Response to public consultation

Sustainability agreements in agriculture – consultation on draft guidelines on antitrust exclusion

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I INTRODUCTION & SUMMARY

1 LTO Nederland ("**LTO**") is the Netherlands Agricultural and Horticultural Association – the association for farmers and growers in the Dutch agricultural and horticultural sector. LTO is an association of three associations of undertakings: LTO Noord, ZLTO and LLTB. Together they represent over 35,000 undertakings in the Dutch agricultural and horticultural sector. LTO is a member of Copa (the Committee of Professional Agricultural Organisations). LTO is committed to the improvement of the socio-economic position of the undertakings and persons it represents.

2 In respect of a sustainable agricultural sector in the Netherlands, LTO aims to promote vertical cooperation between farmers and other stakeholders to improve sustainable production above and beyond the levels required by legislation. Furthermore, LTO is looking at the possibilities of horizontal cooperation to ensure that sustainable production goes hand in hand with a fair living wage for farmers.

3 BarentsKrans Coöperatief U.A. ("**BarentsKrans**") is an independent firm of lawyers and civil-law notaries. BarentsKrans is based in the Hague and its (approximately) 90 lawyers represent Dutch and international clients in both domestic and international matters. BarentsKrans has a strong presence in the food & agri sector (originating from its proximity to the Dutch horticultural hub in the *Westland*) and in the sustainable energy sector.

4 LTO and BarentsKrans welcome the opportunity to respond to the public consultation on the draft 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 (the "**Guidelines**"). LTO and BarentsKrans believe Article 210a of the CMO Regulation potentially offers significant opportunities to promote sustainable development in agricultural markets. At the same time, the introduction of the new exemption brings about legal uncertainty for undertakings aiming to introduce sustainability initiatives that may benefit from the exemption. The upcoming guidelines are therefore essential to the success of the exemption.

5 In this response to the public consultation we present our views and suggestions regarding the following topics:

(a) the personal scope of Article 210a CMO;

(b) the application of the indispensability-criterion ;

(c) the quantitative level of restrictions and a fair remuneration for farmers;

(d) the application of Article 210a(7) CMO;

(e) examples in the Guidelines and test cases, and;

(f) the retention and use of information acquired by the Commission from applicants.

II COMMENTS

II.1 Personal scope of Article 210a CMO

6 Chapter 2.2 of the Guidelines provides guidance on the personal scope of Article 210a CMO. While the chapter provides useful guidance, we respectfully suggest clarifying one element regarding the definition of operators at the processing level of the food supply chain.

> *"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."*

7 The cited wording of the Guidelines cast doubt if the definition is limited to processors that process agricultural products listed in Annex I or if the definition extents to processors that further process derivative products that have already been processed. Article 210a CMO does not seem to include a limitation in respect of the personal scope of such processors. We therefore suggest amending the Guidelines accordingly:

(a) Para. 28 under (c): *"Operators at the 'processing level': this includes operators (sometimes called processors, sometimes called manufacturers) that process agricultural products or their derivatives 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."*

(b) Para. 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'), without prejudice to point (28) as regards derivatives of agricultural products."*

(c) We suggest amending para. 36 and its four examples accordingly.

II.2 Indispensability – free movement

8 We welcome the guidance provided by the European Commission in respect of the indispensability-criterion of Article 210a CMO. However, the Guidelines contain a statement in respect of free movement that, in our view, would be incompatible with the goals of Article 210a CMO. Para. 106 states the following:

> *"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."*

9 This position severely limits the potential effectiveness of Article 210a CMO. For sustainability initiatives to be effective, a broad market coverage tends to be a requirement or, at least, preferable.

As a result, many initiatives will be, at least, national in scope. Such initiatives are likely to affect trade between Member States to a certain extent. Categorically excluding such agreements from the scope of Article 210a CMO severely limits the possible positive environmental effects of the clause. In our view, such a limitation is not required by Union law and has not been foreseen by the co-legislators.

