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Remarks/Comments on Commission Guidelines on the application of the exclusion from Art. 101 TFEU for Sustainability Agreements of agricultural producers pursuant to Art. 210a of the Regulation 1308/2013 ("Guidelines")

I. General Remarks

- 1 ITW explicitly welcomes the new provision of Art. 210a CMO which opens the door for more legal certainty for sustainability agreements in the food sector. Cooperation of companies is of paramount importance to achieve sustainability goals. Comprehensible regulations and legal guidance are important to avoid any adverse effect of competition/antitrust rules to the achievement of such sustainability goals as described in the ICC Paper "When Chilling Contributes to Warning" (<https://iccwbo.org/news-publications/policies-reports/how-competition-policy-acts-as-a-barrier-to-climate-action/>). ITW is grateful for the possibility to submit comments to the Guidelines.

Please see our comments as follows:

- 2 The general concept of Art. 210a CMO of an exclusion of Art. 101 (1) TFEU is preferable as compared to an exemption within the meaning of Art. 101 (3) TFEU. Consequently, regarding the application of the exclusion one should clearly distinguish between Art. 210a CMO and Art. 101 (3) TFEU.



- 3 In para. 20 of the Guidelines it is clarified that only the Court of Justice of the European Union is competent to authoritatively interpret Art. 210a CMO. As a consequence, if a national authority would prohibit sustainability initiatives that claim to fulfil Art. 210a CMO and appeals the authorities' decision in front of a national court, the national court would have to submit the case for a preliminary ruling to the European Court of Justice. From a legal standpoint this is understood. However, for companies/cooperations involved, this system can lead to long procedures and periods of uncertainty. The guidelines should clarify that cooperations that the companies involved and/or their legal advisors have reviewed and found to be compatible with competition law can start operating while such proceedings are pending. The timing aspect is of great importance to the issue of sustainability. Proceedings should in no way delay the implementation of sustainability goals.
- 4 ITW embraces the clarification (para. 33 of the Guidelines) that sustainability agreements to be covered by Art. 210a CMO must have at least one agricultural producer as a party. In that context it is of importance that producers are actively involved in setting the sustainability standard. The mere requirement of a higher standard by food producers or retailers cannot fulfil Art. 210a CMO.
- 5 ITW particularly welcomes the clarification in para. 58 of the Guidelines. In fact, for certain species there is no minimal standard regarding space allowance in livestock farming (e.g. turkeys). It is important to clarify that any initiative which exceeds the *de facto* space allowance for such species can benefit from Art. 210a CMO if the other conditions are met.

II. Concept of Art. 210a CMO and burden of proof

- 6 The Guidelines correctly point out that the concept of indispensability in Art. 210a CMO is different to the one in Art. 101 (3) TFEU. This is the consequence of the fact that Art. 210a CMO excludes the application of Art. 101 (1) TFEU, whereas Art. 101 (3) TFEU is an exemption.



7 However, to the understanding of ITW the Guidelines fall short regarding the consequences of this differentiation. It is not only necessary to apply different indispensability standards regarding Art. 210a CMO as compared to Art. 101 (3) TFEU. The Guidelines should also clarify that in such cases where the question of indispensability following the assessment of all facts and arguments remains open (“*non-liqueur*”) Art. 210a CMO can be applied because in such cases the burden of proof is on the regulator not on the sustainability initiative.

8 In this respect we explicitly refer to the

*Opinion of the Advocate General Nils Wahl delivered on 6 April, 2017
in the case C-671/15.*

9 General Advocate Wahl in the mentioned case pointed out that a derogation/exemption from the application of competition law is more than an exception. As far as practices are established that are in line with the targets of the CMO but include restrictions of competition, those anticompetitive agreements must automatically be excluded from the application of the Art. 101 (1) TFEU.

10 General Advocate Wahl further pointed out, that this clarification is important as it has significant implications for both, methods used to examine the measures taken and for the burden of proving the (potentially) anticompetitive nature of those measures. For all exclusions of competition law in the CMO, including Art. 201a CMO, it is for the authority responsible for prosecuting anticompetitive behaviour to prove that the measures in question fall within the scope of the law, and to demonstrate that they have effects which restrict competition,

Opinion of the Advocate General Wahl C-671/15, Rn. 51 ff..

