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**Sent:** Mon, 24 Apr 2023 21:42:25 +0200

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**Subject:** HT.6134 - reply from an organisation

**Attachments:**

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## **Mondelēz International's Response to EU Antitrust Guidelines for Food Agri Sustainability Agreements Consultation ("Draft Guidelines")**

### **INTRODUCTION / GENERAL REMARKS**

- Mondelēz International (" **Mondelēz** ") welcomes the European Commission's Green Deal and objectives to move to a low carbon circular economy. Indeed, as a major business we have set ourselves near- and long-term sustainability goals and share our progress against those goals in our publicly available Snacking Made Right ESG annual report. This includes our programs for more sustainably sourcing wheat and cocoa, Harmony Wheat and Cocoa Life, respectively. We are also a signatory to the EU Code of Conduct for Responsible Business and Marketing Practices and have a long-term goal of net-zero greenhouse gas emissions across our value chain by 2050. We believe our programs and goals contribute to the aspirations in this Code and can help support a path for more sustainable food systems.
- It is our view that the EU Farm to Fork Strategy is currently not sufficiently resourced or equipped to deal with today's market realities and anticipated future challenges. Funding instruments, such as the Common Agricultural Policy (" **CAP** ") and the EU Recovery Fund, are currently insufficient to scale-up and de-risk the transition to more sustainable agricultural practices while safeguarding farmers' incomes and to provide fundamental conditions to move to more circular, sustainable food systems. Consequently, the EU agri-food sector is suffering from an investment deficit which could harm its competitiveness and hinder innovation to accelerate the transition to greater sustainability. The private sector can play its part but cannot progress sufficiently without further public support. Success will only be possible with enabling conditions that allow businesses along the food value chain to be real solution providers at scale.
- Overall, Mondelēz welcomes the Commission's Draft Guidelines, which are generally detailed and contribute to providing the legal certainty that is essential for businesses like Mondelēz and producers in the agri-food supply chain. Mondelēz appreciates that sustainability agreements are by nature context specific, as the objectives they pursue (namely the sustainability of environmental, economic, and/or social development) are complex and underscored by various variables.
- To assist the Commission in finalizing the Draft Guidelines, Mondelēz sets out below its comments and suggestions on specific sections of the Draft Guidelines where further clarification may be required.

### **SCOPE AND PRODUCTS COVERED BY ARTICLE 210A**

#### **Scope**

- Paragraph 26 as currently drafted includes the statement " *In practice , the distinction between 'agreements', 'decisions of associations', and 'concerted practices' is artificial* ".

Mondelēz does not consider that this statement works in practice as agreements and concerted practices have their own legal tests. This is illustrated by paragraph 31, which refers to an agreement, and states that there is no agreement if "*the operator can decide unilaterally to stop applying the standard at any time*", which is true of agreements, not concerted practices. Similarly, paragraph 32 refers to the legal position on agreements specifically. Given that the derogation under Article 210a applies to agreements, decisions of associations, and concerted practices, the Commission should amend this section to ensure all are captured.

### **Annex 1 and related examples of application**

- Mondelēz considers that the Draft Guidelines take an unduly narrow approach to the interpretation of Annex I TFEU. Mondelēz submits that the Draft Guidelines should be extended to sustainability agreements that relate to "Non-Annex I products" or "Processed Agricultural Products" ("PAPs"), provided that they are food products mostly using Annex I products as ingredients. PAPs would include food products processed by using mostly Annex I products. In particular:
  - This would be consistent with the case law of the European Court of Justice ("ECJ"), which has held that the purpose of a Regulation, and the underlying TFEU Article, is relevant to understanding whether only the specific Annex I products are to be included within the scope of the Regulation, or whether products derived from the Annex I products are also to be included. In *Bavaria and Bavaria Italia* (Case C-343/07), the ECJ held that the purpose of the relevant Regulation meant that beer fell within the scope of the Regulation, even though beer is not listed in Annex I, since "*most of its ingredients are*".
  - As most of the agriculture commodities listed in Annex I are transformed into PAPs, the sustainability objectives set out in Article 210a point 3 points (a)-(c) will not achieve their full potential if PAPs are excluded. As an example, PAPs have a significant impact on packaging / waste related agreements, which is something Article 210a(3)(a) is intended to reduce.
  - The inclusion of PAPs will also incentivise and facilitate producers to use fresh, natural produce, e.g., dairy, eggs, natural honey. This will allow the Draft Guidelines to further align with the Green Deal and achieve benefits in agriculture and biodiversity beyond what is currently contemplated.

