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Directorate-General for Agriculture and Rural Development – Unit E1
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Date : April 21, 2023
Regarding : Consultation on draft sustainability guidelines in agriculture – Contribution from
Fresh Produce Centre / GroentenFruit Huis

Introduction and summary

Fresh Produce Centre / GroentenFruit Huis is an industry body from the Netherlands that represents the interests of fruit- and vegetables growers, their Producer Organisations, traders and wholesalers. The members of Fresh Produce Centre account for over 80% of total sales of vegetables and fruit in the Netherlands.¹ Our number in EU- transparency register is 824033130961-66.

We are grateful to the European Commission ("Commission") for this opportunity to contribute to the draft Commission Guidelines on the application of the derogation from Article 101 TFEU for sustainability initiatives of agricultural producers pursuant to Article 210(a) of Regulation 1308/2013 (the "**Guidelines**").

We believe that guidelines are vital to enable all stakeholders in the agri-food supply chain to effectively use the opportunities stemming from Article 210a of Regulation 1308/2013 establishing a common organisation of the markets in agricultural products ("**CMO**") and create even more sustainable alternatives for society.

Please note that there are six topics in the Guidelines that in our opinion need addressing to ensure the effectiveness of Article 210a CMO while at the same time creating the legal certainty that is pivotal for the co-operation needed for developing sustainability initiatives:

1. the proposed market share criteria;
2. the objectives of Article 39 TFEU;
3. the relation between consumer preferences and a fair price;
4. the economic incentive for growers;
5. the participation of processors in the supply chain; and
6. the potential effect on the free movement of goods.

Hereafter we explain in more detail each of these six topics.

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1. Market share criteria

In the Guidelines, the Commission considers market shares as an indicator for the potential restriction of competition.² Where the parties to a sustainability initiative exceed the combined market share of 15% (horizontal initiatives) or 30% (vertical initiatives), the initiative should be checked for the possibility to restrict competition.

In our view, there is no place for introducing market share criteria for the application of Article 210a CMO.³ The first reason is legal. The co-legislators – the European Parliament and the Council – did not (intend to) incorporate the market share criteria. We therefore believe that the Commission should not introduce such criteria via guidelines.

The second reason is practical. Introducing a market share threshold creates legal uncertainty, since a case-by-case assessment is required when the thresholds are exceeded. This is the exact opposite of what our industry needs in order to swiftly implement all kinds of above legal/mandatory sustainability initiatives. It will deter market participants from starting or joining, while initiatives with broad market coverage should actually be promoted in order to come to a swift implementation of all kinds of above legal/mandatory sustainability initiatives. Consequently, the mention of market shares – also if they are supposed to be regarded as a safe harbour – would not be helpful to fulfil the objectives of Article 210a CMO.

Article 210a CMO should be treated like its counterparts Article 152 and Article 209 CMO. Under Article 210a CMO, the initiative either completely excludes competition or it does not. Market shares of the parties concerned should not be conclusive.

Furthermore, a market share threshold will result in discriminatory outcomes between Member States. The vast majority of sustainability initiatives is at least initially likely to be national in scope. We expect this to also be the case in the foreseeable future due to market characteristics. In that case, the most narrow relevant geographical market will in most cases be considered to be national in scope. Consequently, growers in a relatively small territory (e.g. The Netherlands) will much quicker exceed the market share threshold than those in a larger territory (e.g. France), while the volume of produce might be the same. This would mean that growers in smaller Member States could never achieve the same volume and economies of scale while benefiting from the legal certainty provided by the safe harbour with relatively low market shares (e.g. 15 - 30%) introduced in the Guidelines. Since legal certainty is vital for the introduction and success of sustainability initiatives, growers in larger Member States will be in a significantly better position. This is unfair and demotivating to growers and farmers in Member States with small territories.

Therefore, in order to ensure the effectiveness of Article 210a CMO in all Member States (be it large or small), we kindly suggest the Commission to not apply any market share thresholds in the competitive assessment. This will be to the benefit of the goals of Article 210a CMO, and the broader sustainability goals within the EU.

To conclude the above, we kindly suggest leaving out the market criteria from the Guidelines. Should the Commission believe that market shares are a useful tool, we believe the thresholds should reflect

² Par. 178 and 179, and footnote 31 of the draft Guidelines.

