

Competition and Sustainability – New Guidance from Brussels

11 January 2023

When the President of the European Commission (Commission), Ursula von der Leyen, announced the adoption of the European Green Deal – a roadmap to a sustainable economy – in 2019, she called it Europe’s “man on the moon moment”. The achievement of the multidisciplinary objectives gathered under the Green Deal is a priority on the EU agenda and the Commission has taken yet another step on lunar soil yesterday in a steady commitment to firm its grip and gain some traction on this new planet.

On January 10th, the Commission published draft Guidelines for sustainability agreements in the field of agriculture and opened a [public consultation](#) on these. Sustainability agreements (see also [our briefing of 25 January 2022](#)) are generally set high on the Commission’s antitrust agenda, which most recently became apparent by the fact that the Commission devoted a specific chapter to the matter in the [draft revised Horizontal Guidelines](#). Even though the practical relevance of the guidance provided therein so far has been heavily doubted, there may still be hope that the Commission refines this chapter and provides more substance by the time the Guidelines will be published (expected in spring 2023).

Background on the sector-specific exemption

To support the EU transition to a sustainable food system, a provision was introduced in December 2021 to allow competition restrictions in horizontal or vertical agreements in the agricultural sector *provided* they are indispensable to achieve sustainability standards exceeding the mandatory EU and national standards (Article 210a CMO Regulation).

However, it remained rather uncertain to stakeholders what sort of cooperation would actually benefit from the antitrust exclusion. It became apparent that further guidance from regulators was necessary in order to bring the intention of stimulating the uptake of sustainable practices beyond statutory requirements to life and encourage green cooperation initiatives in the sector.

Special Guidance for agri-food stakeholders

The Commission first made a call for evidence in 2022 to identify the main questions and concerns of agri-food stakeholders. Now the draft Guidelines intend to provide more direction on the scope of the exclusion and conditions for application, which are summarized below.

Scope of the exemption

Art. 210a only applies to agreements that directly relate to the production or trade of agricultural products listed in Annex I of the TFEU (other than fishery and aquaculture products). The Commission clarifies in the draft Guidelines that if an agreement concerns both agricultural products (e.g. tomato certification) and non-agricultural products (e.g. tomato sauce), the provision exclusively applies to the agricultural part.

As a result, at least one producer of agricultural products should be party to the agreement. The producer may enter into an agreement with other producers (horizontal agreements) and/or operators (including associations) at different levels of the supply chain, e.g. companies supplying production inputs, retailers and wholesalers (vertical agreements).

Eligible sustainability objectives

Sustainability standards are defined in the Regulation in a comprehensive way and include initiatives which contribute to one or more of the following objectives:

- (i) environmental objectives (e.g. climate change mitigation, sustainable resource use, and reduction of waste),
- (ii) reducing the use of pesticides (or better manage the risks entailed), and/or
- (iii) promoting animal health and welfare.

The draft Guidelines clarify that even though social and economic objectives are part of a comprehensive ESG initiative (e.g. improved working conditions and fair remuneration of farmers), such objectives are not taken into account when assessing compliance of a given agreement with Art. 210a.

Requirements for sustainability standards

In order to benefit from the exemption, the pursued sustainability standard must be higher than the mandatory standard (if existent) or (in the absence of a mandatory EU or national standard) than the *de facto* level of sustainability. Where the national standard is higher than the EU standard, operators in that Member State must acknowledge the higher national standard. Also, if during the course of an agreement, more ambitious EU or national standards are adopted, the agreement will cease to benefit from Art. 210a.

How to assess indispensability

To assess whether the restrictions on competition resulting from an agreement are indispensable to reach an improved level of sustainability, a two-step test applies. First, *the agreement* as such must be reasonably necessary to attain the pursued sustainability

standard. Second, the *restrictions of competition* must be indispensable. In order to assess this, the parties should

- (i) identify obstacles that would prevent them from reaching the objective on a stand-alone basis (e.g. lack of expertise, high investments) and be able to explain why a collaboration is necessary,
- (ii) bear in mind that the provisions should be the least possible restrictive on competition, particularly where there is more than one suitable approach (e.g. agreement on price or certification),
- (iii) take into account that the duration of the restriction should not exceed the time necessary to achieve the goals.

It is worth noting that, different from an exemption under Article 101(3) TFEU, under Art. 210a the burden of proof tends to be lower. As clarified in the draft Guidelines, the parties are not required (i) to analyse the market coverage of a competition restriction to assess whether the agreement is indispensable or (ii) to ensure that consumers receive a fair share of the benefits resulting from the sustainability agreement.

What if agreements fall outside the scope of Art. 210a?

Even if a sustainability agreement in agriculture falls outside the scope of the antitrust exemption, contracting parties can still benefit from the Horizontal and the Vertical block exemption regulations. Moreover, an individual exemption under Article 101(3) TFEU can apply if the conditions are met. Therefore, such agreements should also be assessed in light of the Horizontal and Vertical Guidelines.

Key Takeaways

Alongside the Dutch Consumer & Markets Authority (**ACM**) and the British & Markets Authority (**CMA**), who have been the frontrunners with regard to sustainability agreements in Europe, the Commission's recent initiatives acknowledge the importance of providing more comfort and clearer guidance to companies committed to sustainability initiatives.

Encouraging agri-food operators to join forces towards a more sustainable food value chain is key to the effectiveness of the European Green Deal. It remains to be seen whether the proposed Guidelines to sustainability agreements in agriculture will actually provide the expected boost of green cooperation initiatives in the sector.

BLOMSTEIN will continue to monitor developments and practical application of sustainability agreements under the antitrust framework. If you have any questions on the topic, [Anna Blume Huttenlauch](#), [Marie-Luise Heuer](#) and [Carolina Vidal](#) will be happy to advise you.