

Response to public consultation

To European Commission, DG COMP E.5 / DG AGRI E.1
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Subject Input from science and the legal profession for the consultation concerning the draft guidelines for Art. 210a of the CMO Regulation

This is a contribution from the side of science and the legal profession regarding competition policy in agriculture:

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We would like to thank the European Commission for its public consultation as regards the draft guidelines for Art. 210a of the CMO Regulation.¹ Please find below our comments, suggestions and proposals for improvement of the guidelines.

¹ Source: Commission Guidelines on the application of the derogation from Article 101 TFEU for sustainability agreements of agricultural producers pursuant to Article 210(a) of Regulation 1308/2013 (https://competition-policy.ec.europa.eu/public-consultations/2023-sustainability-agreements-agriculture_en).

I. SUMMARY

- (1) First of all, we very much appreciate the diligent work done by the EC to provide an understandable framework for the application of Art. 210a. In particular, we welcome the clarification that the term ‘indispensable’ needs to be interpreted differently for Art. 210a than in the context of Art. 101 TFEU. This was a key question in the 2022 consultation on Art. 210a.² We are grateful for and support the statement of the EC that the *effet utile* and the intention of the co-legislators as regards Art. 210a require a different interpretation. Indeed, Art. 210a would otherwise have no added value.
- (2) Art. 210a offers important prospects for private sustainability agreements, permitting farmers to be compensated fully for the additional costs of more sustainable practices, on the condition that those agreements are indispensable. Such compensation is key for farmers to conclude the agreements and be able to permanently implement more sustainable practices, since sustainable practices will otherwise often not be affordable for them. The additional costs may be partly absorbed by chain actors, for example food industries and retailers. However, these companies operate on a global market and they also have limited margins. Hence, better prices for farmers for sustainable products necessarily imply (at least temporarily) higher food prices for consumers. This is also highlighted by the scientific literature (e.g. Deconinck, 2021;³ Baayen et al., 2023)⁴.
- (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. The draft guidelines bring back this notion which is foreign to Art. 210a, given the full derogation from Art. 101 TFEU. The consumer demand (i.e. willingness to pay) criterion belongs to the domain of Art. 101 TFEU and we object to its reintroduction through the guidelines for Art. 210a.
- (4) This is also the case for the notions of 15% and 30% market share, which similarly belong to the domain of Art. 101 TFEU and are foreign to Art. 210a as decided by the co-legislators. 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 or 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 require a binary assessment (is competition excluded or not). As long as effective competition continues to exist on other parameters and characteristics, e.g. product quality and or product range/diversity, there is no exclusion of all relevant competition parameters.
- (5) Moreover, the proposed approach as regards market share as a criterion – even if it is only supposed to work as a sort of safe harbour – is in some ways discriminatory in the context of Art. 210a. In most cases, sustainability agreements will at least initially concern domestic parties and trade only. Farmers and other actors in the food chain in large Member States will therefore have considerably better opportunities for concluding sustainability agreements than farmers and other actors in smaller Member States. This is the case because, it will be less likely that companies in

² https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13305-Sustainability-agreements-in-agriculture-guidelines-on-antitrust-derogation_en.

³ 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>).

⁴ R.P. Baayen et al., 2023. 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>).

large Member States using national relevant markets will have combined market shares that exceed 15% (horizontal) or 30% (vertical).

- (6) 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 at least initially largely domestic initiatives, and thus will impact the EU internal market to some extent by definition. 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 minute steps can be set towards more sustainable agriculture. In the light of the urgent need for a transition to sustainable agriculture, the proposed limitations are too restrictive. Moreover, 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). We believe that the statement in point 106 therefore needs to be corrected accordingly.
- (7) We agree with the statement in point 168 as regards jeopardising the objectives of Art. 39 TFEU that 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 due to a sustainability agreement. From a scientific viewpoint, increased sustainability inevitably requires at least in the beginning 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 and do not offer farmers a solution in their quest for increased sustainable farming. The logic of point 166 and the example given is therefore flawed.

II. INTRODUCTION

- (8) Increased sustainability in agriculture is an important objective of the EU. We highly appreciate the inclusion of Art. 210a on sustainability initiatives in the CMO Regulation (1308/2013). This marks a fundamental policy change, permitting private parties to conclude sustainability agreements which include the provision of compensation to farmers for the higher costs of achieving a (more) permanent shift to sustainability.
- (9) We appreciate the consultation opened by the European Commission (EC) concerning the draft guidelines for the application of Art. 210a. We welcome the clarification given by the EC and support the proposed guidelines in general. However, we do have a number of concerns, where the draft of the guidelines that was published on 10 January 2023 would unnecessarily restrict the room offered by Art. 210a or even contradict the explicit will of the co-legislators (the European Parliament and the Council). In particular, certain parts of the guidelines seem to re-introduce elements from Art. 101 TFEU and its derived legislation and guidelines, while Art. 210a explicitly foresees in a derogation from Art. 101 TFEU.
- (10) In our opinion, these concerns should be addressed appropriately in the final guidelines. The main issues are presented below. Other issues and further remarks and suggestions are provided at the end of this paper.

