

Agri-food agreements with a sustainable aim

Response¹ to the public consultation of the European Commission

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Background

Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU) contains a general prohibition against agreements, decisions and concerted practices and agreements of associations that restrict competition (“cartels”). However, Article 42 of the TFEU² and Regulation (EU) 1308/2013³ (CMO) exempts from this provision certain agreements in the agricultural sector⁴, if they expand to the full food supply chain, i.e. the producer is part of such agreements⁵. Such agreements may be horizontal agreements (between producers) or vertical agreements (between producers and other actors in the supply chain).

Following years of preparatory work and the latest view of the stakeholders, by the end of this year, the European Commission aims at adopting the new guidelines for the more targeted assessment of such agreements. Consequently, the European Commission (EC, Commission) has, on 10 January 2023, published a draft legislation⁶ on “Sustainability agreements in agriculture” and a corresponding public consultation on draft guidelines on antitrust exclusion, which describes in which cases could participants be exempted from the application of Article 101 of the TFEU (under Article 210a of CMO).

An overall principle of the guidelines is that sustainability agreement must aim to pertain to higher sustainability standards than mandated by EU or national law⁷. The

¹ Though this document reflects the view of the submitting parties as to the subject matter, it cannot be considered as a full-fledged theorem representing the strategy or consideration of the respective companies’ clients. For contact: Pál Belényesi, bp@brusselsconsulting.hu

² General rule, limiting the applicability of competition law to the objectives of the Common Agricultural Policy (CAP), e.g. increasing market stability and agricultural productivity.

³ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007

⁴ Strengthened by Regulation 2021/2117, adding the non-requirement of prior approval by the Commission, for example. See: REGULATION (EU) 2021/2117 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 2 December 2021 amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union. OJ L 435/262.

⁵ Article 210a of CMO covers agreements, decisions and concerted practices of producers of agricultural products that relate to the production of or trade in agricultural products and that aim to apply a higher sustainability standard than mandated by EU or national law.

⁶ Commission Guidelines on the application of the exclusion from Article 101 TFEU for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation 1308/2013.

⁷ Recital 11 of the draft guidelines.

draft also places the burden of assessment of such agreements – similar to the latest developments under Dutch competition law⁸ – on the participants, while at the same time easing the workload of public authorities, by requiring no public decision before the evaluation and conclusion of such agreements with a clear sustainability objective.

In particular, the draft suggests that agreements aiming at improving the status of soil in the European Union would be a good candidate for exemption, should such arrangements meaningfully mend the status of the soil, without of course, inherently restricting competition (by charging the same prices to customers the later having no alternative as suppliers, for example).

Sustainability and competition

As the Commission rightly points out in its draft guidelines, there are many aspects to a single sustainability agreement, which should be analysed under competition law (see Section 4, in particular). We agree that the ultimate aim and the particularities of each sustainability agreement should consider the free will of participants to act as independent agents on the market.

We would like to observe the following:

- 1) Our submission does not aim at providing a full-scale theoretical analysis of the subject matter – there is a growing number of available studies covering that.⁹
- 2) Market participants are only commencing to turn inward for sustainable production methods and improving their internal standards. Irrespective of the rules on green claims, circularity and recyclability that are only being developed globally or in the EU¹⁰, most agricultural producers are subject to more and more *extreme weather conditions*, constantly *changing national support mechanisms* and ever more present *financial constraints*.
 - a. Farmers still experience **high conversion rates** when attempting to change to more sustainable production methods.¹¹ **High production costs related to sustainable production** also continue to pertain.
 - b. At the end of the day, immediate and direct concerns are what mostly define the farmers' business strategies and hence their pricing. Therefore, the appreciation of sustainability agreements from a competition point of view should focus on these as well. An aligned competition law enforcement with other economic policies is vital.

