Independent Retail Europe

DRAFT GUIDELINES ON SUSTAINABILITY AGREEMENTS IN AGRICULTURE
- COMMENTS OF INDEPENDENT RETAIL EUROPE -

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COMMENTS OF INDEPENDENT RETAIL EUROPE ON THE DRAFT GUIDELINES ON SUSTAINABILITY AGREEMENTS IN AGRICULTURE

Independent Retail Europe welcomes the consultation on the draft Guidelines on the application of Article 210a of Regulation 1308/2013, which foresees a derogation from Article 101 TFEU for sustainability agreements between agricultural producers or between agricultural producers and other actors along the supply chain.

Overall, we consider that EU competition law is very flexible, as it allows to demonstrate on a case by case basis that an agreement with restrictions of competition can provide efficiencies which justify an exemption, as long as the restrictions are indispensable and the agreement benefits consumers. In our membership, there are various examples that show that competition law does not stand in the way of genuine sustainability agreements.

As the CMO Regulation provides that agreements to reach a higher sustainability standard may benefit from an exemption to competition law when they are indispensable to achieve their aim, we consider that, due to the positive effect that competition has on resource efficiency, such an exemption should be implemented in a way that follows closely the assessment of indispensability and restrictions of competition as required by Article 101(3) TFEU.

We therefore see positively the intention to introduce these concepts in the Guidelines on Article 210(a) CMO. We nevertheless would like to provide a number of comments and suggestions with regards to the draft text subject to consultation.

1. Definition of undertakings sustainability agreements under Article 210a

We welcome the reference made in paras 21-26 to concepts commonly recognised in competition law such as the concept of 'undertaking', 'agreement', 'association of undertakings' or 'concerted practice'. These concepts are extensively used in EU law and have been clarified by the ECJ. Referring to these concepts will bring higher legal certainty and ensure a better articulation between Article 210a of the CMO Regulation and Article 101 TFEU (as agreements restricting competition that do not meet the criteria of Article 210a CMO will need to be self-assessed under Article 101(3) TFEU).

Our position:

➔ **Keep paras 21-26 reference to well-established legal concepts under EU and competition law.**

2. Personal scope of article 210a – parties to the agreement (para 33)

Concerning para 33, we fully agree that it is essential that at least one producer (of agricultural products) is party to the agreement at the time it is set up.

However, outside of the clear-cut scenario mentioned in para 33, there may be many cases where discussions on a new sustainability standard will be initiated by non-producers (e.g. a group of retailers), and that in a second stage (but still before the finalisation of the agreement) agricultural producers will be invited to join the initiative with the view to comment on the future standard to improve it before finalisation of the agreement which will then be co-signed by all parties (including the producers who joined in the middle of the discussions).

We believe that the guidelines should recognise the validity of this scenario, as it would provide for the necessary flexibility that many market-driven initiatives need, while ensuring that producers will be party to the agreement already at the conception stage of the agreement. This would allow to maximise legal certainty and would have a positive effect on the negotiations of sustainability agreements.

Our position:

➔ **In para 33, add an intermediary scenario clarifying that discussions on an agreement and a new standard may be initiated by non-producers (e.g. retailers), as long as producers are invited to join before the finalisation of the agreement and of the standard (and are therefore given the opportunity to participate in its definition).**

3. Sustainability objectives covered by Article 210a

Paras 42 and 43 clarify that, when a sustainability agreement contributes to multiple objectives, only those listed under Article 210a(3) are relevant for the assessment, and that economic or social objectives are not within the scope of Article 210a. We fully subscribe to this assessment. However, it should be noted explicitly that, in such cases, for agreements between competitors a self-assessment under Article 101 may be required as regards the aspects that fall outside the scope of 210a.

Our position:

➔ **In para 43, add that objectives of an agreement which do not correspond to those listed in Article 210a may require a self-assessment under Article 101 TFEU.**

4. The concept of indispensability

a. General considerations (para 79-83)

As noted by para 79, the concept of indispensability under Article 210 of the CMO Regulation is already used in EU competition law, as it is one of the four criteria in Article 101(3) that needs to be met to benefit from an exemption from the prohibition of Article 101(1). We therefore welcome the clear reference to the use of the two-step test to assess the indispensability of the agreement.

However, we are surprised to read in para 83 that "*this test cannot, however, be applied in the same way as the two-step test under Article 101(3)*". This bold statement is all the more surprising given that the draft guidelines on Article 210a actually also use a two-step test which is in practice almost identical to the one used under Article 101(3).

