Consultation draft guidelines for Art. 210a of the CMO Regulation

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Summary

The Dierenbescherming is pleased with the inclusion of Art. 210a in the CMO Regulation and for the opportunity to respond to this consultation. There are many animal welfare challenges in livestock farming. Government, industry and ngo's are working together to improve this and give animals a life worth living. However, better animal welfare is often associated with higher costs for farmers. At this moment, it is often not possible for them yet to earn back these extra costs, and therefore they do not invest in animal welfare improvements. The introduction of Art. 210a is an important step to remove barriers for farmers and industry partners to make long-term commitments and help improve animal welfare in the Netherlands and give farmers a fair price for more animal-friendly products. Therefore, we welcome the article and the guidelines.

We appreciate the work done by the EC to provide a clear framework for the application of Art. 210a. We welcome in particular the clarification that the term 'indispensable' needs to be interpreted differently in the context of Art. 101 TFEU than for Art. 210a. This was an important question in the 2022 consultation on Art. 210a.[1]

Art. 210a offers prospects for private sustainability agreements, giving the option for farmers to be fully compensated for the extra costs of more animal-welfare friendly practices. This compensation is essential for farmers to conclude the agreements, since these practices will otherwise often not be achievable for them. Better prices for farmers for sustainable products often imply higher food prices for consumers. This is also highlighted by the scientific literature[2][3]. For this reason, a key problem with the draft guidelines as proposed by the EC is the reintroduction of the notion from Art. 101 TFEU that consumers shall not be forced to buy more expensive products if they do not wish to do so. This notion is foreign to Art. 210a, given the full derogation from Art. 101 TFEU. The willingness to pay criterion belongs to the domain of Art. 101 TFEU and we do not agree with its reintroduction through the guidelines for Art. 210a.

The proposed approach as regards market share as a criterion is discriminatory. In most cases, sustainability agreements will concern domestic trade. Large Member States will therefore have considerably better opportunities for concluding sustainability agreements than smaller ones. In addition, the notions of 15% and 30% market share, also belong to the domain of Art. 101 TFEU and are foreign to Art. 210a. Among the derogations from Art. 101 TFEU in the CMO Regulation, Art. 210 on inter-branch organisations is the only one to require a graduated assessment of restriction of elimination of competition in respect to a substantial proportion of the products in question. This is not the case for Art. 152 (on producer organisations), Art. 209 (on other associations of farmers) and Art. 210a (on sustainability agreements). Art. 210 imposes a considerably stricter and gradual regime as regards elimination of competition, more akin to Art. 101 TFEU, while the other three articles

[1] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13305-Sustainability-agreements-in-agriculture-guidelines-on-antitrust-derogation_en

[2] Deconinck, K., 2021. Concentration and market power in the food chain. OECD Food, Agriculture and Fisheries Papers, No. 151. Paris, OECD Publishing. http://dx.doi.org/10.1787/3151e4ca-en

[3] Sustainability agreements in agriculture. Horizontal and vertical agreements in agriculture for the benefit of nature, the environment, the climate, animal welfare and the earning capacity of farmers. Wageningen Environmental Research, report 3239. https://doi.org/10.18174/590740

require a binary assessment (is competition excluded or not). As long as competition continues to exist on other characteristics, e.g. product quality, there is no exclusion of competition.

We agree with the statement in point 168 as regards endangering the objectives of Art. 39 TFEU that reasonable prices for consumers should not be understood as referring to the lowest price possible. However, we do not agree with point 166, which states that prices for consumers are not allowed to increase substantially due to a sustainability agreement. Improved animal welfare in most cases inevitably requires higher prices for consumers. Reasonable prices should take into account the costs of animal welfare and other sustainability goals, and consumer prices which do not cover the costs of sustainability are in fact unreasonable. The logic of point 166 and the example given is therefore flawed.

Furthermore, we do not agree with the statement 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" (point 106). Sustainability agreements are by nature largely domestic agreements, and thus will have an effect on the EU internal market to some extent by definition. It seems to be implied that only minor agreements with small impact will be acceptable. This would imply that only small steps can be set towards sustainable, more animal-welfare friendly agriculture. In the light of the urgent need for a transition to sustainable agriculture, the proposed limitations are too restrictive. The statement in point 106 needs to be corrected accordingly.

Detailed comments, suggestions and proposals for improvement of the guidelines are provided in the annexed pdf file.

Main issues

1. Compensation of farmers

Sustainability agreements should not leave room for greenwashing. A price premium should be limited to the extra costs or income lost by the farmers. However, the remuneration should cover those costs. A calculation based on averages will be insufficient for part of the farmers concerned: for some the costs will be somewhat higher, and for others somewhat lower than the average. This will be a disincentive for participation.

