

QJ(23)02594[2] - PPA/na

Brussels, 21 April 2023

**Copa-Cogeca contribution to the European Commission public consultation
on
Sustainability agreements in agriculture –Draft guidelines on antitrust
exclusion**

Summary of main requests

1. Quality labels should be excluded given that are already regulated under the single CMO;
2. Farmers need to be part of sustainability agreements;
3. Vertical agreements under art. 210a should follow the Unfair Trading Practices Directive (UTP);
4. Producers organizations (POs) and associations of producers organizations (APOs) notably cooperatives, have a key role;
5. Higher prices are a key element to be able to meet higher sustainability standards;
6. Plant health and spread of invasive alien species should be included in the sustainability objectives.

• **Competition Policy supporting the EU Green Deal**

In order to deliver on the European Green Deal objectives, including those set out in the Farm to Fork Strategy, responsibility needs to be shared among all actors across the entire food chain. Achieving ambitious goals requires synergies between sectors and players in the value chains. In this context, cooperation among farmers is crucial to reach economic, environmental and social goals. This cooperation allows for the implementation of innovative and sustainable actions that foster job creation and contribute to vibrant rural areas benefiting everybody, from farmers to agri-cooperatives, from consumers to the value chain as a whole.

Moreover, cooperation among farmers and within the whole agri-food chain can be in place to promote sustainability but it should also ensure a fair distribution of the added value created by sustainable products and actions. Sustainability and competition often go hand in hand. Just as competition can stimulate innovation in the form of new or improved products and processes, so can it stimulate sustainability.

Sustainability agreements need to put at the center the key role of farmers, which may use collective action and horizontal cooperation to achieve common interests related to their agricultural business.

The ability for producers/traders, operating through a co-operative or PO, to collaborate on matters conferring a genuine sustainability benefit is currently allowed under EU legislation and many different kinds of both vertical and horizontal sustainable agreements are already a feature of the EU market. However, formal express clarification on sustainability agreements is a positive and useful development.

Hence, the European Commission initiative to end the confusion that currently reigns over the limits of producer cooperation in the agricultural sector is certainly welcome. **Such a clarification ought to dispel the ambiguities and favour clear and workable rules over overly wrought nuances which are mainly of academic consequence.**

Copa-Cogeca deems that a feasible approach aimed at effectively reconciling the CAP legislation and competition rules should recognize the primacy of Common Agriculture Policies (CAP) objectives over those of competition policy as stipulated by the European Court of Justice. This is crucial bearing in mind that national authorities will apply this new regulation. Such clarification shall be deemed to ensure harmonized implementation.

This is in line with the objectives of the CAP set forth by the Article 39 of the Treaty on the Functioning of the European Union (TFEU), which remains even more central in the current geopolitical context where ensuring the availability and access to food for consumers at reasonable prices are objectives that cannot be taken for granted.

The CAP objective confirms the need to:

- (a) to **increase agricultural productivity by promoting technical progress** and by ensuring the rational development of agricultural production and the optimum use 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.

These objectives need to be kept in mind also by the guidelines published by the Commission for consultation.

In this respect, Copa-Cogeca would first like to emphasize that the new guidelines should be considered as an additional element of flexibility and leniency concerning the

application of competition rules to the agri-food sector if compared with the current legal framework regarding both competition and CAP rules.

You will find below some more detailed comments on the Draft guidelines on antitrust exclusion referred to the respective chapters/paragraph.

➤ **Legal context of the exclusion (chapter 1.2)**

- **Sustainability agreements should not include quality labels because they are already regulated in the Single CMO:** Copa-Cogeca appreciates the Commission's observation under paragraph 17 of the guidelines and concurs that those agreements falling under articles 152, 209 and 210 of the CMO Regulation 1308/2013 may escape the application of article 101 TFEU, even though they do not fulfil all the conditions enshrined in article 210a of Regulation n. 1308/2010.