While it is true that "*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*", this difference lies only in the fact that the co-legislator did not request sustainability agreements to fulfil two of the four criteria under Article 101(3) (namely the 'fair share to consumer' and the 'economic efficiency' criteria).

The fact that Article 210a refers to 'indispensability' and allows competition authorities to intervene ex-post when there is a risk of exclusion from competition makes it clear that the co-legislator did not

wish to exempt sustainability agreements from the other two criteria of Article 101(3). Moreover, as provided later on in the guidelines, the indispensability test is inherently linked to the notion of the 'least restrictive agreement' (which implies to minimise as much as possible any risk to exclude competition).

Therefore, para 83 should be rephrased to make it clear that the indispensability test under Article 210a of the CMO Regulation requires the exact same two-step test as under Article 101(3), the only difference being that elements linked to the 'economic efficiency' and 'fair share to consumers' are not to be taken into account under Article 210a.

Such a clarification would provide additional legal certainty, especially for smaller operators that may otherwise be wrongly led to believe that the indispensability test under Article 210a is more lenient than under Article 101(3) TFEU. Additionally, it would be in line with the (legally rightful) clarification in para 15 that "*as with all exceptions to a general principle, the scope of Article 210a needs to be interpreted strictly*".

Our position:

➔ **Amend para 83 to make it clear that the indispensability test under Article 210a is identical to the test under Article 101(3), apart from the absence of the assessment related to the consumer fair share and efficiency criteria.**

b) Indispensability of the provisions of the sustainability agreement (para 101-106)

We globally support the guidance on these aspects and welcome in particular the clarifications

- in para 102 that "*if a choice exists between two or more such provisions, the indispensable provision will be the one that least restricts competition*";
- in para 106 that provisions aiming to fragment the Single Market are incompatible with the exemption provided by Article 210a.

c) Indispensability of the restrictions in terms of nature of the restrictions (para 107-113)

Overall, we welcome the approach taken. In particular, we support para 107 which is a key element of step 2 of the indispensability test.

Concerning paras 111/112, we appreciate that special attention is given to price restrictions as these are by nature one of the most important restrictions of competition. The guidelines should be clear and unambiguous on that aspect. Concerning the second part of para 112, in particular "*By contrast, if attaining the sustainability standard would impose additional costs throughout the entire production process…*", we have serious doubts that price fixing is reasonably necessary in all circumstances. Indeed, in many cases, and even in the case described, it may be possible to individualise the additional costs at various key stages of the production process, meaning that a price premium may be sufficient and reasonably practical (therefore allowing competition to take place on the other elements unaffected by the sustainability agreement).

We therefore invite the Commission to modify the second part of para 112 to ensure that full price fixing is a 'last resort' measure that can only possibly take place where it is realistically impractical to

dissociate the extra costs generated by the new standard from the production costs, and provided that these extra costs represent a substantial part of the overall costs of production.

Our suggestions:

- **We fully support the overall approach in paras 107-113.**
- **We support the specific attention provided in para 111/113 to price restrictions.**
- **Amend the second part of para 112: It is likely that price fixing in many circumstances does not fulfil the indispensability test, as there may be many cases where it is reasonably feasible to identify extra-costs along the production process and that a price premium reflecting these costs is least restrictive than a full price fixing scheme.**

d) Indispensability test and intensity of the restriction (para 114-119)

Generally, we welcome the approach taken in the guidelines to ensure that quantitative levels of restrictions and duration of restrictions will be assessed as part of the indispensability test. We consider that these are essential must-do steps when assessing the indispensability of the restrictions in step two of the indispensability test, as rightly stressed by para 114.

Concerning quantitative levels of restrictions, we welcome the specification (para 116) that, after doing an analysis of the level of price increase or decrease that would be reasonably necessary, "*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*". We agree that this is an important specification to ensure that the quantitative restriction is the least restrictive.

However, concerning the example provided under para 116, we have doubts whether the justification of the agreement is realistic (i.e. there is demand for pesticide free strawberries, but consumers are unwilling to pay more than for conventional strawberries). Indeed, if there is an unwillingness for consumers to pay more, it is highly unlikely that retailers will participate in such schemes, as consumers will simply ignore the pesticide-free strawberries with the price premium. We believe that such example would be better justified on the basis of the first-mover disadvantage, where there is demand for such products, but low acceptance for higher prices for pesticide-free products (instead of an unwillingness to pay more).