⁸ <https://zoek.officielebekendmakingen.nl/dossier/kst-35247-2.html>

⁹ See, for some of the latest ones: D. Wouters (2021), *Which Sustainability Agreements Are Not Caught By Article 101 (1) of the TFEU?* Journal of European Competition Law and Practice., Vol. 12, 257-270; J. Malinauskaite and F. B. Erdem (2023) *Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities*. Journal of Common Market Studies, 1-24.

¹⁰ E.g., Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 COM/2022/71 final; and the Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Text with EEA relevance) PE/35/2022/REV/1 OJ L 322, 16.12.2022, p. 15–80

¹¹ Agri-Nutri Monitor 2021, ACM, <https://www.acm.nl/sites/default/files/documents/agro-nutri-monitor-2021-hoofddocument.pdf>

- c. A changing farmers' approach to food production is also vital for European **food security**. Agreements aiming at securing inputs based on healthy soil are to become a central element of the agri-food policies and competition enforcement ought to support this.
- 3) Consumers of agri-food products continue to base their decisions on well-researched existing behavioural and cognitive biases.
- a. They **manifest a choice-paradox**: consumers declare to be very sensitive to the origin of food (attitude) but the bottom line (main driver) for their choices remains the price of the product ("price sensitivity"). This is particularly true nowadays given the high and volatile inflation rates across Europe, more so in Hungary.
According to a recent, representative, quantitative survey¹² conducted by Századvég in Hungary, almost 63% percent of responders stated price as a driver behind their decision when buying vegetables, while only 46% mentioned source of origin. There is a similar tendency among fruits, with 63% mentioning price as a driver, contrary to 42% stating source of origin. The same trend was observed in another survey¹³ on factors consumers considering when buying bakery products, with 39% mentioning price as a driver behind their decision, while only 21% stating source of origin. Similar percentages were observed in relation to meat consumption¹⁴, where 61% of respondents mentioned price as a driver influencing their choices when shopping for meat, while only 45% considered the source of origin important. For factors influencing customer decisions when purchasing dairy products, 58% of responders indicated price as a factor, while only 48% the mentioned source of origin¹⁵. This is reinforced by another, recent in-depth analysis of Századvég, looking at dairy production in Hungary: the main driver behind customer preferences is price.
 - b. **Vocal consumers** about sustainability and circularity still **only exist in small groups**, and they tend to be from the **financially better off segment** of society or people with higher education. The average consumer cares more about availability and the historically built reputation of firms rather than their internal environmental standards.
According a recent analysis of Századvég observing the customer habits in Hungary with the focus on vegetable, milk, meat and bakery products, the consumption of plant-based dairy-free products, such as oat milk was significantly higher among segments with higher salaries and education. This survey also found that poultry products produced using GMO-free methods or originating from bio farms tend to have a higher price, which in turn make them less attractive to customers. The same tendency has been identified when choosing between domestic and imported fruits and vegetables, with most respondents being guided solely by the price of these product. The analysis also concluded that the primary concern of respondents was the increase of food prices rather than the sustainability of food production or even the availability of food caused by shortages.

