example 2:** Turkey breeders, making up 60% of the market, decide to improve their turkey's living conditions, by establishing a new animal welfare standard that go beyond what is prescribed by mandatory law. This requires increasing the turkeys' living space, and installing air renewal and water treatment systems. The

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<sup>31</sup> For further details concerning the calculation of market shares, see (by analogy) Section 4 of the Commission Notice on the definition of relevant market for the purposes of Community competition law.

new sustainability standard also includes feeding turkeys premium-quality products only. The producers agree to apply a price premium to cover their costs.

The price premium is 150% higher than the price of the less sustainable reared turkeys. This increase is indispensable given the extensive extra costs of the new standard. The higher price of sustainable turkeys has the effect of leading producers of non-sustainable turkeys (amounting to 40% of the market) also to increase their price by 60%.

Market studies show that as a result of the agreement, a range from 15 to 20% of the consumers of turkeys declare that they are no longer able to afford non-sustainable turkeys, and are hence prevented from buying any turkey.

As a result, consumers that were only willing to pay for the cheaper – and less sustainable alternative – will no longer access turkeys, as they cannot afford the 150% price increase. Such a situation is likely to lead to an intervention by the relevant competition authority.

### 8.3 Procedural aspects

- (180) Where a sustainability agreement only covers a single Member State, the national competition authority of that Member State may take a decision under Article 210a(7). Where a sustainability agreement covers more than one Member State, only the Commission may take a decision under Article 210a(7).
- (181) When determining whether to apply Article 210a(7), the Commission will rely on its own market monitoring and submissions made by any natural or legal person. Any natural or legal person who holds information about a sustainability agreement may inform the Commission or the national competition authority concerned, by means of the appropriate national procedure. The submission should contain information on the content of the sustainability agreement, the parties to it, and the grounds substantiating the allegations. The Commission may ask additional necessary information from the parties to the sustainability agreement within two months after the opening of the formal investigation, taking account of the confidentiality of business information.
- (182) If the Commission has opened an investigation, it will normally issue its decision within six months from the day of the opening of the investigation or within six months from the day on which it has received necessary information. Between the opening of the investigation and the issuance of a decision, the parties are free to continue implementing the sustainability agreement.
- (183) If the Commission determines that competition is being excluded or that the objectives set out in Article 39 TFEU are being jeopardised, it may take the following measures:
  - (a) **If the sustainability agreement has been entered into but has not yet been implemented**, and the sustainability agreement cannot be modified to satisfy the

conditions for exclusion under Article 210a, the Commission may adopt a decision ordering the agreement not to be implemented.

(b) **If the sustainability agreement has already been implemented**, the Commission may decide that, in the future, the parties should:

- Modify the sustainability agreement, in the event that modifying the sustainability agreement would be sufficient to remedy the exclusion of competition or the jeopardisation of the objectives set out in Article 39 TFEU;
- Discontinue or terminate the sustainability agreement, in the event that modifying the sustainability agreement would be insufficient to remedy the exclusion of competition or the jeopardisation of the objectives set out in Article 39 TFEU by modifying the sustainability agreement.