Concerning the duration of restrictions (para 117), we support the guidance provided. It is indeed extremely important to ensure that this parameter is analysed, as well explained by this paragraph. However, we think that this paragraph should be expanded with additional guidance. Indeed, para 117 describes two fully opposed scenarios, but in practice some intermediate scenarios may be encountered (e.g. a mix of on-off initial investments and continuous investment throughout the duration of the agreement). Para 117 should describe how to assess the agreement in this case (e.g. meaning that some elements of the agreement may need to be phased-out after the initial costs have been absorbed, while the elements related to the continued investments through the lifespan of the agreement would be continued).

Our position:

- **We largely support the overall approach and in particular para 114 and 116.**

- **Concerning the example in para 116, we believe that a more realistic situation should be used in support of the example (see proposal above).**
- **We support para 117, but it should be expanded with an additional case, namely: an intermediary situation (combining one-off investments and continued investments).**

e) Examples of application of the indispensability test

Example 1 (page 33) assesses a sustainability agreement which includes Resale Price Maintenance (RPM) clauses binding retailers, and considers that RPM in this case would fail to meet the indispensability test. We strongly support the inclusion of this example with this conclusion. RPM is typically considered a hard-core restriction under competition law because it is highly unlikely to meet the requirements of Article 101(3). Although not all four conditions of Article 101(3) apply to the exemption under Article 210a of the CMO Regulation, we consider that RPM is equally unlikely to meet the indispensability test under Article 210a as it is under 101(3). We therefore fully support the inclusion of this specific example and the fact that RPM will not meet the criteria of Article 210a in this example.

Our position:

- **We fully support example 1 (page 33) which considers RPM restrictions to not meet the indispensability test. It is extremely important to keep such an example.**

5. The temporal scope of application and continuous review of indispensability (para 130-139)

We strongly support this Chapter which mandates parties to continuously review whether the agreement keeps satisfying the indispensability test, as per para 130.

Concerning para 131, we fully agree with its content, but suggest to clarify (at the end) that in the case mentioned, not only the restrictions of competition are no longer covered by Article 210a of the CMO Regulation, but also, that they then fall under the scope of Article 101 TFEU.

We also support para 135 and the example provided.

Lastly, we fully support paras 137/138/139, which explain that amendment of the agreement or full termination will be required when the restrictions are no longer indispensable.

Our suggestions:

- **We support this Chapter.**
- **Add in para 131 a clarification in relation to the applicability of Article 101 TFEU in this case.**

6. Ex-post intervention and exclusion of competition (para 170-179)

We largely support this part of the guidelines, and in particular paras 174, 175 and 177.

Concerning paras 178 and 179, we consider it important that the wording does not inadvertently discourage discussions on sustainability agreements with large market coverage. We would therefore suggest to amend slightly para 179 to make clear from the first sentence that agreements with a large

market coverage do not automatically exclude competition nor lead to ex-post control by competition authorities.

For instance, we would suggest the following wording: "(179) ***The setting-up of a sustainability agreement with a large market coverage should not per se be considered as excluding competition and will not automatically lead to an ex-post intervention by competition authorities***. Where the combined market shares of the participants 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 sustainability agreement covers the entirety ***or a large part*** of the market will not in and of itself necessarily lead to an exclusion of competition."

Concerning the example provided under para 179, we invite to specify that the purchasing agreement concerns higher quality feedstuff for poultry "with a demonstrated positive effect on animal welfare and human health". Indeed, this is a necessary condition for the example to be in the scope of Article 210a. This should be made clear already at the beginning of the example.

Lastly, we invite the Commission to add a clear statement that competition authorities can always intervene (ex-post) if they have reasons to believe that an agreement does not fulfil the conditions for an exemption under Article 210a of the CMO Regulation, and may therefore be in breach of Article 101 TFEU.

Our position:

- **We support this Chapter.**
- **To avoid any perceived obstacle to the setting-up of sustainability agreements with a large market coverage, para 179 should make clearer from the beginning that such an agreement does not per se exclude competition nor lead automatically to ex-post intervention by competition authorities.**
- **Be more specific in the introduction of the example under para 179 (i.e. the higher quality feed should have a demonstrated positive effect on health/animal welfare).**
- **Add a paragraph stating explicitly that competition authorities can intervene if Article 210a is not applicable and Article 101 TFEU is breached.**

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