¹² Századvég survey, September 2022, n=901

¹³ Századvég survey, September 2022, n=903

¹⁴ Századvég survey, September 2022, n=903

¹⁵ Századvég survey, September 2022, n=982

- c. Though studies provide us with diverging results, the trend is that **consumers tend not to differentiate between information presented to them, once the information is indeed “front-labelled”**. In other words, claims made by companies are usually not traced back to credibility and consumers perceive them as info-marketing means.¹⁶ On the other hand, the reduction of “consumer information costs” tend to result in healthier choices.¹⁷
- 4) The quality of soil in Europe.
- a. Restoring European soil is key to achieve climate neutrality, close-to-zero pollution, *sustainable* food provision and a more resilient environment. The European Commission’s respective technical assistance body, the Joint Research Centre recognized that “[h]owever, they are a fragile and finite resource and they are currently at risk, in Europe and beyond.”¹⁸ The European Commission, in consequence, made healthy soils a central element of the Green Deal,¹⁹ and the EU soil strategy for 2030²⁰.
 - b. Soil degradation²¹ is an increasing problem. Already 8 years ago, 13% of soil in Europe suffered from high level of degradation.²² This results in billions of Euro losses because of less productivity.
 - c. Carbon emission from non-sustainable management of cultivated land amounts to ca. 7.5 million tonnes yearly.²³
 - d. According to a 2018 European Court of Auditors report, 25% of land in southern and eastern Europe was already at high risk of desertification.²⁴ The report found that the risk of desertification in the EU was not being effectively and efficiently addressed. Desertification and land degradation were declared to be growing threats, the steps taken to combat desertification lacked coherence.
 - e. Also in 2018, the JRC reported that there were around 2.8 million potentially contaminated sites in the EU and neighbouring countries.

Consequently, European soil is endangered by contamination, desertification, degradation, and inefficient carbon sequestration.²⁵ The planned guidance’s part on

¹⁶ E.g., S. Vandevijvere et al., (2020), *Consumers’ food choices, understanding and perceptions in response to different front-of-pack nutrition labelling systems in Belgium: results from an online experimental study*. Archives of Public Health 78, 30.

¹⁷ Chen Zhu et al., (2016) *Information Cost and Consumer Choices of Healthy Foods*. American Journal of Agricultural Economics, Vol. 98., No. 1. 41-53.

¹⁸ JRC, “Healthy Soils: a necessity for the EU”, 9 June 2022, at https://joint-research-centre.ec.europa.eu/jrc-news/healthy-soils-necessity-eu-2022-06-09_en

¹⁹ European Commission, “The European Green Deal”, at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en

²⁰ “EU Soil Strategy for 2030”, 17 November 2021, at https://environment.ec.europa.eu/publications/eu-soil-strategy-2030_en

²¹ Physical, biological and chemical decline of soil quality.

²² P. Panagos et al. (2015) *The new assessment of soil loss by water erosion in Europe*. Environmental Science and Policy, Vol. 54, 438-447; P. Panagos et al. (2022) *Soil priorities in the European Union*. Geoderma Regional, Vol. 29. <https://www.sciencedirect.com/science/article/pii/S235200942200030X>

²³ JRC, “Healthy Soils: a necessity for the EU”

²⁴ ECA, Special report n°33/2018: Combating desertification in the EU: a growing threat in need of more action. <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=48393>

²⁵ As we do not want to focus on a specific member state, we omit referring to soil quality in Hungary. Nevertheless, country-specific problems do exist. See, e.g.

sustainability agreements, with special reference to soil, should in particular focus on these aspects. Agreements aiming at confronting contamination, desertification, degradation, and inefficient carbon sequestration should be prioritized, in particular giving precedence to agreements helping to accomplish the objectives of the EU Soil Strategy for 2030, which are centred around “soil health”²⁶. Given the **plethora of objectives and possible means of realisation**, we don’t expect the Commission to be able to draw up an extensive list of pre-defined market practices. We envisage that the long-standing custom of **case-by-case analysis of such agreements** will provide further guidance to many market players.

CEE specific application of soil protection

Consumer sensitivity in the CEE is less developed than in the EU15. The application of unequivocally harmonised standards may potentially preserve this divide. This should not be the aim of any EU-level legislation. We advocate for a differentiated approach, taking into account local-national-regional historical and cultural characteristics. A gradual approach is more fitted to produce desired results than a mandatory one-size-fits-all methodology.

The major soil types in the European Union are Arenosols, Cambisols, Chernozems and Calcisols; the first three of which dominate the Eastern region of the EU. The quality of soil ranges from very poor to good and very good quality soils, but the quality of soil is better than Southern Europe. However, carbon sequestration is low compared to the carbon-rich UK, Ireland and Nordic soils²⁷.