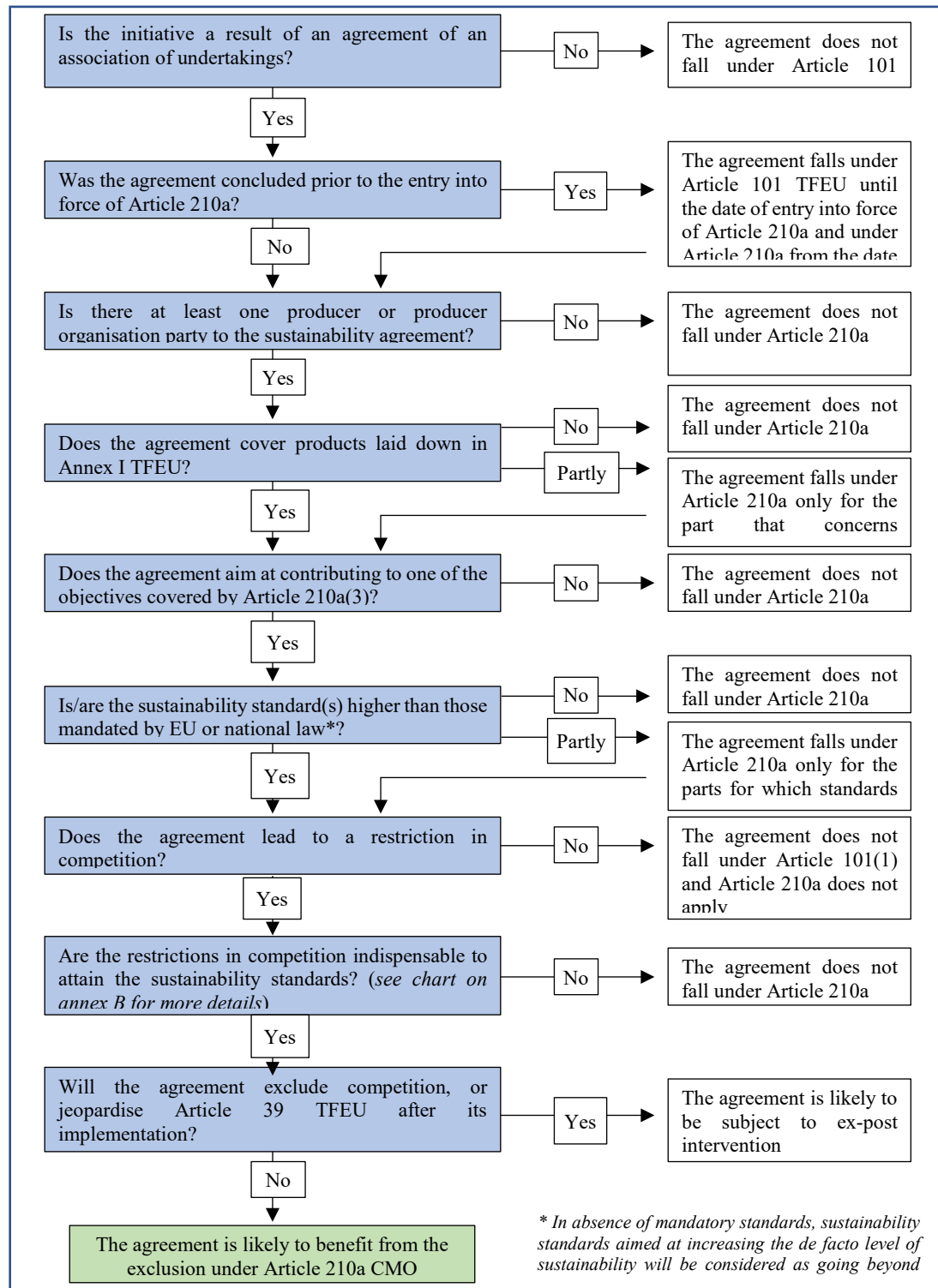
(184) Following a decision by the Commission that the sustainability agreement should be discontinued, the sustainability agreement will no longer be excluded from the application of Article 101(1) TFEU. If the parties to the sustainability agreement continue to implement the sustainability agreement after the date of the decision, proceedings under Article 101 TFEU may be launched with respect to the implementation of the sustainability agreement after that date.