➤ **Personal scope of Article 210a (chapter 2.2)**

- **Farmers need to be part of sustainability agreements:** Copa-Cogeca appreciates that "producers" are a necessary part of sustainability agreements and how the Commission duly remarks such a concept under paragraphs 29 and 33 of the draft guidelines. The necessary involvement of producers is not only crucial to deliver effective results in terms of sustainability but becomes key to avoid cases of sustainability agreements implemented by other players against the will or the interest of producers, as duly explained by example 1 following paragraph 33.
- **Vertical agreements under art. 210a should follow the Unfair Trading Practices Directive (UTP)¹:** Copa-Cogeca deems that vertical agreements involving different levels of the food supply chain have a distinguished potential to respect the conditions set forth by the guidelines, delivering good results in the public interest. Such agreements are indeed well suited to achieve sustainability objectives through the involvement of different players located at different steps of the chain, passing on the benefits to the final consumers.
- ✓ Having said that, Copa-Cogeca urges the Commission to ensure an adequate protection of producers involved in the implementation of sustainability agreement with players enjoying considerably more market and bargaining power than producers. In this respect, although not strictly a matter of competition policy, the Commission should refer to the necessity, for processors and distributors, of

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L0633>

respecting the UTP legislation within the single sustainability agreements regulating the relationship between all the players involved. **Paragraph 27 should be modified accordingly.**

- ✓ Sustainability agreements are indeed meant to benefit from a specific exclusion from competition rules provided they can deliver sustainability results in the general interest and should not, by any reason, become the venue where imbalances within the food chain are exploited to the detriment of producers.

Proposal for amendment -Par. 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. ***In the case of vertical agreements, given that within the agricultural and food supply chain, significant imbalances in bargaining power between suppliers and buyers of agricultural and food products are a common occurrence, with the aim to achieve the objectives set by art. 210a, particular attention should be applied to the application of Directive 2019/633 of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.***

- **Producers organizations (POs) and associations of producers organizations (APOs) notably cooperatives, have a key role:** The express mention of POs and APOs among the producers to be involved in developing sustainability agreements is also welcome by Copa-Cogeca (par.29). It is indeed worth noting that organized systems as POs and APOs, notably cooperatives, seem very well suited to bring about an effective contribution to possible sustainability agreements. That is especially true in terms of: i) reductions of transaction's cost related to the involvement and coordination of producers in the first place; ii) effective control and supervision of the producer's action aimed at sustainability objectives during the implementation of the agreement iii) enhanced legal predictability and legal certainty.
- **Co-operatives as a collaboration.** In paragraph 21 an agricultural cooperative can be an undertaking for the purposes of the guidelines. In paragraph 24, cooperatives, as "association of undertakings" can be one of two or more parties to the sustainability agreement. It would be relevant to clarify that organized systems as POs and APOs, notably cooperatives, could stand in place of a contractual 'sustainability' agreement (made up of shareholders being either all producers or a combination of producers and other corporate operators). **The Guidelines (par. 29) should be consequently amended.**
- In a cooperative the constitutional and contractual elements (between - and depending - member and member, member and co-op, and co-op and

external/governmental agencies) creates a strong platform for governance and compliance. A contractual obligation such as membership of a co-operative can go some way towards ensuring parties commit to and deliver on their respective obligations (pertaining to sustainability and indeed other matters) Providing producers with long term stability and guidelines is essential in enabling sustainability investments.

Proposal for amendment -Par. 29:

Parties to sustainability agreements may be individual operators and associations or other collective entities involving producers, **agriculture cooperatives** 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').

- **Higher prices are a key element to be able to meet higher sustainability standards (see also Section 4, Restriction of competition):** The diversity of EU food production, both in terms of actors and methods of production, constitutes one of its main strengths and is central to its great resilience capacity. However, to preserve this diversity and economic and social sustainability, it is essential to ensure that the costs and benefits of all environmental sustainability measures are fairly distributed among all actors of the food chain, paying specific attention to the agricultural sector. An enhanced sustainability might be related to price's increase or reduction of output that are inherent consequences of pursuing elevated standards of sustainability, as long as they will prove to be decisive to the attainment of the sustainability standard pursued. The Guidelines and specifically par. 43 should be adapted accordingly in view to ensure a smooth application by farmers of the possibility provided by art. 210a.