General considerations

- 1) While sustainability agreements may be exempted from the prohibition of Article 101 (1) of the TFEU under other than the exemptions already presented in Article 201a of the CMO regulation, we will focus on the first only. Similarly, we will not deal with neither the exemption under the horizontal guidelines or the vertical guidelines or other sectoral law such as the block exemption regulation.²⁸

<https://www.sciencedirect.com/science/article/abs/pii/S0167198704000406?via%3Dihub>,
https://www.researchgate.net/publication/309093044_Spatial_distribution_of_selected_soil_features_in_Hajdu-Bihar_county_represented_by_digital_soil_maps, and
https://www.researchgate.net/publication/240617001_Soil_Compaction_Alleviation_as_a_Solution_in_the_Climate_Stress_Mitigation

²⁶ H.H. Janzen, D.W. Janzen, E.G. Gregorich (2021) The ‘soil health’ metaphor: illuminating or illusory? Soil Biology and Biochemistry, 159, 10167

²⁷ <https://www.irta.cat/en/regenerating-the-poor-soils-of-the-southern-eu-countries-and-the-mediterranean-an-essential-step-in-combatting-climate-change/>

²⁸ Regulation (EEC) No 2821/71 of the Council of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices, OJ L 285 (29.12.1971, p. 46); Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 335(18.12.2010, p. 36); Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 335 (18.12.2010, p. 43); Regulation No 19/65/EEC of 2 March of the Council on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, OJ 36 (6.3.1965, p. 533); Council Regulation (EC) No

- 2) Soil protection is not merely – perhaps neither is best – addressed by sustainability agreements and their appreciation under competition law.²⁹ But there is certainly a complementary effect.
- 3) EU-level regulation and national-level reality should be carefully assessed. The situation of soil health in Europe is very heterogeneous. No immediate and one-stop solution can be the short-term remedy of such an assorted palette.

Consumer benefits of sustainability agreements focusing on soil - suggestions

Consumers may benefit directly and indirectly from a more light-handed state aid policy framework in the agri-food sector. **Directly** because consumers are often agricultural producers at the same time (“prosumers”). **Indirectly**, among others, because of better and cheaper products and services (passed-on support), and overall healthier environment (aim of the agreements).

- 1) We believe that a key to success is the **integration of environmental, public health and agri-food policies**. This is not totally new.³⁰ However, with the possibility of the concurrent revision of relevant sectoral policies, the European Commission ought to seize the moment.
- 2) The Commission should consider attributing special attention to the critical – concentrated and substantial – level of **buying power of large supermarkets**, often direct customers of individual producers of agri-food (on whom the latter are greatly dependant).
 - a. The practice of the German Bundeskartellamt concerning the evaluation of such chains should provide an example to follow both a more lenient approach³¹, and a stricter approach looking at final consumer benefits and costs³².

1215/1999 of 10 June 1999 amending Regulation No 19/65/EEC on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices, OJ L 148 (15.6.1999, p. 1); Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 129 (28.5.2010, p. 52); Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 134 (11.5.2022, p. 4).

²⁹ We take note that there are plenty of sector- or product specific regulations or draft legislation that aim at improving soil quality in Europe. For example, in 2020, the European Commission presented an ambitious package of measures consisting of the biodiversity strategy for 2030, the Farm to Fork Strategy and the sustainable chemicals strategy as well as the circular economy action plan and the European Climate Law, all of which included actions to protect soils. The Commission’s Fit for 55 package, the zero pollution action plan, climate adaptation strategy, EU forest strategy, organic action plan, long term vision for rural areas and the EU soil strategy for 2030 have then been presented as complementary to the above. In addition, a draft of “Soil Health Law” is already in circulation, and the European Commission is planning to propose it publically before the end of the year.

³⁰ F. Galli et al. (2020), *How can policy processes remove barriers to sustainable food systems in Europe? Contributing to a policy framework for agri-food transitions?* Food Policy Vol 96, Oct 2020.

