



COMMUNICATION FROM THE COMMISSION

Commission guidelines on the exclusion from Article 101 of the Treaty on the Functioning of the European Union for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation (EU) No 1308/2013

(C/2023/1446)

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1. INTRODUCTION

1.1. General context

1.1.1. Policy context

- (1) These guidelines aim to explain the conditions for applying Article 210a of Regulation (EU) No 1308/2013 of the European Parliament and of the Council ⁽¹⁾ (the ‘CMO Regulation’), which was introduced by Regulation (EU) 2021/2117 of the European Parliament and of the Council ⁽²⁾ (‘Article 210a’).
- (2) Article 210a was introduced as part of the 2021 reform of the Union’s Common Agricultural Policy (‘CAP’), to support the transition to a sustainable food system in the Union and to strengthen the position of producers in the agri-food supply chain.
- (3) Sustainable development is referred to in Article 3(3), Article 3(5) and Article 21(2), point (f), of the Treaty on European Union (TEU) and Article 11 of the Treaty on the Functioning of the European Union (TFEU). It is also a priority objective of Union policies in general. Moreover, the Commission is committed to implementing the United Nation’s Sustainable Development Goals (‘SDGs’) ⁽³⁾. In line with this commitment, the European Green Deal sets out a growth strategy to transform the Union into a fairer and more prosperous society, with a modern, resource-efficient, and competitive economy, in which there are no net emissions of greenhouse gases from 2050 onwards and in which economic growth is decoupled from resource use ⁽⁴⁾.

⁽¹⁾ 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 (OJ L 347, 20.12.2013, p. 671).

⁽²⁾ 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, 6.12.2021, p. 262).

⁽³⁾ Resolution adopted by the General Assembly on 25 September 2015, 70/1, Transforming our world: the 2030 Agenda for Sustainable Development.

⁽⁴⁾ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of Regions – The European Green Deal (COM(2019) 640 final).

- (4) Two central Green Deal strategies are relevant to the agri-food supply chain. The Biodiversity Strategy ⁽⁵⁾ sets the ambition of reversing biodiversity loss by investing in the protection and restoration of nature. The Farm to Fork Strategy ⁽⁶⁾ holistically addresses the challenges of sustainable food systems. It includes sustainable food production, processing, and trade, but also sustainable food consumption, healthy diets and food waste. A shift to a sustainable food system can bring environmental, health and social benefits and offer economic gains.
- (5) The two Green Deal strategies list a number of non-binding quantitative targets to improve the sustainability of agriculture by 2030, including targets for: (i) reducing the overall sales of antimicrobials used on farmed animals and in aquaculture; (ii) reducing the overall use and risk of chemical pesticides and use of more hazardous pesticides; (iii) reducing nutrient losses due to the use of fertilisers; (iv) increasing the amount of land under organic farming; and (v) increasing the amount of land dedicated to high-diversity landscape features ⁽⁷⁾. The strategies listed a number of actions, including legislative initiatives, to reach those targets.
- (6) Operators in the agri-food supply chain, especially individual producers of agricultural products ('producers'), play a key role in those strategies, respecting mandatory Union and national standards. They can also increase sustainability by exceeding mandatory Union and national standards.
- (7) As recital 62 of the preamble to Regulation (EU) 2021/2117 states, certain vertical and horizontal initiatives concerning agricultural and food products, which aim to apply requirements that are more stringent than the mandatory requirements, can have positive effects on sustainability objectives ⁽⁸⁾. Moreover, such initiatives can also strengthen the position of producers in the supply chain and increase their bargaining power ⁽⁹⁾.
- (8) At the same time, operators in the agri-food supply chain may be deterred from engaging in cooperation because of the financial resources required and because of concerns about the application of Article 101(1) TFEU to such cooperation.

1.1.2. Exclusion from Article 101(1) TFEU created by Article 210a

- (9) Article 210a creates an exclusion from Article 101(1) TFEU. It was adopted by the European Parliament and the Council pursuant to Article 42 TFEU. It 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 Union or national law. Such agreements may be either between producers ('horizontal agreements') or between producers and other operators at different levels of the agri-food supply chain ('vertical agreements').
- (10) For the purposes of these guidelines, the term 'sustainability agreement' refers to any type of agreement, decision or concerted practice involving producers, both horizontally and vertically, that relates to the production of or trade in agricultural products and that aims to apply a higher sustainability standard than mandated by Union or national law, irrespective of the form of cooperation.
- (11) Sustainability agreements that fulfil the conditions laid down in Article 210a are excluded from the application of Article 101(1) TFEU and no prior decision to that effect is required.

⁽⁵⁾ Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions EU Biodiversity Strategy for 2030 Bringing nature back into our lives (COM(2020) 380 final).

⁽⁶⁾ Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system (COM(2020) 381 final).

⁽⁷⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Biodiversity Strategy for 2030 Bringing nature back into our lives COM(2020) 380 final).

⁽⁸⁾ 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 (OJ L 347, 20.12.2013, p. 671).

⁽⁹⁾ Ibid.