## **9 BURDEN OF PROOF FOR THE FULFILMENT OF THE CONDITIONS OF ARTICLE 210A**

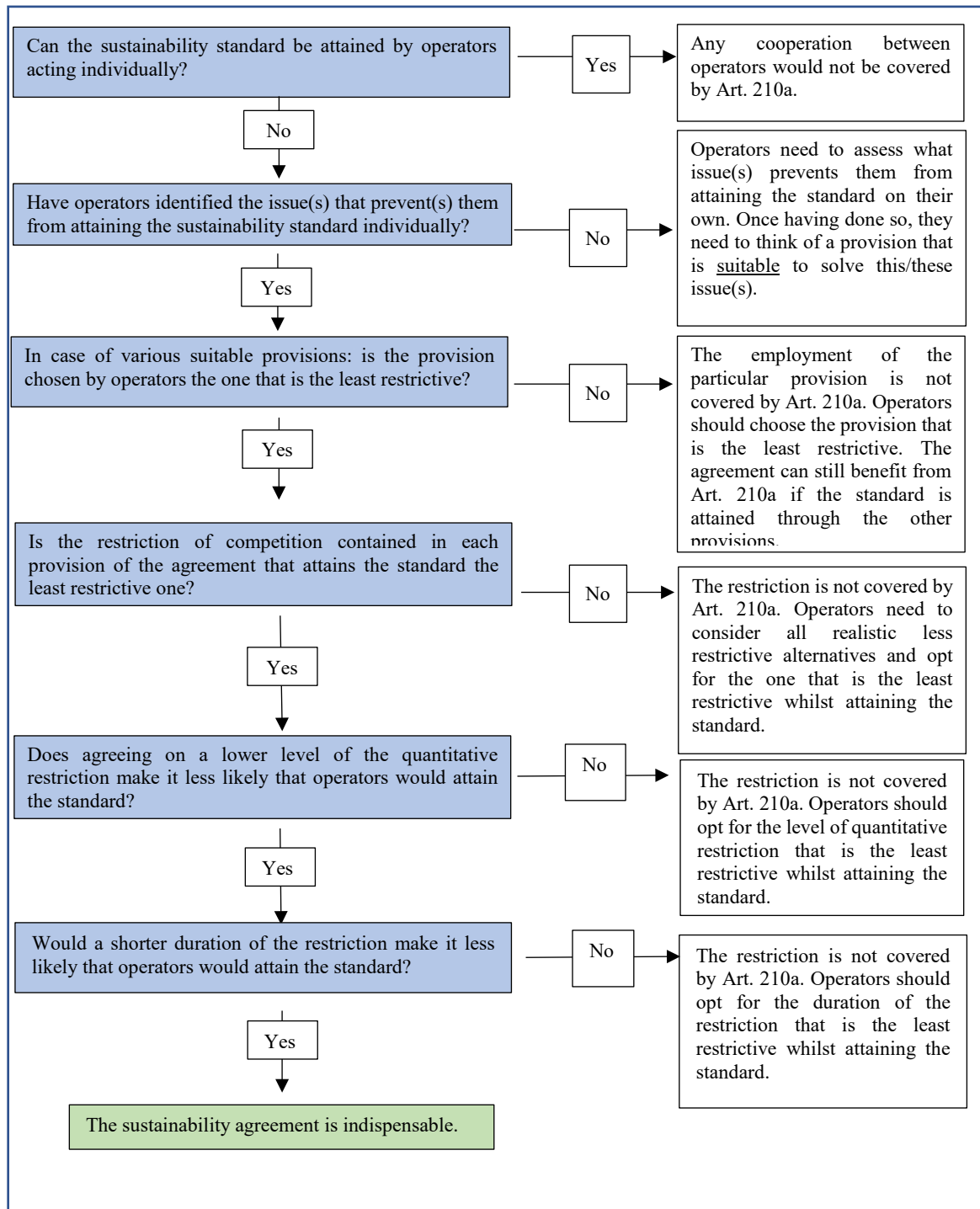
(185) If the parties concerned claim the benefit of the exclusion in Article 210a(1), they bear the burden of proving that the conditions of that Article are fulfilled.

(186) Private individuals may also dispute that a sustainability agreement fulfils the conditions of Article 210a in proceedings before the relevant competition authority. In those cases private individuals bear the burden of proving that the sustainability agreement fails to fulfil such conditions.

## ANNEX A - FLOWCHART OF THE ASSESSMENT UNDER ARTICLE 210A



## ANNEX B – FLOWCHART OF THE ASSESSMENT OF THE INDISPENSABILITY TEST



## ANNEX C - GLOSSARY

Term	Definition
Agreement	Any type of agreement, decision or concerted practice of producers (alone or together with other operators at different levels of the production, processing and trade in the agri-food supply chain) that relates to the production of or trade in agricultural products, irrespective of the form of cooperation.
Common Agricultural Policy (“CAP”)	The Common Agricultural Policy is the European Union agricultural policy.
CMO Regulation	Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products <sup>32</sup> .
Court of Justice	The Court of Justice of the European Union, including the General Court.
Force majeure	Unusual circumstances outside the control of the producer or the operator, the consequences of which, in spite of the exercise of all due care on the part of the producer, the producer could not have avoided except at the cost of excessive sacrifice.
Horizontal agreement	An agreement between economic operators at the same level of the supply chain, e.g. an agreement between agricultural producers.
Mandatory standard	A standard that establishes the levels, substances, products or techniques to be attained or to be avoided by individual producers or other operators, excluding standards or targets that are not legally binding on individual producers or operators.
National standard	A mandatory standard set at national level, excluding standards or targets that are legally binding within a Member State or a territory of a Member State, but not legally binding on individual producers or operators.
Operator	Producer, grower, processor, manufacturer, converter, trader, wholesaler or retailer active in the agri-food supply chain.