³¹ See: Initiative Tierwohl for greater animal welfare in livestock farming, <https://initiative-tierwohl.de/en/>, where the authority approved a coordinated practice of supermarket chains for quality label food production of animal meat.

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- b. Also, ACM's investigation in the food processing sector (though in nature not directly limited to sustainability agreements) underlines the buying power and potentially abusive behaviour of large international supermarket chains. Distribution of products and price setting being the central elements.
- c. GVH, the Hungarian competition authority, has recently started an *ex officio* wide-scale investigation into the pricing practices of supermarkets in Hungary.³³ The hurried inquiry addresses questions such as abuses of – potentially – concentrated buying power, concerted practices both at retail and at wholesale level. At the same time, GVH is also looking into individual concerns presented by market players and consumers in relation to alleged practices of large chains'. The outcome is expected to address issues as higher-than inflation price raises of agri-food products.

3) Sustainability agreements and soil health

- a. Improvement can only be realized through **quantitatively sound data analysis**. This requires regular and detailed data collection about the status of soil, not only in central Europe, but everywhere. Also, relevant policy recommendations can only be made based on comparable and accurate databases (measurable indicators, reliable data) across Europe³⁴. Therefore, **vertical agreements aiming at improved and managed-shared data gathering** should be promoted under Article 101 of the TFEU and the relevant parts of the CMO.
- b. Agreements targeting directly the causing factors of biological, chemical and physical decline of quality – such factors are industrial pollution, overgrazing, urbanisation or unsustainable farming – should be listed as specific and **measurable objectives of sustainability agreements**.
- c. Agreements which **help reducing soil-related mechanical intervention** – ploughing for example – help maintain soil quality. Similarly, agreements which alleviate the cost burden of smattering organic fertilizers and the application of related **precision-based agricultural activities** are also highly beneficial to soil quality. Additional benefits – availability of higher quantity and directly exploitable organic fertilizer – could be obtained from the closer **integration of livestock production and plant production** arms of agriculture.³⁵

4) Consumer's health and the protection of the environment

- a. It is often discussed that agri-food production chains, production and distribution, have not realized significant – if any – decrease in GHG emission in recent decades. Policymakers in the EU are often reminded

[ardialog.html](#), in which the authority refused a sustainability agreement between producers of raw milk, because of surcharges without improved sustainability.

³³ <https://www.gvh.hu/sajtoszoba/sajtokozlemenye/2023-as-sajtokozlemenye/lep-a-gvh-vizsgalodik-a-versenyhatosag-az-elelmiszer-kiskereskedelmi-lancoknal>

³⁴ See also: P. Panagos et al. (2022) *Soil priorities in the European Union*. Geoderma Regional, Vol.

29.
³⁵

See, also:
https://www.researchgate.net/publication/323317439_Hosszu_tavu_szerves_anyag_manipulacio_hata_sa_a_talaj_biologiai_aktivitasara

and aware of this.³⁶ Off-the-shelves options are possible solutions, and sustainability agreements embraced by competition law would well feed into this thinking. Hence, the Commission **guidelines should particularly enlist GHG-reducing sustainability agreements focusing on carbon capture** and improved agri-food systems.

- b. The **indirect effect of the availability of a healthier environment** and healthier food on consumer's personal well-being should not be discarded. One tends to choose the healthier option if all other parameters are equal. Promoting the healthier environment via soil protection and improvement of soil status in Europe could lead to measurable effects in a 10-15 years' time already.

We recommend that policy makers consider the above options and prioritize the sustainable improvement of soil quality in Europe via alleviated or discharged agri-food agreements between market players along the vertical or horizontal value chains, under statutory competition law.

Budapest, 23 April 2023

³⁶ For recent reminders, see the Parliament's internal brief of 7 February 2023 at <https://www.europarl.europa.eu/committees/en/supporting-analyses/latest-documents>