### **APPLICATION OF TEST IN THE CREATION OF A SUSTAINABILITY AGREEMENT**

#### **Sustainability Objectives covered by Article 210a and related examples**

- Article 210a(3)(a)-(c) currently sets out three objectives to which a sustainability agreement must contribute in order to fulfill the conditions of Article 210a. Mondelēz generally welcomes the guidance on these objectives, with particular reference to examples of the "environmental objectives" under point (a).
- Paragraph 43 of the Draft Guidelines excludes social objectives (for example working conditions or healthy and nutritious diets) or economic objectives (for example development of brands or fairer remuneration of farmers). Mondelēz submits that this is inconsistent with the objectives of the CAP, as set out in Article 39 TFEU, which includes ensuring a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture. Indeed, the Draft Guidelines state s-(at paragraph 165) as regards to Article 39 TFEU that "*the relevant competition authority should assess how the sustainability agreement affects the living standards of all farmers, not only those farmers who are parties to the sustainability agreement*".

Mondelēz submits that such social and economic objectives should be included within the scope of Article 210a(3).

- Mondelēz also notes that paragraph 39 provides helpful examples on the application of Article 210a(3)(a). However, guidance on the application of Article 210a(3)(b)-(c) is limited. For example, point (c) is listed as relating to " *animal health and animal welfare* " as an objective, which may be obvious in certain scenarios, e.g. cage free eggs produced at a chicken farm as opposed to battery eggs. However, not all cases are so obvious. Mondelēz also suggests that the Draft Guidelines should clarify that, provided a material part of the relevant sustainability agreement pursues animal welfare as an objective, the agreement should be captured by Article 210a(3)(c).
- Mondelēz would also welcome the use of examples setting out how regenerative agriculture practices can conform with the Article 210a derogation. In particular, example 2 at page 60 notes that an agreement by a group of farmers who grow similar crops in the same region to reserve at least 20% of their arable land for use as ecological focus areas is likely to be a restriction of competition on the basis that it is in effect an output restriction. However, soil regeneration practices are core to regenerative agriculture. For example, to let the soil regenerate itself, farmers may wish to agree to allow for a certain percentage of their land to rest for a cycle, or to alternate crops. It would therefore be beneficial for the Draft Guidelines to set out examples within section 5 on the types of regenerative agriculture practices that would benefit from the derogation.
- Paragraph 52 requires the results obtained by the application of a sustainability standard needing to be " *tangible and measurable* ", unless it is " *not appropriate* " to do so. The dividing line between the two types of standards is not clear, however, and Mondelēz submits that this paragraph would be improved by amending the drafting from " *where it is not appropriate to measure the results obtained in numerical terms* " to " *where undertakings consider it better to describe the results in non-numerical terms* ". Example 2 demonstrates the issue, since it is possible for undertakings to set a standard, in numerical terms, regarding cultivating certain wild plants (e.g. by setting an absolute or percentage threshold). It is also unclear how this paragraph applies in the presence of external factors beyond a producer's control, for example mitigating the adverse effects of unsuitable weather resulting in a reduction of crop growth.
- The Draft Guidelines are inconsistent in addressing the minimum standard by which sustainability agreements must exceed mandatory sustainability standards. The Draft Guidelines suggest, at paragraph 61, that there is an (unspecified) minimum amount against which undertakings must self-assess. In contrast, paragraph 88 states that there is no minimum standard and that, rather, the more marginal the improvement, the less likely restrictions will be indispensable. Mondelēz submits that the explanation in paragraph 88 is clearer and should be replicated in paragraph 61.