<sup>32</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 (OJ L 347, 20.12.2013, p. 671).



Producer	A producer of agricultural products as listed in Annex I TFEU.
Sustainability agreement	An agreement that aims to apply a sustainability standard higher than mandated by EU or national law.
TFEU	Treaty on the Functioning of the European Union
Undertaking	Any entity engaged in an economic activity, regardless of its legal status, and the way in which it is financed. An undertaking may comprise multiple legal entities.
EU standard	A mandatory standard set at EU level, excluding standards or targets which are binding on Member States but which are not legally binding on individual undertakings.
Vertical agreement	An agreement between operators at different levels of the supply chain, e.g. an agreement to which both producers and other operators in the agri-food supply chain are party.

**ANNEX D – ARTICLE 210A OF REGULATION (EU) NO 1308/2013 – VERTICAL AND HORIZONTAL INITIATIVES FOR SUSTAINABILITY**

*‘1. Article 101(1) TFEU shall not apply to agreements, decisions and concerted practices 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.*

*2. Paragraph 1 applies to agreements, decisions and concerted practices of producers of agricultural products to which several producers are party or to which 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, are party.*

*3. For the purposes of paragraph 1, ‘sustainability standard’ means 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.*

*4. Agreements, decisions and concerted practices that fulfil the conditions referred to in this Article shall not be prohibited, no prior decision to that effect being required.*

*5. The Commission shall issue guidelines for operators concerning the conditions for the application of this Article by 8 December 2023.*

*6. From 8 December 2023, producers as referred to in paragraph 1 may request an opinion from the Commission concerning the compatibility of agreements, decisions and concerted practices as referred to in paragraph 1 with this Article. The Commission shall send the applicant its opinion within four months of receipt of a complete request.*

*If the Commission finds at any time after issuing an opinion that the conditions referred to in paragraphs 1, 3 and 7 of this Article are no longer met, it shall declare that Article 101(1) TFEU shall apply in the future to the agreement, decision or concerted practice in question and inform the producers accordingly.*

*The Commission may change the content of an opinion at its own initiative or at the request of a Member State, in particular if the applicant has provided inaccurate information or misused the opinion.*

*7. The national competition authority as referred to in Article 5 of Regulation (EC) No 1/2003 may decide in individual cases that, in the future, one or more of the agreements, decisions and concerted practices referred to in paragraph 1 are to be modified, discontinued or not take place at all, if it considers that such a decision is necessary in order to prevent competition from being excluded or if it considers that the objectives set out in Article 39 TFEU are jeopardised.*

*For agreements, decisions and concerted practices covering more than one Member State, the decision referred to in the first subparagraph of this paragraph shall be taken by the Commission without applying the procedures referred to in Article 229(2) and (3).*

*When acting under the first subparagraph of this paragraph, the national competition authority shall inform the Commission in writing after initiating the first formal measure of the investigation and shall notify the Commission of any resulting decisions without delay after their adoption.*

*The decisions referred to in this paragraph shall not apply earlier than the date of their notification to the undertakings concerned.'*

## ANNEX E – EXAMPLES OF RESTRICTIONS OF COMPETITION

### 1. Restrictions relating to price

Sustainability agreements that directly or indirectly restrict the freedom of a party to negotiate the price at which it buys or sells a product are likely to restrict competition.

**Example 1:** A certain rice cultivation technique uses less water than traditional rice cultivation techniques, does not use artificial fertilisers, and is pesticide-free. The use of this technique contributes to the sustainable use and protection of landscapes, water and soil, and to reducing pesticide use. A grain wholesaler agrees with a rice production cooperative that the former will pay a premium per ton over a reference price for Arborio rice that is cultivated using this technique. The premium is calculated based on a composite commodity price index. The rice cooperative is free to produce rice using traditional methods and is free to sell as much rice as it wishes to other customers.

The premium is unlikely to restrict competition. It is simply a formula agreed between a buyer and a seller for setting the price at which the buyer buys the product from the seller.

**Example 2:** An NGO that is promoting the rice cultivation technique referred to in the first example develops a quality mark to be used in marketing Arborio rice produced using the cultivation technique. It licenses the quality mark to wholesalers and producers. Among the conditions for the use of the quality mark is that a grain wholesaler must pay a premium per ton over the reference price referred to in the first example.