11 In its

ECJ, Decision of 14 November 2017, Case C-671/15, para. 38,



the Grand Chamber of the European Court of Justice incorporated the respective statements of the Advocate General Wahl.

- 12 ITW encourages DG Agri to clarify this issue in the description of the concept of the indispensability as well as in sect. 9 of the Guidelines (para. 185, 186 of the Guidelines) dealing with the burden of proof.

III. Indispensability

- 13 The term “not indispensable” will most likely be one of the key points of dispute in application of Art. 210a CMO. Therefore, it is of utmost importance to make clear that the established case law regarding the term indispensable in Art. 101 (3) TFEU cannot be applied one to one on the concept of indispensability in Art. 210a CMO. This argument is supported by the fact that the EC’s Draft Horizontal Guidelines on the application of Art. 101 TFEU on Horizontal Agreements (para. 52) explicitly state that these Guidelines do not apply to agreements, decisions or concerted practices of producers of agricultural products that aim to apply a sustainability standard higher than mandated by EU or national law and are exempted from Art. 101 (1) TFEU pursuant to Art. 210a CMO.
- 14 From ITW’s perspective the Guidelines are too closely referencing to the indispensability test in Art. 101 (3) TFEU and the respective case law (para. 80 ff. of the Guidelines).
- 15 The examples provided for the test whether a sustainability standard could equally be attained by acting individually should also include the situation where agricultural producers have to cooperate in order to produce a critical quantity of products fulfilling a higher standard because either food processing industry or retailers will only accept and promote such a higher standard if they have a certain guarantee that producers can supply of the given products in sufficient quantity and with relevant certificates.
- 16 The situation described in para. 100 of the Guidelines does not mirror the reality in the supply chain. Typically, agricultural producers do not have a direct relationship with end customers (consumers). Even if consumers show a certain willingness to pay for a higher sustainability standard that does not necessarily mean that agricultural producers can bring such products to market and reach higher prices. Agricultural producers have to



adopt to the pattern of demand of the food processing industry and the retailers. These patterns of demand can lead to requirements beyond the question whether consumers are willing to pay a certain surcharge for more sustainability. A cooperation of agricultural producers can (for example) be necessary in order to create a sustainability standard that can be audited or to implement a logo and certain marketing activities. ITW wants to make clear that the requirement of a sustainability cooperation can be necessary for various reasons and is not exclusively linked to the question of willingness or unwillingness of consumers to pay for more sustainability.

- 17 ITW clearly welcomes the list of examples in para. 103 of the Guidelines and especially example 103 (d). This example shows that certain payments or price commitments by buyers can be suitable to compensate agricultural producers if additional costs occur in order to comply with the sustainability standard.
- 18 ITW also welcomes the example in para. 111 f. of the Guidelines. Indeed, in a scenario where additional costs of compliance with the sustainability standard are easily separable from the other costs a price premium is an appropriate restriction. This is correctly illustrated with the example from the livestock sector in para. 112 of the Guidelines. ITW is exactly reflected in this example.
- 19 The assessment of the quantitative level of the restriction (para. 115 f. of the Guidelines) is helpful to prevent potential overcharges to the detriment of the consumer and on the other hand render a practical approach to sustainability corporations. Especially the example in para. 116 of the Guidelines is extremely helpful in this context.
- 20 ITW understands that the indispensability assessment cannot be a static “snapshot” but indispensability has to be continuously monitored. However, ITW wants to point out that only short-term or insignificant changes in the market should not lead to the conclusion that certain restrictions are no longer indispensable.

IV. Procedure

- 21 Regarding the procedure ITW welcomes the “opinion system” that shall be implemented under Art. 210a CMO.



- 22 For the burden of proof (para. 185, 186 of the Guidelines) ITW wants to reiterate its position regarding the burden of proof standard as described in the Opinion of the Advocate General Wahl in the case C-671/15 (see above).
- 23 Regarding the flowchart in Annex B the green box at the bottom should be amended and read as following:

“The sustainability agreement and the restriction of competition are indispensable”.