III. KEY ISSUES

(11) Our main concerns are the following:

1. CONSUMER PREFERENCES

- (12) 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 (Deconinck, 2021; Baayen et al., 2023) or be subsidised by third parties. 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 (as) sustainable). The guidelines for Art. 210a should not prohibit this. Unfortunately, the draft guidelines are double-hearted in this respect.
- (13) For example, point 98 supports the need for a price premium agreement resulting in higher costs for consumers because of the first-mover disadvantage. 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 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. For instance it might have a negative impact (e.g. efficiencies of scale and scope) on the business case and opportunities for the farmers and other actors willing to make/support a rapid shift towards increased sustainable farming.
- (14) Efficiencies of scale and scope which would lead to lower production costs and prices for consumers might not be (rapidly) achieved if consumer demand (with a short term focus on the lowest price) will permanently be used. In other words, using consumer demand could mean that a rapid shift towards increased sustainable farming and attaining a tipping point where the costs of production and distribution of the more sustainable products will go down (because of economies of scale /scope) cannot be reached. This will result in a market where the price difference between different products (less and more sustainable) will remain unnecessarily high, at the detriment of the cases aiming at a rapid shift towards increased sustainable farming.
- (15) 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 distinctly 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.⁵ 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. However, this is not appropriate for Art. 210a, for which a binary criterion applies (is competition excluded or not). As long as residual effective competition remains, e.g. for product quality and product range/diversity, effective competition is not significantly excluded, even if it is (temporarily) reduced.

⁵ 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.

- (16) 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)”*.
- (17) Therefore:
- We request the EC to delete points 173 to 176.
 - We also request the EC to clarify in point 168 that reasonable prices may include sustainability costs, e.g. as follows (additions are underlined): “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 – even if the omission of these costs might be economically beneficial to the individual consumer – the omission of these costs is unreasonable from the perspective of society.”

2. MARKET SHARE

- (18) 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 forms a derogation. The principle is echoed in Art. 210 of the CMO Regulation, which includes the prohibition 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).
- (19) Moreover, the proposed approach as regards market share as a criterion is discriminatory and brings along the risk of favouring farmers and others actors in the food chain in larger over smaller Member States.
- (20) Re-introduction of market share principles (even if it is supposed to work as a form of safe harbour) will greatly reduce the scope for effective agreements as are necessary for the transition to a more sustainable agriculture, especially in the light of the Green Deal and its objectives as regards climate change mitigation, pollution reduction and biodiversity and nature protection and restoration. In view of the resistance of farmers and Member States against that transition, re-introduction of market share principles will be highly counterproductive.
- (21) We therefore have to disagree with the introduction of any 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 be used as a form of safe harbour only and be above 50% in all cases.
- (22) Therefore:
- We kindly request the EC to delete points 177 to 179.

3. JEOPARDISING THE OBJECTIVES OF ART. 39 TFEU

- (23) As already stated above, we agree with the statement in point 168 as regards jeopardising the objectives of Art. 39 TFEU that reasonable prices for consumers should not be understood as referring to the lowest price possible.
- (24) However, we disagree with point 166, as regards the example, which states that prices for consumers are not allowed to increase substantially, because this would jeopardise 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 (temporarily) 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 jeopardise the *effet utile* of Art. 210a.

- (25) Increased sustainability inevitably results in (at least temporarily) 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. Consumer prices which do not cover the costs of sustainability are in fact unreasonable and no solution for any farmer in the quest for a (rapid) shift towards more sustainable farming.
- (26) Therefore:
- We request the EC to clarify in point 168 that reasonable prices may include sustainability costs, e.g. as follows (additions are underlined): “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 amend it as follows to clarify that price increases for reasons of sustainability are acceptable, unless this seriously impacts consumer prices (additions are underlined, deletions in strikethrough): “*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 multiplication of in the price of bread. This would be likely to jeopardise the objectives of ensuring the availability of supplies and reasonable prices for consumers.*”

4. PARTITIONING OF MARKETS

- (27) As explained in the summary of this paper, 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.
- (28) 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 minute steps can be set towards sustainable agriculture. In the light of the urgent need for a transition to sustainable agriculture, the proposed limitations are too restrictive.
- (29) Moreover, 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).
- (30) 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.