We therefore propose to include in the guidelines that the cost calculation may include an incentive for farmers of maximally 20% of the extra costs or income lost. Such a margin is already permitted under the Guidelines for State aid in the agricultural and forestry sectors and in rural areas (C(2022)9120 final, points 430, 434 and 555)[4] and similar flexibility exists in the Common Agricultural Policy for eco-schemes (Art. 31(7)(a) of Regulation 2021/2115).

Therefore we propose to **insert an additional sentence in point 116**, building on the Guidelines for state aid in the agricultural and forestry sectors and in rural areas, as follows: "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 extra costs and income lost due to sustainability agreements, an incentive payment may be given. This payment may not exceed 20 % of the compensation." This is in line with the logic

[4] Point 555 reads: "The eligible costs can be calculated either: (a) as a compensation to beneficiaries for all or part of the additional costs and income foregone resulting from the commitments made. Where necessary, it may also cover transaction costs to a value of up to 20 % of the aid premium paid for the forest-environment commitments. The aid may cover collective schemes and result-based payments schemes, such as carbon farming schemes, to encourage beneficiaries to deliver a significant enhancement of the quality of the environment at a larger scale or in a measurable way. In addition to the compensation, an incentive payment, which may not exceed 20 % of the compensation, may be given; […]"

developed in point 116 of the draft guidelines for Art. 210a, which caters for an incentive in the case of investments.[5]

2. Involvement of parties further downstream

Points 28, 35 and 36 rule out the participation of processors downstream the chain in sustainability agreements for products not listed in Annex I TFEU.

Point 28 under (c) says "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".

Does this imply that exclusively those processors may participate in sustainability agreements that themselves process agricultural products listed in Annex I, while excluding processors further down the line? If yes, where is the legal basis for this limitation in Art. 210a?

Downstream processors who wish to contribute in sustainability agreements and co-finance the price premium for farmers should not be excluded as they are vital to the production process. This is a limitation which substantially hinders the transition to sustainable agriculture.

Therefore we ask to **amend point 28 under (c) as follows**: "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."

Consequently, **we ask point 35 to be amended as follows**: "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."

We ask to delete point 36 and its four examples.

3. Consumer prices

The required transition to sustainable agriculture will only be possible if the extra costs incurred from sustainable production may for a significant part be passed on to the consumers. It is therefore of critical importance that sustainability agreements are allowed to result in higher prices for consumers, even if many consumers would prefer to continue purchasing cheaper products which are not sustainable. The guidelines for Art. 210a should not forbid this. The draft guidelines are ambivalent in this respect.

Point 98 supports the need for a price premium agreement resulting in higher costs for consumers. Points 173 to 176, however, state that "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

[5] Quote from point 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. 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."

and for which there is substantial consumer demand". This re-introduces the willingness-to-pay criterion from Art. 101 TFEU, contrary to Art. 210a which was intended to derogate from Art. 101 TFEU. Consumer demand is not a proper criterion in this respect.

It should be noted that the formula concerning the 'competition being excluded' is found only in Art. 152(1c), Art. 209(1) and Art. 210a(7). It refers to a marginal test, which – as the EC itself confirms in point 172 - should be invoked only exceptionally ("the threshold for exclusion of competition should be high"). The wording is very different from that in Art. 210(3), which defines a set of criteria to assess whether agreements create discrimination or eliminate competition in respect of a substantial proportion of the products in question.[6] The restrictions in Art. 210 for inter-branch organisations have been set by the co-legislators at a stricter level than for Art. 152 (producer organisations), Art. 209 (other associations of farmers) and Art. 210a (sustainability initiatives). A graded approach on exclusion of competition is appropriate under Art. 210, but not Art. 210a for which a binary criterion applies (is competition excluded or not). As long as residual competition remains, e.g. for product quality, competition is not excluded, even if it is reduced.

The statements in points 173 to 176 conflict with the message of point 171 that "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)".

Therefore we ask to delete points 173 to 176.

We also ask to **clarify in point 168 that reasonable prices may include sustainability costs**, e.g. as follows: "Similarly, the 'reasonable prices' objective should not be understood as referring to the lowest price possible. Indeed, 'reasonable prices' should include the costs of sustainable, animal-welfare friendly production".

4. Partitioning of markets

We do not agree with the statement made in point 106 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". This logic is echoed in points 188 and 119, even if differentiating between ex-ante and ex-post assessment.

Sustainability agreements are by nature largely domestic agreements, and thus will always impact the EU internal market to some extent. The logic of the EC seems to be that this implies that only minor agreements with small impact will be acceptable. This would imply that only very small steps can be set towards sustainable agriculture. The proposed limitations are too restrictive in the light of the urgent need for a transition to sustainable, more animal-welfare friendly agriculture.

Additionally, the European Court of Justice has decided that restrictions of the internal market to the benefit of the environment are acceptable, as long as they are necessary and justified (ECLI:EU:C:2008:717, point 57).