Proposal for amendment -Par.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). ***On the contrary an enhanced sustainability might be related to price's increase or reduction of output that are inherent consequences of pursuing elevated standards of sustainability, as long as they will prove to be decisive to the attainment of the sustainability standard pursued.***

➤ **Products covered by Article 210a (section 2.3)**

- **Application exclusively to products listed in annex I to the TFEU** The central role of producers and producers organizations is once more underlined (pars. 34-36) by limiting the application of the guidelines only to the products listed in annex I to the TFEU. This can be useful to ensure a solid correspondence between the exclusion guaranteed to sustainability agreements under article 101 TFEU and the scope of application of the CMO general legal framework.
- Considering vertical agreements are covered by article 210a, sustainability agreements are likely to concern products listed in annex I upstream of the food supply chain but also agri-foods downstream of the food supply chain. The impact of this limitation to Annex I products should be assessed in relation to the new Common Agriculture Policy post 2027 in view of adapting the exclusion, should it appear relevant. **Paragraph 35 should be modified accordingly.**

Proposal for amendment -Par. 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 product). ***The impact of this limitation should be assessed in relation to the new Common Agriculture Policy post 2027 in view of adapting the exclusion, should it appear relevant.***

➤ **Sustainability objectives covered by Article 210a (section 3.1)**

- **Plant health and spread of invasive alien species should be included in the sustainability objectives:** the phytosanitary rules covered under the Plant Health Law (Regulation 2016/2031) should be included in line with other EU legislation where plant health and animal health are treated in combination for example: Official Controls (Reg. 2017/625), Internal Market Expenditures (Reg. 2021/690), Strategic Plans (Reg. 2021/2115) and on financing, management and monitoring of

the CAP (Reg. 2021/2116). Such a clarification would be in line with the coverage in Art. 210a of landscape, biodiversity and ecosystem protection (point (a) of paragraph 3) and reduction of pesticide use (point (b) of paragraph 3). The introduction of new pests and diseases generally leads to a need for additional use of plant protection products. Therefore, sustainability agreements targeting the prevention of the entry, establishment and spread of new pests and diseases should be recognized in the guidelines as fulfilling the requirements of Art. 210a. The entry, establishment and spread of new regulated pests may severely damage the landscape, biodiversity and ecosystems (new pests of trees and wild flora). For similar reasons as above, we recommend clarifying in the guidelines that sustainability agreements aimed at preventing the entry, establishment and spread of invasive alien species, covered under Regulation 1143/2014, are compliant with Article 210a in the light of protection of biodiversity and ecosystems. These two clarifications would be specifically important as examples for the production and trade of flowers and pot plants, for the sector to be able to move forward with sustainability arrangements, other than pesticide use reduction alone.

- All the above-mentioned regulation contains prominent examples of sustainability practices and objectives that should be mentioned in section 3.1 of the guidelines with a dedicated paragraph following current paragraph 39 or at least in the examples listed just after paragraph 39. **Paragraph 39 should be modified accordingly.**

Proposal for amendment -Par. 39:

The examples of environmental objectives listed in Article 210a(3), point (a), are illustrative and may involve different types and variations. For example, ***the introduction of new pests and diseases generally leads to a need for additional use of plant protection products., therefore, sustainability agreements targeting the prevention of the entry, establishment and spread of new pests may constitute a sustainability objective covered by Article 210a. Additionally,*** 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) **also** may constitute a sustainability objective covered by Article 210a.