(31) Therefore:

- We kindly request the EC to delete points 106, 118 and 119.

5. PARTICIPATION OF CHAIN PARTIES FURTHER DOWNSTREAM

(32) 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 (i.e. derived and composite products).

(33) Point 28 under (c) reads “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”.

(34) Does the EC mean that those processors exclusively may participate in sustainability agreements that themselves process agricultural products listed in Annex I, while excluding processors who further process the processed products? If so, where is the legal basis in Art. 210a for this limitation?

(35) This is a limitation which substantially hampers the transition to sustainable agriculture. Downstream processors who wish to participate in sustainability agreements and co-finance the price premium for farmers should be welcomed and not excluded.

(36) Therefore:

- We kindly request the EC to amend point 28 under (c) as follows (additions are underlined):
“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, point 35 should 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.*”
- Point 36 and its four examples should be deleted.

6. ECONOMIC INCENTIVE FOR FARMERS

(37) In our opinion, sustainability agreements should not leave room for greenwashing. A price premium should be limited to the costs incurred and income foregone by the farmers. At the same time, the remuneration should truly cover those costs. A calculation based on averages will provide insufficient remuneration 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.

(38) We therefore propose to include in the guidelines that the cost calculation may include an incentive for farmers of maximally 20% of the costs incurred and income foregone, in order to address this uncertainty. 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)⁶ and similar leeway exists in the Common Agricultural Policy for eco-schemes (Art. 31(7)(a) of Regulation 2021/2115).

- (39) Our proposal is in line with the logic developed in point 116 of the draft guidelines for Art. 210a, which caters for an incentive in the case of investments.⁷
- (40) Therefore:
- We propose to insert a supplementary 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 costs incurred and income foregone due to sustainability agreements, an incentive payment, which may not exceed 20 % of the compensation, may be given."*

IV. OTHER ISSUES

- (41) We would furthermore like to make the following comments and suggestions, listed in the order of the draft guidelines as published for consultation.
- Point 56: The reference to **mandatory standards at local level** is confusing. Points 53, 54 and 55 refer to standards set at EU or national level. This is in line with the general logic of the CAP, in which mandatory standards at national level are the lowest relevant level in relation to CAP support. Such CAP support shall only be given for sustainability activities which exceed national and EU mandatory standards. The same logic should apply as regards Art. 210a.

The wording of point 56 however conflicts with this principle by adding a reference to mandatory standards set at regional or local level: *"Depending on the constitutional law of each Member State, a mandatory standard may exist at the regional or local level. If an applicable mandatory national standard is set at regional or local level, that should constitute the relevant standard"*.

The constitution of certain Member States allocates certain responsibilities to the regional level instead of the national level. We therefore agree with a reference to mandatory standards at regional level, where this would follow from the constitution of a Member State. This would still be in line with the logic of the Strategic Plans Regulation, see e.g. Art. 104(2) and Art. 123(1) of that Regulation.

⁶ 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; [...]"

⁷ 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."

The formula “*Depending on the constitutional law of each Member State, a mandatory standard may exist at the regional or local level. If an applicable mandatory national standard is set at regional or local level, that should constitute the relevant standard*” as proposed in point 56 however, deviates from the standard formula concerning constitutional law, in which provision is being made for regional level legislation (e.g. the German Länder and the autonomous regions of Spain) but not for local level legislation.

At the level of a municipality, official water board or province of the Netherlands, mandatory standards may be introduced of a higher level than the national ones. It should be clear that such local mandatory standards may be covered in a sustainability agreement and the costs compensated. Likewise, Member States may provide CAP support in such cases. The rules for public and private compensation should follow the same logic.

We therefore kindly request amendment of the wording of point (56) as follows, deleting ‘local’ (deletions in strikethrough):

“If a mandatory national standard is more stringent or ambitious than the corresponding EU standard, producers and operators active in that Member State must respect that higher national standard. Depending on the constitutional law of each Member State, a mandatory standard may exist at the regional ~~or local~~ level. If an applicable mandatory national standard is set at regional ~~or local~~ level, that should constitute the relevant standard.”

- Paragraph 5.5, Examples of application of the indispensability test, 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 economic reality. Having separate production (or slaughtering) lines is very expensive and in fact a main reason why sustainability initiatives in practice fail to survive. This passage will block the indispensable possibility to raise the level of sustainability or animal welfare, even for sound economic reasons.

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.

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