[6] 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;
b. may affect the sound operation of the market organisation;
c. may create distortions of competition which are not essential to achieving the objectives of the CAP pursued by the interbranch organisation activity;
d. entail the fixing of prices or the fixing of quotas;
may create discrimination or eliminate competition in respect of a substantial proportion of the products in question.

Above all, however, the co-legislators decided that this criterion should not apply to Art. 210a. It is present explicitly in Art. 210(4), which states that "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; […]". Such a statement has not been included in Art. 210a. The co-legislators could have decided to include the same provision in Art. 210a, but they decided not to do so and follow the example of Art. 209, in which that provision is not present either. It is not appropriate for the EC to introduce a provision in the guidelines for Art. 210a which the co-legislators consciously chose to leave out.

Therefore we ask to delete points 106, 118 and 119.

5. Market share

As argued above in the Summary, the notions of 15% and 30% market share are foreign to Art. 210a as decided by the co-legislators. The market share principle belongs to the domain of Art. 101 TFEU, to which Art. 210a provides a derogation. The principle is echoed in Art. 210 of the CMO Regulation, which prohibits to "eliminate competition in respect of a substantial proportion of the products in question", but not in Art. 210a (nor in Art. 152 or Art. 209 of the CMO Regulation). Moreover, the proposed approach as regards market share as a criterion is discriminatory and favours large over smaller Member States.

We therefore disagree with the introduction of the market share criterion as a matter of principle (the co-legislators decided that a graded market share approach should not apply to Art. 210a) and for reasons of reduction of the *effet utile* of Art. 210a, which the EC should promote and not reduce. In case the EC would nevertheless decide to maintain the market share criterion, it should explicitly apply at EU and not Member State level.

Therefore we request the EC to delete points 177 to 179.

6. Endangering the objectives of Art. 39 TFEU

As already stated in the summary of this paper, we agree with the statement in point 168 as regards endangering the objectives of Art. 39 TFEU that concerning reasonable prices for consumers should not be understood as referring to the lowest price possible.

However, we disagree with the point 166, the example in which states that prices for consumers are not allowed to increase substantially, because this would endanger the objective of Art. 39 TFEU as regards reasonable prices for consumers. Reasonable prices are prices that reflect economic reality and can be reasoned, i.e. explained rationally as the correct outcome of price setting processes. A key impediment to the transition of agriculture to sustainability is the notion that prices should not be permitted to increase for reasons of sustainability. If this is the final line of the Commission in the guidelines on Art. 210a, it will render Art. 210a useless. This would seriously endanger the intended effect of Art. 210a.

Increased sustainability almost always inevitably requires higher prices for consumers. This is what the deadlock in the sustainability transition in agriculture is all about. Reasonable prices should take into account the costs of sustainability and consumer prices which do not cover the costs of sustainability are in fact unreasonable.

Therefore **we request the EC to clarify in point 168 that reasonable prices may include sustainability costs**, e.g. as follows: "Similarly, the 'reasonable prices' objective should not be

understood as referring to the lowest price possible. Indeed, 'reasonable prices' should include the costs of sustainable production, since omitting these may be to the benefit of the individual consumer, but is unreasonable from the perspective of society".

We suggest to **delete the example in point 166**, or at least adapt it as follows for clarifying that prices increases for reason of sustainability are acceptable, unless this seriously impacts on consumer prices: "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 severe shortage of inputs for processors that use the grains, and this instability leads to ~~a~~an multiplication of~~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."

Other issues

- Paragraph 5.5, Example 2: We cannot support the logic in the second example as regards the **commitment by the slaughterhouse to slaughter only animals reared in line with the sustainability standard**. The draft text states that separate slaughtering lines would come with 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."

  This is not in line with reality. Having separate production (or slaughtering) lines is very costly and an important reason why sustainability initiatives fail to survive. This passage will block the indispensable possibility to raise the level of sustainability or animal welfare.

  We therefore kindly request deletion of the following passage:

  "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."

- Annex A: the **Flowchart** should be adapted in line with the comments above. In particular, the question "Does the agreement lead to a restriction in competition?" erroneously leads to the conclusion that in such a case Art. 210a will not apply. This is in contradiction with Art. 210a, which states that this will be only the case if competition is excluded. It also contradicts several of the points in the main text, e.g. point 135 and 171.

  The question should therefore be deleted.

- Annex E: in Section 2, **Example 2** closely resembles the agro-environment-climate schemes of the second CAP pillar through agricultural collectives of farmers. It is not clear why this would be considered inappropriate under Art. 210a, while permitted and promoted by the co-legislator under the CAP.

Example 2 should be deleted.

- Annex E: in Section 2, the same applies to **Example 3**, but now in relation to animal welfare. Reducing the number of pigs is an appropriate method to enhance animal welfare. It is not clear why this would be considered inappropriate under Art. 210a, while permitted and promoted by the co-legislator under the CAP.

  Example 3 should be deleted.