10 The European Court of Justice recognizes environmental protection as one of the essential objectives of Union law.

> *ECJ 13 September 2005, case C-176/03 (European Commission/Council of the EU), ECLI:EU:C:2005:542, para. 41;*
>
> *ECJ 11 December 2008, case c-524/07 (Commission/Austria), ECLI:EU:C:2008:717, para. 58.*

11 Furthermore, the European Court of Justice has recognized that measures that have a restrictive effect on free movement are nevertheless compatible with Union law if such measures are justified by the pursuit of environmental protection.

> *ECJ 7 February 1985, case 240/83 (ADBHU), ECLI:EU:C:1985:59, para. 15;*
>
> *ECJ 20 September 1988, case 302/86 (Commission/Danmark), ECLI:EU:C:1988:421, para. 8 – 9.*

12 In light of this case law, it is accepted that environmental protection may override free movement concerns to the extent that a restriction of free movement is required to achieve the environmental goals of an agreement. A categorical exclusion of agreements that may limit free movement is therefore more restrictive of sustainability initiatives than required by the existing case law of the European Court of Justice.

13 Furthermore, we respectfully submit that the wording of the Guidelines is not in line with the wording of Article 210a CMO and the intent of the co-legislators. Article 210(4) CMO states the following:

> *"Agreements, decisions and concerted practices shall in any case be declared incompatible with Union rules if they:*
>
> *(a) may lead to the partitioning of markets within the Union in any form; […]"*

14 The partitioning of the internal market is therefore explicitly included in Article 210 CMO. The co-legislators have not included such wording in Article 210a CMO. As such, the result is that the conditions of application as well as the possibility for ex-post intervention do not contain any reference to partitioning of the internal market. In that light, we believe there is no requirement contained in the legislative act, nor in the case law of the European Court of Justice to introduce such a condition through the Guidelines.

15 We suggest deleting paragraphs 106, 118 and 119 from the Guidelines.

II.3 Quantitative level of a restriction and fair remuneration of farmers

16 One of the main challenges in achieving a more sustainable agricultural supply chain is a fair remuneration of farmers – producers in the wording of the CMO. Without fair remuneration, producers have no means to invest in more sustainable production. We therefore welcome the acknowledgement by the European Commission that investments and other costs should be included in the analysis of the quantitative level of the restriction described in para. 116. Furthermore, it is appreciated that the European Commission acknowledges the inherent uncertainties in calculating the proper quantitative level of the restriction.

17 We respectfully suggest to include further guidance regarding the remuneration of producers in the Guidelines. An inherent issue of the analysis is that different producers will face different costs to participate in sustainability initiatives. In order to prevent that producers are not able to participate in sustainability because their costs are not properly covered, measures should be taken. Guidance on those measures would be welcomed.

18 We ask the European Commission to take note of the slim profit margins in agricultural production. Given those slim margins it is not uncommon for producers to have difficulties even earning a fair living wage. Producers in such situations are not positioned to invest in more sustainable production.

19 We suggest to include wording in the guidelines to the effect that at most 20% of the costs incurred and income foregone may be included in the calculation as incentive for producers. That figure is also applied in the Guidelines for State aid in the agricultural and forestry sectors and in rural areas (C(2022)9120 final, points 430, 434 and 555). The Common Agricultural Policy for eco-schemes (Art. 31(7)(a) of Regulation 2021/2115) also allows for the inclusion of such incentives.