³ Regulation (EU) No 1308/2013 of the European Parliament and the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulation (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007.



that the exception of Article 210a(7) CMO exclusively applies in cases where competition is “excluded” (and not merely restricted).

2. The objectives of Article 39 TFEU

Article 39 TFEU aims – amongst others – to assure the availability of supplies and ensure reasonable prices. We agree with the Commission on paragraph 168 of the Guidelines. A reduction in the availability of less sustainable versions of an agricultural product does not jeopardise the objective of Article 39 TFEU. We also agree that a reasonable price is not equal to the lowest price possible. However, we would kindly yet firmly suggest the Commission to reconsider the example in paragraph 166 of the Guidelines.

The transition to more sustainable agriculture will inevitably result at least temporarily in higher prices for consumers. However, as long as the price increase is a direct consequence of the costs necessary in the process of reaching and maintaining one or more above legal sustainability goals/targets, the resulting price is still “reasonable”.

In this light, we kindly ask the Commission to consider clarifying the example in para. 166 in order to ensure sufficient legal certainty for growers and other producers. Only where a lasting *severe* shortage might result from a sustainability initiative, and the price of the product increases *significantly and for the long term* (i.e. non-transitory) solely as a result of the sustainability initiative, then the objectives of Article 39 TFEU might be in jeopardy. See the following suggestions:

“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 lasting severe shortage of inputs for processors that use the grains, and this instability leads to a very significant and long term 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.”

Furthermore, growers and other producers, producer organisations participating in sustainability initiatives should have (legal) certainty regarding the application of Article 39 TFEU to the sustainability initiatives concerned. If an initiative falls within the scope of Article 210a CMO paragraphs 1 to 3, the initiative should be guaranteed to benefit from the exclusion of Article 210a CMO. This, even if the initiative jeopardises any of the goals of Article 39 TFEU. To provide growers with this certainty, we kindly suggest the Commission to include this in the Guidelines. In concrete terms this would mean that if a sustainability initiative that benefits from the exclusion in Article 210a CMO jeopardises the objectives set out in Article 39 TFEU, *only* the remedies listed in Article 210a CMO paragraph 7 can be applied by national competition authorities.



3. The relation between consumer preferences and a fair price

As regards consumer preferences, we would like to add on the objective of a reasonable price. The production of more sustainable agricultural products will go hand in hand with extra costs. Therefore – considering the razor thin margins in the agriculture industry – the transition to more sustainable agriculture will lead to higher prices for consumers.⁴ We appreciate that some consumers may prefer the non-sustainable yet cheaper option over the sustainable yet more expensive version. However, this should not stand in the way of concluding sustainability initiative under Article 210a CMO.

We believe that the Guidelines currently do not provide for sufficient room for sustainability initiatives in this respect. For example, paragraphs 173 and 176 indicate the possibility of finding an exclusion of competition if a sustainability initiative excludes food products with a lower sustainability standard but for which there is substantial consumer demand. Here, the demand of consumers is effectively introduced as a relevant factor in terms of terms as pricing. We appreciate this is relevant for the regular assessment under Article 101 TFEU, however, we believe this should not be applied in the assessment under Article 210a CMO. If the willingness to pay for consumers would be included in the assessment, this would be counterproductive for achieving the aims of Article 210a CMO. With this, the usefulness of Article 210a CMO would be reduced substantially.

As is stated in the Guidelines, the threshold for exclusion of competition should be high.⁵ Where residual competition remain – e.g. from less sustainable alternatives – it should be concluded that competition is not excluded. Therefore, we kindly suggest that the Commission emphasises in the Guidelines that higher prices especially in the cases were they will be of temporary nature do not stand in the way of sustainable initiatives. In addition, we believe it is vital for the effectiveness of Article 210a CMO that the Guidelines clarify that a reasonable price includes the long run costs of permanent sustainable production.

4. A financial incentive for growers/producers, producer organisations

Further to our previous points regarding a fair price, we emphasise that sustainability initiatives should not lead to excessive prices. In the first place, extra costs of the growers (or other parties in the supply chain) should be adequately covered.

