

EU CONSULTATION RESPONSE

**AIM and FoodDrinkEurope's joint comments
on the derogation pursuant to Article 210a of
Regulation 1308/2013**

24 April 2023

AIM, the European Brands Association, FoodDrinkEurope, and their respective members (together “we”) welcome this consultation and the derogation from Article 101 TFEU contained in Article 210a of Regulation 1308/2013 for vertical and horizontal initiatives relating to the production of or trade in agricultural products that aim to meet sustainability standards going beyond mandatory EU and/or national legal standards (hereinafter the “Derogation”).

With reference to AIM’s previous response to this consultation dated 23 May 2022, we would like to reiterate both our support for the proposed legislation and our core view that the scope of application of the Derogation should be explicitly extended to include sustainability agreements covering so-called “Non-Annex I products” or “processed agricultural products (PAPs)”, provided that they are food products using Annex I products as ingredients.

As noted in AIM’s previous response, the European Court of Justice (“ECJ”) ruled in 2009 that legislation whose “primary purpose [...] is the achievement of the objectives mentioned in Article [39 TFEU and that] covers principally products included in Annex I to the Treaty” may also cover products “not expressly mentioned in that annex” but which constitute “most of its ingredients”, as this “is consonant with the purpose of that [legislation] and in particular with the achievement of the objectives mentioned in Article [39 TFEU].”¹ In other words, food products not listed in Annex I but processed by using Annex I products as ingredients may also be covered by legislation adopted under Article 43 TFEU that aims to contribute to the achievement of the objectives mentioned in Article 39 TFEU.

Various EU legal instruments based on Article 43(2) TFEU have since adopted the ECJ’s teleological approach to achieving the objectives set out in Article 39 TFEU:

- Article 2(1) of [Directive 2019/633](#) on unfair trading practices defines “agricultural and food products” as “products listed in Annex I to the TFEU as well as products not listed in that Annex, but processed for use as food using products listed in that Annex”.
- Article 2 of [Regulation 2018/848](#) on organic production and labelling of organic products states that the scope of the Regulation applies to “products originating from agriculture [...] as listed in Annex I to the TFEU and to products originating from those products”, including specifically “processed agricultural products for use as food”, as well as “to any operator involved, at any stage of production, preparation and distribution”.²

¹ Judgment of 2nd July 2009 in Case C-343/07 Bavaria and Bavaria Italia, [EU:C:2009:415](#), paragraph 51.

² Recital 10 of Regulation 2018/848 clarifies that “it should cover processed agricultural products for use as food or feed because the placing of such products on the market as organic products provides a major outlet for agricultural products and ensures that the organic nature of the agricultural products from which they are processed is visible to the consumer.” We submit that the exact same reasoning should apply if the word “organic” in this sentence were replaced by the word “sustainable”.

- Article 5(1) of [Regulation 1144/2014](#) on information provision and promotion measures concerning agricultural products includes a number of processed food products in the list of eligible products, in addition to *“the products listed in Annex I to the TFEU”*, because, as Recital 8 makes clear, *“the Union mainly exports final agricultural products, including agricultural products not included in Annex I to the TFEU.”*
- Article 2(1) of [Regulation 1151/2012](#) on quality schemes for agricultural products and foodstuffs clarifies that *“the Regulation covers agricultural products intended for human consumption listed in Annex I to the Treaty and other agricultural products and foodstuffs listed in Annex I to this Regulation”*.

As the Derogation is also based on Article 43(2) TFEU, it would be logical for it to adopt the same teleological approach as that retained in these three EU legal acts and to cover sustainability agreements relating to the production or trade of *“food products processed from Annex I products”* to provide incentives to achieve the objectives set out in Article 39 TFEU.

As *“more than 70% of agricultural commodities produced in the EU [listed as Annex I products] are transformed into manufactured food products, many of which are Non-Annex I goods”*,³ the useful effect of the Derogation would be severely limited if manufactured food products were excluded from its scope or if they had to qualify for this benefit by reaching a certain proportion of Annex I products as ingredients.

Given the safeguards already foreseen in Article 210a(6) and (7) of Regulation 1308/2013, the legal risks or challenges posed by vertical and horizontal initiatives for sustainability are limited and would not increase if they concerned processed agricultural products rather than raw agricultural products.

Limiting the scope of the Derogation to Annex I products would not only be inconsistent with key EU legal precedents but would also miss a significant opportunity to incentivise sustainability practices across the entire food value chain. All actors in the FMCG industry, from the smallest start-ups to the largest multinationals, have a responsibility and stake in promoting the sustainable sourcing, production, and distribution of food and beverages.

As climate change, environmental degradation and biodiversity loss are reaching critical levels that require immediate and coordinated action by all stakeholders across the European Union, in particular to achieve higher sustainability standards, the European Commission would be well advised to extend the benefit of the Derogation to *processed* agricultural products, as this would provide a clear incentive for the European food and drink industry — a leading manufacturing sector in the EU in terms of turnover and employment — to become more sustainable more quickly.

³ European Commission, [“What are processed agricultural products?”](#).

Extending the scope of the Derogation to non-Annex I products made from Annex I products would allow for a more consistent and transparent application of sustainability standards to all types of food products, regardless of their degree of processing or transformation, making these standards more robust, credible, and effective. This extension would create a truly level playing field across the EU for all actors in the food and drink value chain, incentivising them to adopt more sustainable production practices, from sourcing to production to distribution, thereby maximising the potential benefits of the Derogation by optimising the chances that such practices will be more widely adopted across the industry and that all companies will contribute to the transition to a more sustainable future.

We therefore call on the EC to explicitly state in the future guidelines clarifying the conditions for the application of the Derogation that vertical and horizontal initiatives for sustainability involving the production or trade of food products processed from Annex I products may also benefit from the Derogation.

We acknowledge the brevity of our contribution to this consultation, which can be attributed to the exclusion of the processed agricultural products produced by our members from the scope of the Derogation. This exclusion significantly limits their interest and therefore their eagerness to participate in the consultation. As operators in an interlinked and interdependent supply chain, we deem that the inclusion of “processed agricultural products” as part of “agricultural products” under Article 210a of Regulation 1308/2013 would enhance the possibility of achieving the desired goals of sustainable food systems.