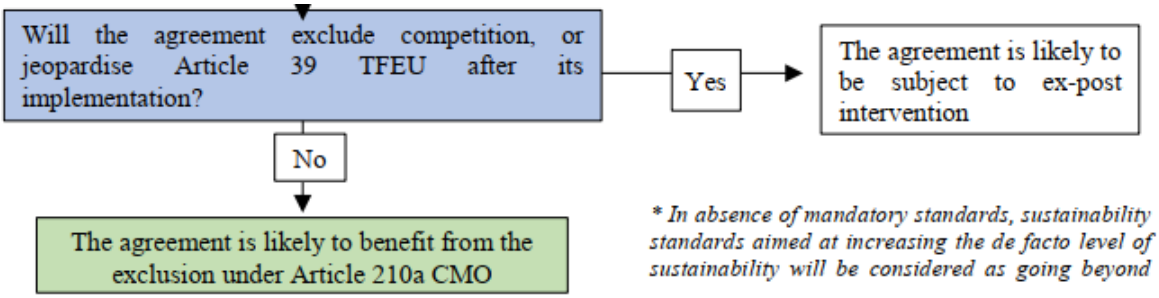
20 We suggest inserting additional wording in paragraph 116:

> *"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. In general, when calculating the costs incurred and income foregone due to sustainability agreements, an incentive payment, which may not exceed 20 % of the compensation, may be given."*

II.4 The application of Article 210a paragraph 7

21 In our view, the Guidelines would benefit from a clarification that agreements that satisfy the conditions of Article 210a paragraphs 1 to 3 CMO benefit from the exclusion of Article 210a CMO. That exclusion applies even if the agreement may jeopardise the goals of Article 39 TFEU or if the agreement may exclude competition within the meaning of Article 210a paragraph 7 CMO. The Guidelines in their current form leave room for interpretation regarding the application of the exclusion in those circumstances. Undertakings and the effect of Article 210a CMO would benefit from further clarification.

22 The flowchart in Annex A illustrates the issue. The final step of the analysis is included as follows:



23 From this flowchart, it is clear that an agreement that satisfies the conditions of Article 210a paragraphs 1 to 3 CMO and does not exclude competition nor jeopardise the goals of Article 39 TFEU benefits from the exclusion of Article 210a CMO. However, it is not explicitly stated that an agreement that satisfies the conditions of Article 210a paragraphs 1 to 3 CMO but may exclude competition or jeopardise the goals of Article 39 TFEU benefits from the exclusion of Article 210a CMO. It is our understanding that such an agreement does indeed benefit from the exclusion of Article 210a CMO. However, national competition authorities may intervene if necessary to prevent jeopardising the goals of Article 39 TFEU or an exclusion of competition.

24 Clarity on this topic is of great importance especially because undertakings are expected to conduct a self-assessment in respect of the conditions of Article 210a CMO (pursuant to paragraph 4 of Article 210a CMO). Depending on the application of the exclusion under Article 210a CMO, the risks of entering into a sustainability agreement differ vastly.

(a) If the agreement benefits from the exclusion under Article 210a CMO, national competition authorities may decide that the agreement must be modified, discontinued or not take place at all.

(b) If the agreement would not benefit from the exclusion under Article 210a CMO, the agreement is subject to enforcement by competition authorities under Article 101 TFEU including the risk of considerable fines.

25 In light of the above, we respectfully suggest that the European Commission clarifies, in chapter 8 of the Guidelines as well as in Annex A, that agreements that satisfy the conditions of Article 210a paragraphs 1 to 3 CMO benefit from the exclusion of Article 210a CMO. If such an agreement jeopardises the goals of Article 39 TFEU or excludes competition ex-post intervention by national competition authorities is limited to the remedies described in paragraph 7 of Article 210a CMO.

II.4.1 <u>Article 210a(7) CMO - exclusion of competition</u>

26 We appreciate the guidance provided by the European Commission regarding the application of Article 210a paragraph 7 CMO in the Guidelines. It is particularly helpful to take note of the position of the European Commission in respect of the criterion related to exclusion of competition. Furthermore, we appreciate the clarification by the European Commission that the threshold for an

exclusion of competition is set high and will not be met by a mere restriction of competition that is necessary for the attainment of the sustainability standard.