Additionally, to ensure that growers are sufficiently (i.e. both in numbers and in terms of long term commitment) motivated to transition to more sustainable production, it must be guaranteed that participants in the initiative are also fairly compensated for the increased risk caused by the initiative (similar to the 'strawberry' example in the Guidelines). We believe that a financial incentive of up to 20% of the added sustainability costs and income forgone is appropriate. This is in line with the margin under the Guidelines for State aid⁶ and in the Common Agricultural Policy for Eco-schemes.⁷ This is also in line with the example mentioned in paragraph 116 of the draft Guidelines.

⁴ Unless the extra costs are subsidised.

⁵ Paragraph 172 of the draft Guidelines.

⁶ Guidelines for State aid in the agricultural and forestry sectors and in rural areas (2022/C 485/01).

⁷ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulation (EU) No 1305/2013 and (EU) No 1307/2013.



5. The participation of processors down the chain

The Guidelines seem to suggest that certain processors in the supply chain are left out. In the Guidelines, reference is only made to processors at the processing level.⁸ We believe that the application of Article 210a CMO should not be limited in this scope, meaning that it should also cover the processors of derivative products. Indeed, the wording of Article 210a CMO contains no indication as to such a limitation. Excluding processors further down the supply chain will prevent the full use of Article 210a CMO's capacity and hinder the ability to achieve the sustainability objectives of this provision. That is why we would like to request to amend paragraphs 28, 35 and 36 of the draft Guidelines accordingly.

6. The potential effect on the free movement of goods.

Paragraph 106 of the Guidelines states that *"provisions restricting the free movement of goods or services and thus partitioning the EU internal market are not considered as indispensable"*. We believe this statement is an oversimplification and could benefit from more nuanced wording.

Sustainability initiatives could have the effect of restricting the free movement of goods between EU Member States to some extent. This, because many sustainability initiatives will likely be national in scope (at least for the foreseeable future), such as an initiative between national growers and national supermarkets. The current wording of paragraph 106 would effectively exclude such national initiatives from the scope of Article 210a CMO. The only solution would be to significantly limit the scope and size of an initiative (in order to remove the possibility of affecting interstate trade in the first place). This runs counter to the objective of Article 210a CMO.

We also believe that the co-legislators did not intend to make the effect on the internal market a relevant factor in the application of Article 210a CMO. This is confirmed by the absence of any reference to the internal market in Article 210a CMO. One could compare this to Article 210(4) CMO, where the legislator did explicitly consider the partitioning of markets a ground for rendering initiatives incompatible with EU law.

But even if a sustainability initiative would affect the free movement of goods, such restriction is acceptable as long as it is outweighed by the environmental benefits. This has been confirmed by the European Court of Justice in various cases.⁹ Consequently, the mere fact that there is a (potential or temporary) restriction of the free movement of goods cannot mean that the sustainability initiative is *by definition* not indispensable within the meaning of Article 210a CMO. We therefore kindly suggest to leave out or rephrase paragraphs 106, 118 and 199 of the draft Guidelines.

Last and not least please note that we truly appreciate the inclusion of various examples in the Guidelines that provide the view of the Commission's position in respect of the practical application of Article 210a CMO. We strongly believe that using as much real examples (such as the BKA has published regarding raw milk¹⁰) as possible would provide the most valuable insights into the analysis conducted by the Commission regarding the practical application of Article 210a CMO. Given the fact that our members would be helped by insights in real cases while conducting any self-assessment regarding Article 210a CMO we would like to suggest to consider the following measure.

⁸ Paragraphs 28, 35 and 36 of the draft Guidelines.

⁹ ECJ 7 February 1985, ECLI:EU:C:1985:59, par. 15; ECJ 20 September 1988, ECLI:EU:C:1988:421, par. 8 and 9; ECJ 13 September 2005, ECLI:EU:C:2005:542, par. 41; ECJ 11 December 2008, ECLI:EU:C:2008:717, par. 57.

¹⁰ www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/29_03_2022_Milch_Nachhaltigkeit.html



Please consider adjusting the Guidelines in such a manner that the Commission will be able to publish all relevant information of a real case regarding an Article 210a CMO assessment i.e. publishing the non-confidential full analysis conducted by the Commission under Article 210a CMO + the information provided by the participants to the Commission following their explicit consent.

On behalf of Fresh Produce Centre / GroentenFruit Huis,

A handwritten signature in blue ink, consisting of a large 'R' followed by a stylized 'S' and a small dot.

Richard Schouten
Director Public Affairs