1.2. Legal context of the exclusion

1.2.1. Article 210a only applies to sustainability agreements that restrict competition

- (12) Article 101(1) TFEU contains a general prohibition against agreements, decisions of associations of undertakings and concerted practices that restrict competition. If an agreement restricts competition, it is automatically null and void and may expose the parties to fines, unless it qualifies for an exemption under Article 101(3) TFEU, for the exclusion under Article 210a, or for another exclusion from Article 101(1) TFEU. Article 101(1) TFEU applies to agreements, which may affect trade between Member States and that may appreciably restrict competition. Article 210a applies only to sustainability agreements falling under Article 101(1) TFEU. Therefore, it does not apply to agreements that fall under the *de minimis* regime ⁽¹⁰⁾ or that do not affect trade between Member States ⁽¹¹⁾.
- (13) Under certain conditions, agreements relating to sustainability standards may restrict competition. Article 210a excludes from the application of Article 101(1) TFEU certain types of sustainability agreements that meet the conditions laid down in Article 210a.
- (14) As with all exceptions to a general principle, the scope of Article 210a needs to be interpreted strictly while taking into account the objectives pursued by the exclusion ⁽¹²⁾. The objectives of and the conditions for the application of Article 210a, as well as the limits to its application, derive exclusively from the CMO Regulation.
- (15) The types of sustainability agreements likely to be covered by Article 101(1) TFEU are explained in Section 4 of these guidelines.

1.2.2. Sustainability agreements that restrict competition and do not fulfil the conditions of Article 210a may benefit from other rules

- (16) Sustainability agreements that restrict competition but do not fulfil the conditions laid down in Article 210a may still be excluded from the prohibition laid down in Article 101(1) TFEU if they fall under other exclusions from that Article.
- (17) Sustainability agreements that restrict competition and that fall outside the scope of Article 210a and other exclusions in the CMO Regulation are subject to Article 101(1) TFEU. Producers and operators should analyse such agreements in the light of the Horizontal Guidelines and the Vertical Guidelines ⁽¹³⁾ and should consider whether their agreements can be exempted under Article 101(3) TFEU, including under any block exemption regulation ⁽¹⁴⁾.

⁽¹⁰⁾ Communication from the Commission – Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis* Notice) (OJ C 291, 30.8.2014, p. 1).

⁽¹¹⁾ Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4.2004, p. 81).

⁽¹²⁾ See to that effect Judgment of 14 November 2017, *APVE and Others*, C-671/15, EU:C:2017:860, paragraphs 45 and 46.

⁽¹³⁾ Communication from the Commission Approval of the content of a draft for a Communication from the Commission – Commission Notice: Guidelines on vertical restraints 2021/C 359/02, C/2021/5038.

⁽¹⁴⁾ 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 1965 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 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).

1.3. Purpose and scope of the guidelines

- (18) These guidelines aim to provide legal certainty by helping producers and operators in the agri-food supply chain assess their sustainability agreements ⁽¹⁵⁾. These guidelines also aim to provide guidance on the application of Article 210a to national courts and national competition authorities. They provide guidance on: (i) the personal scope of Article 210a and the products covered by the provision; (ii) the material scope of Article 210a; (iii) the types of restrictions of competition that are excluded from the application of Article 101(1) TFEU under Article 210a; (iv) the concept of indispensability under Article 210a; (v) the temporal scope of Article 210a; (vi) the procedure for requesting an opinion from the Commission as to whether a given sustainability agreement satisfies the requirements of Article 210a; (vii) the conditions for *ex post* intervention by the Commission and national competition authorities; and (viii) the burden of proof for demonstrating whether the conditions of Article 210a have been fulfilled. Given the potentially large number of types and combinations of sustainability agreements and market circumstances in which they may operate, it is impossible to provide specific guidance for every possible scenario. Therefore, these guidelines do not constitute a checklist that can be applied mechanically. Each sustainability agreement must be assessed in its specific economic and legal context.
- (19) Although these guidelines are intended to assist producers and operators at different levels of the agri-food supply chain who are considering whether to enter into a sustainability agreement, or who have already entered into such an agreement, only the Court of Justice of the European Union has the authority to interpret Article 210a.
- (20) In addition to Article 210a, Articles 172b, 209, 210 and 222 of the CMO Regulation exclude certain agreements, decisions and concerted practices from the application of Article 101(1) TFEU. Those provisions have different requirements and serve different purposes. In some cases, a sustainability agreement may fulfil the conditions of both Article 210a and of another provision under the CMO Regulation. The applicability of each provision needs to be assessed separately.

2. PERSONAL SCOPE OF AND PRODUCTS COVERED BY ARTICLE 210A

2.1. Definition of undertaking and sustainability agreement under Article 210a

- (21) The Court of Justice has defined an ‘undertaking’ as ‘any entity of personal, tangible and intangible elements, engaged in an economic activity, irrespective of its legal status and the way in which it is financed’ ⁽¹⁶⁾. Any natural or legal person is an undertaking if it offers products or services on a market. An undertaking could be an individual farmer, a family-owned farm, an agricultural cooperative, a food processing company or a multinational chain of retailers. In some cases, public bodies are undertakings if they engage in an economic activity that is not a task that forms part of the essential functions of the state ⁽¹⁷⁾.
- (22) Because the concept of ‘undertaking’ is an economic concept, a single undertaking may include multiple legal entities ⁽¹⁸⁾. That means that an agreement between a parent and its wholly owned subsidiary, or between two wholly owned subsidiaries of the same parent company, cannot infringe Article 101(1) TFEU because the agreement is not between different undertakings ⁽¹⁹⁾.