> *"(171) […] 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."*

27 We note however that other paragraphs of the Guidelines cast doubt on the standard that is to be applied in the analysis of an exclusion of competition. These paragraphs concern:

(a) the apparent distinction drawn by the European Commission between products that were withdrawn as a result of consumer demand for more sustainable products and products that were removed from the market even though substantial consumer demand remained;

(b) the market share thresholds included in the Guidelines.

II.4.2 Exclusion of competition – unsatisfied consumer demand

28 Paras. 173 – 176 of the Guidelines contain the following wording:

> *"(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.

29 The Guidelines draw a distinction between products that were withdrawn as a result of consumer demand for more sustainable products and products that were removed from the market even though substantial consumer demand remained (para. 176). The Guidelines suggest that an exclusion of competition may occur when products are withdrawn while there is substantial consumer demand for that product. That position is, in our view, incompatible with the structure of Article 210a CMO and it jeopardizes the attainment of the goals of Article 210a CMO.

(a) In our view, the position of the European Commission threatens to introduce a double indispensability-test where that was not foreseen by the co-legislators. The cited paragraphs in the Guidelines seem to apply to sustainability initiatives that abolish production of less sustainable products to promote the uptake of more sustainable products. Such agreements raise the question if the withdrawal of the less sustainable product is indispensable to achieve the higher sustainability standard. This question should be resolved through the indispensability-criterion. If it can be established that a restriction of competition – withdrawal of the less sustainable product – is required to achieve the sustainability standard, the exclusion of Article 210a CMO applies. That analysis includes a test of proportionality to establish that the restriction of competition is indeed the least-restrictive measure to achieve the benefits of the agreement. The current wording of the Guidelines suggest that the conclusions of this analysis can subsequently be called into question in the context of Article 210a(7) CMO. That is not consistent with the structure of article 210a CMO. In our view, the market situation after the withdrawal of the less sustainable product should be considered as the proper reference framework in which the remaining competition is to be analysed. National competition authorities could only intervene if competition is excluded within that reference framework.

(b) The position of the European Commission furthermore jeopardizes the attainment of the goals of Article 210a CMO. One of the challenges of achieving more sustainable production is finding a solution for unfair distribution of costs and solving the issue of hidden societal costs of less sustainable production. Less sustainable production may lead to more diverse product offerings and lower prices but ignore the hidden costs to society. Properly accounting for those costs and ensuring more sustainable production may bring those costs to the forefront but present firms with a potential first-mover disadvantage. Entering into sustainability agreements may resolve that fundamental issue. This is recognized by the European Commission in paras. 97-98 of the Guidelines. If the withdrawal of less sustainable products

with continued unfulfilled consumer demand will be considered as an exclusion of competition, the value of article 210a CMO would be considerably diminished.

30 In light of the above, we respectfully suggest deleting paragraphs 173 to 176 of the Guidelines.

II.4.3 Exclusion of competition – market share thresholds

31 Para. 178 of the Guidelines contains the following wording:

> *"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."*

32 We appreciate that the European Commission aims to provide legal certainty in respect of initiatives that are unlikely to exclude competition. While legal certainty is one of the primary goals of the Guidelines and is warmly welcomed by undertakings, we believe that the inclusion of market share thresholds may undermine the effectiveness of Article 210a CMO. We submit the following concerns regarding the inclusion of market share thresholds in the Guidelines.

(a) Our main concern is that the inclusion of market share thresholds might be counterproductive since undertakings are likely to use such thresholds as focal points for their initiatives. This may be particularly counterproductive since many successful sustainability initiatives will require substantial market coverage, far above the market share thresholds in the Guidelines, to achieve tangible sustainability benefits. While the Guidelines make it clear that initiatives with a market coverage above the market share thresholds do not necessarily exclude competition, we fear that the inclusion of market share thresholds would hamper the effectiveness of Article 210a CMO.