This is likely to restrict competition. Although the grain wholesaler in this example would pay the same price as it would in the first example, this is no longer the result of a direct negotiation between buyer and seller, but rather an agreement regarding the terms on which one entity is allowed to negotiate with an independent third party.

**Example 3:** A group of rice cooperatives, rather than an NGO, develop the quality mark and the premium in order to promote the uptake of the rice cultivation technique.

This is likely to restrict competition. Although in this case the parties are buyers and sellers, each seller is agreeing on the price at which other sellers will also sell their products.

**Example 4:** In order to promote consumer uptake of rice produced using the cultivation technique referred to in the above examples, a cooperative and a retailer agree that the resale price for Arborio rice bearing the quality mark will not be more than a certain percentage above the average price that the retailer charges for Arborio rice.

This is likely to restrict competition, because it restricts the retailer's freedom to set the price at which it resells the rice to its customers. Moreover, because the maximum resale price is determined by reference to the price of other types of Arborio rice, it also restricts the retailer's freedom with respect to the price of those other types of Arborio rice. Instead of limiting the price of the rice with the quality mark, the retailer could

meet the pricing cap by increasing the average resale price of those other types of Arborio rice.

## 2. Restrictions relating to output

Sustainability agreements that restrict output are equivalent to sustainability agreements that restrict a party's ability to set prices. If the quantity that is put on the market is reduced and demand remains the same, the effect will likely be that prices go up.

**Example 1:** Desiring to contribute to the mitigation of climate change and to the restoration of biodiversity, an NGO agrees with individual farmers to rent 20% of their arable farmland. The NGO will leave the land fallow in order to increase local biodiversity. The effect of these agreements would be to reduce the amount of land that individual farmers use at any given time, and thus to reduce their crop yields (even though it may contribute to other operations, such as honey production).

This is unlikely to restrict competition, because it is effectively just a real estate transaction. The farmers remain free to use their retained land in whatever manner they see fit.

**Example 2:** In this example, instead of the NGO renting land, a group of farmers who grow similar crops in the same region agree to reserve at least 20% of their arable land for use as ecological focus areas. The effect of this is to reduce the amount of land that the farmers use at any given time, and thus to reduce their crop yields (even though it may contribute to other operations, such as honey production).

This is likely to restrict competition, because the farmers are agreeing to limit the amount of land they each use for production.

**Example 3:** As part of a regional animal well-being initiative intended to improve living conditions for pigs, participating farmers are required to increase the amount of space per pig on their farms significantly in excess of the legal minimum. Because of national law, it is difficult for most farmers to increase the amount of space dedicated to raising pigs. As a result, participating farmers will reduce the number of pigs reared in a given year. The initiative would therefore ensure that farmers received a payment to compensate them for their investments and for their reduced output.

This is likely to restrict competition, because the participating farmers are implicitly agreeing to rear fewer pigs.

## 3. Restrictions relating to inputs

Sustainability agreements that restrict choice with respect to inputs may affect the cost of production (which in turn affects the price at which the product can be profitably sold) or

limit the type of products that can be produced (because they potentially restrict the producer's ability to meet consumer demand).

**Example 1:** A group of dairy cooperatives develops a quality mark for cheeses that requires producers to certify that the milk used in their cheese is exclusively produced using specified “biodynamic” methods that exceed the standards for organic agriculture under EU law. Participating cheese producers are free to produce other cheeses with milk that is not produced using those biodynamic methods.

This is unlikely to restrict competition. Although the agreement specifies the use of certain inputs, participating cheese producers remain free to produce cheeses using other source of milk.

**Example 2:** A group of dairy cooperatives develops a quality mark for cheeses that requires producers to certify that the milk used in their cheese is exclusively produced using the biodynamic methods referred to in the first example. However, unlike in the first example, the quality mark requires that all milk used in the dairy be produced using biodynamic methods, in order to guarantee that there is no commingling of biodynamic and other types of milk.

This is likely to restrict competition, because it removes the participating dairies' freedom to use non-biodynamic milk to produce cheeses that do not carry the quality mark.

#### **4. Restrictions relating to customers, suppliers or territories**

Sustainability agreements 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, are likely to restrict competition. Sustainability agreements that require an undertaking not to buy from other suppliers or from other territories are also likely to restrict competition. The same is true of sustainability agreements that restrict the ability of competing resellers to sell to certain customers or territories or to buy from certain suppliers or territories.

