

Guidelines on Article 210a of Regulation 1308/2013 – EuroCommerce views on the Commission proposed draft

EuroCommerce welcomes the opportunity offered by the European Commission to comment on the draft Guidelines on Article 210a of Regulation 1308/2013 ('the Guidelines') published in January 2023.

EuroCommerce is the European association for retail and wholesale. The sector already [extensively collaborates](#) with other supply chain actors, including farmers, to promote more sustainable and healthier choices for consumers.

Article 210a and the accompanying Guidelines are key instruments for retailers and wholesalers which can provide legal certainty on what the sector can do when cooperating with primary producers for sustainability purposes.

EuroCommerce would like to offer a number of comments on the Guidelines.

Key messages

- Retailers and wholesalers play a key part in the green transition, meeting and informing consumer demand for sustainable products and reducing the environmental impact of their own operations;
- Cooperation among different actors in the food supply chain is at times necessary to meet the green transition. That is why food retailers and wholesalers have over the years implemented a number of agreements with suppliers and primary producers for the purposes of sustainability;
- The new CMO antitrust derogations are novel under EU law: the main aim of the Guidelines on art. 210a should be to provide the necessary legal certainty for businesses to cooperate;
- We welcome the clear definitions and the extensive use of examples made by the Commission in the Guidelines published for consultation;
- EuroCommerce welcomes the recognition in the Guidelines that any exemption from competition rules should be interpreted strictly: strong competition in the EU single market is the best way to meet the green transition in the agri-food chain through innovation.

1. Introduction

General framework

- 1.1. EuroCommerce stands for a strong competitive EU Single Market as the best tool to foster innovation and build a sustainable agri-food supply chain. We are grateful for the recognition in the Guidelines that **any antitrust exemption should be interpreted strictly** in order to promote competition and limit risks of greenwashing and detrimental effects of competition violations on consumers.
- 1.2. We also welcome the explicit recognition that sustainability agreements not benefiting from the conditions of article 210a may benefit from other rules: art. 210a could not apply to horizontal cooperation among retailers and wholesalers but such horizontal sustainability collaboration (for instance on recycling, reducing food waste and cutting emissions) could be found pro-competitive under the Horizontal Guidelines.

Definitions

- 1.3. Paragraph 28 of the Guidelines provides definitions for different operators in the supply chain which may be part of a sustainability agreement.
- 1.4. We would invite the Commission to clarify that there may be operators simultaneously acting in different parts of the chain (e.g. primary producers also operating a retail outlet or retailers involved in primary production) and how the Guidelines may apply in those specific cases – for instance whether art. 210a would apply to an agreement between a retailer involved in primary production and food manufacturers or other distributors.

2. Indispensability

Indispensability of a competition restriction

- 2.1. The Guidelines state that restrictions that have a negative impact on the EU Single Market would not be deemed indispensable under art. 210a. We welcome this statement and reiterate that **a strong competitive Single Market is the best tool to foster innovation and build a sustainable agri-food supply chain**. In order to reinforce this point, we would ask the Commission to include an example of a restriction with a negative impact on the Single Market and which would hence not be deemed indispensable.
- 2.2. The Guidelines also explain that in relation to sustainability goals such as animal welfare – which may feature different components and consequently several obligations on the primary producers' side – an agreement between farmers and their buyers fixing the entire price of a product (and not just elements of the price such as a premium) may be necessary.
- 2.3. We would ask the Commission to explicitly state that **the need to fix the entire price of a product is rarely indispensable**, even in the context of more complex agreements. There are existing animal welfare agreements (such as the Initiative Tierwohl in Germany) where primary producers incur in many different obligations (related to for instance the quality of drinking water for animals, cage space, the use of antibiotics) that however do not require the fixing of the full price but only of an element thereof.
- 2.4. The Guidelines also provide that an agreement would not be indispensable if there were less restrictive alternatives to achieve the same standards. We would welcome the clarification that

such alternative(s) should however be reasonable and proportionate (i.e. it would be feasible for operators to implement them).

- 2.5. We welcome the clarity provided on how duration of the restriction is to be evaluated in the context of its indispensability (paragraph 117) and would ask for further examples on how to assess agreements where certain elements may be phased out within a short timespan, but others need to be maintained for longer.
- 2.6. We are grateful to the Commission for the extensive use of examples throughout the Guidelines. Example 1 on page 33 (on the assessment of the indispensability of a sustainability agreement involving several supply chain operators) features an agreement including clauses on resale price maintenance (RPM) imposed on retailers.
- 2.7. The Commission assessment of the example concludes that RPM would not be indispensable in the circumstances presented. We strongly support the Commission assessment on RPM clauses, which are vertical hardcore rescreens which are unlikely to be exempted under art. 101(3) of the Treaty on the Functioning of the European Union.

4. Ex post assessment

- 4.1. Section 8 of the Guidelines provide further details on the safeguard mechanism by which a national competition authority or the Commission may modify, discontinue or prevent the implementation of an agreement that excludes competition in a market or jeopardises the objectives of the Common Agricultural Policy ('CAP').
- 4.2. We welcome the clarity provided by this section and reiterate the importance of ensuring that fundamental CAP objectives linked to food security (e.g. food affordability or food availability) are not endangered by certain agreements between operators.
- 4.3. Section 8.1. of the Guidelines provide certain examples of agreements jeopardising different CAP objectives.
- 4.4. We would be grateful if the Commission could clarify (and provide examples of) how it would assess **a situation where a sustainability agreement would jeopardise certain CAP objectives but foster other ones.**

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