### **The concept of indispensability**

- Mondelēz welcomes the statement in paragraph 106 of the Draft Guidelines that " *operators must bear in mind 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* ". However, as currently drafted, this statement does not account for scenarios in which an undertaking, with no intent to do so, may develop a local sustainability initiative which meets all other criteria under the Draft Guidelines but, due to the differences in local consumer regulations and codes of conduct, the products produced pursuant to sustainability standards become more difficult to

be traded freely across the EU. In the interests of clarity, Mondelēz submits that paragraph 106 should be amended in the following way: "*operators must bear in mind that provisions that have as their object the restricting of the free movement of goods or services and thus partitioning the EU internal market are in principle not considered as indispensable under Article 210a*". (underlining indicating additions)

- Paragraphs 115-116 set out criteria for assessing the quantitative level of the restriction, including a worked example. These paragraphs are quite complex, however, and require some changes to make them more digestible. For example, a flowchart akin to the helpful flowcharts at Annexes A and B should be included to set out the intensity of the restriction assessment, including the quantitative level of the restriction. Moreover, paragraph 116 could be broken down into sub-paragraphs so that the various factors are easily read and the necessary steps for the assessment are clearly distinguishable.

## **APPLICATION OF PROCEDURES RELATING TO AGREEMENTS**

- The guidance on the applicability of *force majeure* and the failure to attain the sustainability standard, as set out in paragraphs 122-129, is likely to create difficulties in practice. In particular:
  - As regards paragraph 122, it is impractical for producers to "*take all necessary steps to restore the term in question*" in a scenario where crops have not grown due to a year of unsuitable weather. The *force majeure* provisions should explicitly refer to external factors relevant to agricultural producers such as weather, and what steps they should take in such circumstances.
  - Paragraph 128 suggests that a "*shortage in essential input*" would not be considered as sufficient to be considered as a *force majeure*. Mondelēz submits that this reference should be removed, since for agricultural producers this could extend to scenarios that would ordinarily be considered as a *force majeure*, for example, loss of crops from pest manifestation.
- Section 6.5.1 (paragraphs 130 – 136) provides guidance on the ongoing and continuous review of the indispensability test. Mondelēz agrees that undertakings should keep their agreements under review. However, Mondelēz is concerned that the requirement to do so on a constant basis may lead to disproportionate compliance costs, which may defeat the purpose of the agreements. Mondelēz submits that the Draft Guidelines would be improved by the adoption of a "grace period" such that undertakings should only have to review their sustainability agreements every 6 months.
- Mondelēz broadly agrees with the options provided by the Commission where restrictions are determined as no longer being indispensable. However, Mondelēz submits that there should be an explicit provision in paragraph 139 that stipulates a period of time that a sustainability agreement may still benefit from the exclusion of Article 210a when referring to "*the period necessary to unwind the agreement and recoup their investments*".

## **Opinions / Notification Process**

- Mondelēz welcomes the Commission's introduction of the opinion system under Article 210a. Mondelēz has two suggestions with the aim of increasing its utility:
  - Mondelēz submits that the four-month time period allocated to the Commission to provide an opinion should be reduced. A prolonged time period for review may deter

producers / businesses from seeking an opinion, and this would be exacerbated if a practice of pre-notification materializes.

- Paragraph 152 states that a non-confidential version of the Commission's opinion will be published once finalised. Mondelēz submits that the publication of opinions may disincentivise parties from coming forward with requests for opinions. As paragraph 158 states, the Commission's opinion has no legal force; there is a risk that publication may put other undertakings on notice to commence private action. Should the Commission consider that publication is required in the interest of transparency, Mondelēz suggests that the Commission should adopt a wide approach to the protection of confidentiality for the published version of the decision.

### **Exclusion of Competition**

- Paragraph 176 notes that changes in consumer preferences may mean that the withdrawal of a less sustainable product does not imply an exclusion of competition. However, the test for determining whether "*the exclusion of competition is due to consumer preferences for sustainable products or whether instead the sustainability agreement has forced the withdrawal of a product for which there is substantial unfulfilled consumer demand*" may be difficult to evidence, and Mondelēz submits that the Commission should account for the fact that changes to consumer habits are rarely binary, and usually change over time.

### **INTERACTION OF GUIDELINES WITH OTHER EU PROPOSALS**

Finally, we invite the Commission to ensure consistency with other EU proposals on sustainability. This is key to ensuring that activities are aligned and do not contradict other guidelines provided. For example, the proposed EU Directive on Green Claims proposes making it mandatory for companies to open up their current sustainability certification programs to competitors and other players. This could entail potentially giving competitors access to information which is commercially sensitive. Mondelēz does not comment on the virtue of such a proposal in this response. Rather, Mondelēz invites the Commission to provide guidance as to how Article 210a will align with such provisions, since (if the Commission were to pursue the above proposal) it is not obvious from the Draft Guidelines that the provision of such access would meet the indispensability criteria under Article 210a.

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