Where such sustainability agreements are between a supplier and a reseller, whether the sustainability agreement is likely to restrict competition will depend on the position of the supplier and reseller on their respective markets. For example, if a supplier accounts for a large share of the supply to resellers in the relevant market, a sustainability agreement between a retailer and a supplier that restricts the supplier's freedom to sell to other resellers could restrict competition if other resellers would be unable to obtain necessary supplies as a result of the sustainability agreement. Similarly, if a reseller accounts for a large share of purchases of a product, a sustainability agreement that restricts its ability to source from other suppliers could limit those suppliers' ability to sell their products. Moreover, although an individual sustainability agreement between a retailer and a supplier on its own might not be restrictive, if other resellers and suppliers who account

for a large share of supply or purchases in the market have also entered into similar sustainability agreements, the overall impact of those sustainability agreements may be to restrict competition.

**Example 1:** A regional development association develops an agritourism initiative to protect and restore biodiversity while meeting increasing consumer demand for sustainable tourism. Participating farms agree to plant a certain percentage of their land with flowering plants that support the insect population while at the same time making the landscape more attractive. In return, they receive remuneration or subsidies from a fund that is financed by participating retailers, food processors and restaurants. Those businesses receive the right to use a special flower logo and are listed in local tourism materials that highlight sustainable businesses in the area. Participation is voluntary and is open to all farms and businesses in the region.

This is unlikely to restrict competition. The sustainability agreement does not directly relate to any parameters of competition. Although the flower logo and marketing scheme could have an impact on the profitability of farms or on the ability of local businesses to attract customers, the scheme is voluntary and open to all.

**Example 2:** In this example, the same agritourism scheme is introduced in a region that extends across the border of two Member States. Farms typically supply customers on both sides of the border, and tourists who visit the region typically visit destinations on both sides of the border. The scheme is only available to farms and businesses in one of the two Member States.

This is likely to restrict competition. Unlike in the first example, where participation was open to all, in this case only farms and businesses on one side of the border are allowed to participate. Because the scheme may affect both the profitability of participating farms and the ability of participating businesses to attract customers, it is likely to restrict competition vis-à-vis competing farms and businesses on the other side of the border.

**Example 3.** In order to reduce food waste, a group of cooperatives develops a code of good conduct that details the steps that agricultural producers, processors and retailers should take to reduce food waste. The code has been developed with the participation of academics and NGOs, and does not favour any particular agricultural producers, processors or retailers. Participation is voluntary.

This is unlikely to restrict competition. Participation is voluntary, and the code does not discriminate between participants.

**Example 4:** In this example, as part of the code described in example 3, the members of the cooperative agree to sell their produce only to retailers who have signed up to the code.

This is likely to restrict competition, because non-participating retailers would no longer be able to purchase agricultural products from as wide a range of suppliers as they had been able to prior to the sustainability agreement.

## 5. Restrictions relating to information exchanges

Sustainability agreements can involve exchanges of non-public information between competitors. Exchanging non-public information is likely to restrict competition if the information will have an impact on how the recipient competes in the market. Such information is often referred to as “commercially sensitive information”.

A fundamental principle of competition is that each undertaking is supposed to determine its commercial policy independently. By exchanging commercially sensitive information within the framework of a sustainability agreement, competing undertakings can remove uncertainty about how they will respond on the market. This can make it easier to reach a common understanding about how to behave on the market, thereby reducing or eliminating competition between them.

Whether information exchanged within the framework of a sustainability agreement is likely to be commercially sensitive will depend on the nature of the information and the context within which it is disclosed. Some information is competitively sensitive by nature. For example, information relating to an operator’s pricing intentions or strategic plans is usually commercially sensitive because competitors who become aware of the information can adapt their competitive behaviour accordingly.

Other information may be commercially sensitive depending on how detailed it is. The more specific the information is, the more likely it is that competitors can use the information to anticipate each other’s intentions.

Similarly, the age of the information may determine whether it is commercially sensitive. The older the information is, the less likely it is to reveal competitors’ intended conduct or to help reach a common understanding on how to compete in the market.

In other cases, certain information may be essential to be able to compete. In such cases, sustainability agreements that restrict the ability of some undertakings to have access to that information can make it difficult for excluded undertakings to compete or can create barriers to new entry or to expansion by competing undertakings.