(b) In the guidance on the notion of elimination of competition within the framework of Article 101(3) TFEU the European Commission warns against undue focus on market shares. For example, the guidelines on the application of Article [101(3)] state that: *"[w]hile market shares are relevant, the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share."* (para. 109). Furthermore, the guidelines on horizontal co-operation agreements mention in respect of standardization agreements that *"the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share except in cases where a standard becomes a de facto industry standard. In the latter case competition may be eliminated if third parties are foreclosed from effective access to the standard."* (para. 324). The Guidelines themselves state that "the threshold for exclusion of competition should be high". That position is incompatible with the paragraphs in the Guidelines that describe a standard that may be interpreted as being stricter than the standard applied under Article 101(3) TFEU.

(c) We note that the inclusion of a market share threshold was not foreseen by the co-legislators. References to market coverage are included in other Articles of the CMO regulation. For example, Article 210 CMO states that agreements, decisions and concerted practices are incompatible with Union rules if they *"eliminate competition in respect of a substantial proportion of the products in question"*. Similarly, price guidance by recognised interbranch organisations in the wine sector falls outside the scope of Article 101(1) TFEU provided that such guidance *"does not eliminate competition in respect of a substantial proportion of the products in question"*. These clauses explicitly include references to the market coverage of practices. Conversely, Article 210a CMO does not include such a reference.

33 In light of these factors, our view is that ex-post intervention on the basis of exclusion of competition should only be possible when competition is truly excluded. In other words, ex-post intervention should only be possible when undertakings that are active on the relevant market have no means to compete with each other in terms of pricing and/or quality of their offerings.

34 For these reasons, we respectfully suggest deleting paragraphs 177 to 179 of the Guidelines.

II.5 Review of examples & test cases

35 We appreciate the inclusion in the Guidelines of numerous examples that provide a good view of the Commission's position in respect of the practical application of Article 210a CMO. We note that there are some examples that raise additional questions. We therefore respectfully suggest the European Commission to review the examples before finalizing the Guidelines. We refer to the following examples.

(a) Example 2 on page 35 of the Guidelines: we respectfully suggest that the facts of the example may not be in line with the economic reality of producers. The example mentions additional costs of separate slaughtering lines. However, in the view of the Guidelines, the initiative 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."* This position underestimates the costs of separate production lines for producers which is one of the primary reasons that more sustainable production fails to materialize.

(b) Example 1 on page 50 of the Guidelines: the wording of the example implies that the price of better-fed poultry meat is more or less equal to the price of the less sustainable alternative (*"[t]hanks 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."*). It is unclear if the agreement in the example would amount to a restriction of competition since the agreement does not seem to affect product diversity or the pricing of poultry meat. Article 210a CMO may not be required to enter into such agreements since they are unlikely to infringe Article 101 TFEU. It would be more helpful to receive guidance on the

application of Article 210a(7) CMO in respect of agreements that more obviously are restrictive of competition.

36 As mentioned above, we are of the opinion that the Guidelines have the potential to contribute to the effectiveness of Article 210a CMO. Real-life examples would provide undertakings with the most valuable insight into the analysis conducted by the Commission. That would most effectively aid undertakings in conducting a self-assessment. We therefore suggest the European Commission to consider the following measures:

(a) conducting a test case on the basis of a real-world example, publishing the non-confidential full analysis conducted by the Commission under Article 210a CMO as well as the information presented to the Commission by the applicants, subject to consent by the applicants;

(b) amending para. 152 of the Guidelines to include a possibility that non-confidential versions of the full analysis of the Commission along with a description of the information presented by the parties may be published subject to consent by the applicants.

II.6 Use of data for the enforcement of Article 210a CMO / Article 101 TFEU

37 Para. 147 of the Guidelines contains the following wording:

> *"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."*

38 This paragraph implies that any information presented in good faith to the European Commission for an opinion under Article 210a CMO may be retained by the Commission and used in a cartel investigation under Article 210a CMO. That may have a severe chilling effect on the willingness of undertakings to present their initiatives to the Commission for an opinion.

39 We respectfully suggest amending para. 147 accordingly:

> *"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~~."*

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