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

- **Results should also be observable and describable:** Copa-Cogeca believe that the observation of the Commission under paragraph 52 is sharable insofar it encourages to undertake initiatives able to achieve sustainability results that are not-only measurable in quantitative terms, but also observable and describable under a qualitative perspective. In some cases, due to the constant evolution of knowledge, measurable results can be unavailable, therefore environmental general studies led by third parties could provide for proper evidence.
- It is important to keep in mind that, especially in the first period of application of the new guidelines, sustainability agreements should be encouraged and supported if they deliver concrete results that cannot always be measured or quantified, but certainly observed and appreciated embracing the general perspective enshrined in the CAP legislation.
- **Value of regional verified standards as reference-standard:** In order to benefit from article 210a, the sustainability standards implemented should be higher than what is mandated by EU or national legislation. Copa-Cogeca would like to remind the Commission that there might be regional standards introduced by local regulations within Member States (regional or interregional) that often aim at increasing national standards to guarantee the quality of local production also in terms of sustainability. In such cases, especially when the standards are verified by third and independent bodies, regional or local standard that are certain and duly codified might become useful reference points to prove a given EU or national standard has been exceeded, thereby helping the diffusion of sustainability agreements compliant with the new exclusion under article 210a and ensuring more legal predictability as well.
- Article 210a is clear about that sustainability agreements are those aimed “to apply a sustainability standard higher than mandated by Union or national law”. Nevertheless, the impact of this restriction should be assessed in the context of the CAP post 2027. EU legislation is requiring by farmers and agri-cooperatives increasingly higher environment and sustainability standards which require important investments and in certain cases cannot be reached without appropriate means. Cooperation can produce positive externality that permit to reach high standards of sustainability. It is unfortunate to deprive producers from the benefits of Article 210 bis exclusion to conclude agreements aimed to reach legal standards they cannot reach alone without worsening their income.

➤ **Restriction of competition (Section 4)**

- **Higher prices are a key element to be able to meet higher sustainability standards:** Regarding the restrictions of competitions possibly linked to sustainability agreements under section 4, Copa-Cogeca point out that an enhanced sustainability might be related to price's increase or reduction of output that are inherent consequences of pursuing elevated standards of sustainability, as long as they will prove to be decisive to the attainment of the sustainability standard pursued.
- At the same time, it is worth noting that sustainability agreements will likely be able to improve choice for the final consumer (at least by improving products environmental record) and, in some cases, might boost innovation and event investment in R&D.
- It is therefore necessary to point out that, when duly implemented, sustainability agreements will be exempted from the application of article 101 TFUE on specific and solid grounds which require and mandate the collaboration of producers in pursuing public interest objectives related to the green transition.

➤ **The indispensability of the restrictions of competition (Section 5.4.2)**

- As a preliminary remark, **the “indispensability test” assessed by competition authorities should not in practice deprive economic operators from benefits of article 210a exclusion.** The jurisdictional practices in the EU have very rarely admitted exemption conditions were reached by agreements under article 101§3 of the Treaty. Despite the conditions under 210a of CAP regulation are simpler than conditions under 101§3 TFUE (cf. draft guidelines, § 83), competition test under article 101 sets a concerning precedent for the Article 210a of CAP regulation to be implemented.
- **Flexible approach to duration and safe harbour:** the guidelines section regarding the duration of restrictions of competition linked to sustainability agreements sets forth some reasonable principles about the expected duration of a given agreement, raising the question “whether a shorter duration of the restriction would make it less likely (*or not*) to attain the sustainability standard”.
- It is worth noting that the sustainability agreements, especially during the first years of application of the new guidelines, will require a lot of preparation and investments of time and commitment to develop effective and sound agreements aimed at effectively increasing sustainability.

- Excessively limiting and too strictly reviewing the duration of such agreements could therefore disincentivize the implementation of sustainability agreements in the first place, hampering the potential of the new measure.
- **The Commission should recognise the need for a safe harbour for a number of years acknowledging the fact that operators need sufficient time to make a sustainability initiative work.** Thus, producers and the other parts involved would enjoy a minimum period allowed for the safe application of sustainability agreements under article 210a able to justify the initial effort and support the wider diffusion of the new measure in the initial period of application of the new guidelines. **Paragraph 117 should be amended accordingly as suggested above.**
- A “safe harbour” could also be considered when a sustainability agreement has been concluded under the aegis of a member state or public body.