**Example 1:** Every summer, there are periods where the volume of certain vegetables exceeds demand, as a result of which a certain portion of the harvest ends up rotting in the fields or in storage. In order to reduce this waste, a group of cooperatives collects information about the areas planted and yields per vegetable in the past year as well as the amount of harvest waste across all member farms. This information is aggregated at the regional level and published on a publicly accessible website. The cooperatives prepare a joint recommendation for their members on how to deal with the harvest waste based on the best practices of their members.

This is unlikely to restrict competition. The information in this case is historic and aggregated, making it unlikely that any given farm will be able to anticipate in detail what its competitors will do on the market.



**Example 2:** In this case, the group of cooperatives agrees that, before each planting season, each cooperative member will report its planting plan to its cooperative. The cooperatives will promptly publish the individual planting plans on a publicly accessible website, so that each farm will be able to adjust its planting plans to avoid overproduction that would lead to food waste.

This scheme is likely to restrict competition. The information that is exchanged is sensitive (future plans), detailed, non-aggregated and current, allowing each cooperative to know what its competitors are planning to produce next season and to reduce its output accordingly.

**Example 3:** In this example, rather than exchanging planting plans, in order to reduce food waste by ensuring that supply and demand are more balanced, the cooperatives exchange information on their weekly deliveries to specific customers.

This scheme is also likely to restrict competition. The information concerned (sales volumes and customer identities) is sensitive, and the data is current. Exchanging this data would make it easier for the cooperatives to reach a tacit understanding that they should not compete vigorously for certain customers.

For more information on the analysis of sustainability agreements under Article 101 TFEU (including agreements that fall outside the scope of Article 210a), see Section 9 of the Horizontal Guidelines.<sup>31</sup>

## **6. Restrictions relating to the manner in which sustainability standards are set**

In some cases, the way in which the sustainability standard is established may itself be likely to restrict competition. In particular, concerns can arise where participating in a sustainability standard gives participants a competitive advantage over non-participants, or where the way in which the standard is set can give some participants advantages over other participants. Concerns can also arise where the adoption of a sustainability standard necessarily prevents undertakings from adopting other sustainability standards.

**Example 1:** In order to combat anti-microbial resistance, seed companies and an association representing squash producers jointly develop a standard for combatting powdery mildew that reduces the need to use antimicrobial products during cultivation. Farmers who use the standard have the right to use a certain quality mark, and the association representing squash producers invests in raising awareness among consumers about anti-microbial resistance. The standard comprises various agricultural practices and requires the use of squash varieties that have been demonstrated to meet a certain level of resistance to powdery mildew. Membership of the association is open to all squash producers and seed companies, as well as to researchers in the field. All members are allowed to participate in the development of the standard. Meetings of the standards committee of the association are live streamed, and all relevant preparatory documents are published on the association's website. The adoption of the standard is put to a vote of all the members of the association, each of which has one vote. Participation in the standard and quality mark scheme are voluntary.

This is unlikely to restrict competition. Participation in the standard setting is open to all members of the association, and standards are adopted in an open and transparent manner. Members of the association are free to choose whether to adopt the standard.

**Example 2:** In this case, the facts are the same as in example 1, except that the standard requires the use of certain proprietary hybrid varieties, even though other varieties offer similar resistance to powdery mildew.

This is likely to restrict competition. Although participation in the standard is voluntary, the awareness-raising campaign is to lead squash producers to conform to the standard. Because the standard favours certain squash varieties over others, this is also likely to affect competition both between squash producers and between seed companies. Moreover, by restricting the freedom of squash producers to choose other varieties, the standard could prevent squash producers from using more effective varieties that would reduce the need for anti-microbial treatments by an even greater amount.

**Example 3:** In this case, the association in example 1 has different membership rules and procedures. Here, membership is open not only to all squash producers but also to seed developers, annual fees are determined on the basis of each member's annual turnover and voting rights are determined in proportion to the member's annual fees. As a result, a small number of large seed companies control sufficient votes to adopt the standard independently of the votes of the squash producers.

This is likely to restrict competition. The standard setting process would give the large seed companies an incentive to favour their own varieties over those of other seed producers.

**Example 4:** In this case, the facts are the same as in example 1, except that the association representing squash producers adopts a decision requiring all members to adopt the standard. Squash producers that do not wish to adopt the standard are free to leave the association, but by doing so would lose access to valuable marketing and technical support.

This is likely to restrict competition. Although squash producers can decide not to adopt the standard, having to leave the association to do so makes it likely that many squash producers will adopt the standard and that competition on quality and price will be restricted as a consequence.