⁽¹⁵⁾ See also, more extensively, Annex A – Flowchart of the assessment under Article 210a.

⁽¹⁶⁾ Judgment of 16 June 1987, *Commission v Italy*, Case 118/85, ECLI:EU:C:1987:283, paragraph 7; Judgment of 18 June 1998, *Commission v Italy*, Case 35/86, ECLI:EU:C:1998:303, paragraph 36; Judgment of 12 September 2000, *Pavlov and Others*, C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 75; Judgment of 25 March 2021, *Deutsche Telekom v Commission*, C-152/19 P, ECLI:EU:C:2021:238, paragraph 72.

⁽¹⁷⁾ Judgment of 18 March 1997, *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)*, C-343/95, ECLI:EU:C:1997:160, paragraph 22.

⁽¹⁸⁾ The joint exercise of an economic activity is normally assessed by analysing the existence of functional, economic and organic links between the entities. See for example, Judgment of 16 December 2010, *AceaElectrabel Produzione SpA v Commission*, Case C-480/09 P, ECLI:EU:C:2010:787, paragraphs 47 to 55; Judgment of 10 January 2006, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 112.

⁽¹⁹⁾ Judgment of 24 October 1996, *Vihoo Europe BV v Commission*, C-73/95 P, ECLI:EU:C:1996:405, paragraphs 15-18.

- (23) An ‘agreement’ encompasses any act in which two or more undertakings express a concurrence of wills to cooperate ⁽²⁰⁾. The form of such expression is irrelevant. A signed and notarised contract, a ‘gentlemen’s agreement’ or an exchange of emojis in text messages can all constitute an agreement.
- (24) An ‘association of undertakings’ refers to an entity, regardless of its form, that consists of undertakings of the same general type and makes itself responsible for representing and defending their common interests in relation to other economic operators, government bodies and the public in general ⁽²¹⁾. Examples of associations are trade associations, professional and regulatory bodies, and cooperatives that are not themselves economically active in the matter they coordinate. A ‘decision of an association’ is a broad concept that encompasses: (i) rules and regulations; (ii) formal decisions that are binding on one or more members; (iii) codes of conduct; and (iv) non-binding recommendations that reflect a resolve on the part of the association to coordinate the conduct of its members on the market in accordance with the terms of the recommendation.
- (25) A ‘concerted practice’ refers to a form of coordination between undertakings in which they have not reached an agreement but knowingly substitute the risks of competition for practical cooperation ⁽²²⁾. For example, intentional exchanges of confidential information between competitors could allow them to compete less vigorously, even if the competitors never explicitly discussed limiting competition between themselves.
- (26) In practice, the distinction between ‘agreements’, ‘decisions of associations’, and ‘concerted practices’ is of limited relevance. The Court of Justice has held that the terms overlap, ‘are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves’ ⁽²³⁾.

Example 1: A producer begins certifying that all of its strawberries are pesticide free and charges a premium for their sale. A competing producer observes that the first producer is selling out all of its strawberries at the higher price and starts doing the same. Soon other producers start doing the same and are able to charge a premium because they all certify that their strawberries are pesticide-free. In such a situation, there is no agreement: each producer is acting independently, taking into account the present or expected conduct of its competitors.

Example 2: A group of producers meets to discuss ways to make strawberry cultivation more sustainable. They discuss how they would stop using pesticides on their strawberries, but are concerned that, if they do so on their own, other competitors will undercut them on price. They all state that they will not use pesticides the following season if the others agree to the same commitment. They do not produce a written document recording such commitment. None of the producers uses pesticides on its strawberries the following year. That is an agreement. Although it was not in writing, the producers clearly expressed their intention to conduct themselves on the market in a specific way, both by their statements at the meeting and by actually doing what they said they would do.

2.2. Personal scope of Article 210a

- (27) Article 210a applies to sustainability agreements to which at least one producer of agricultural products is a party and that are entered into with other producers (horizontal agreements) or with one or more operators at different levels of the food supply chain (vertical agreements), including distribution, wholesale and retail.

⁽²⁰⁾ Judgment of 6 January 2004, *BAI and Commission v Bayer*, C-2/01 P and C-3/01 P, ECLI:EU:C:2004:2, paragraph 97.

⁽²¹⁾ Opinion of Advocate General Léger of 10 July 2001, *Wouters*, C-309/99, EU:C:2001:390, paragraph 61.

⁽²²⁾ Judgment of 14 January 2021, *Kilpailu- ja kuluttajavirasto*, Case C-450/19, ECLI:EU:C:2021:10, paragraph 22.

⁽²³⁾ Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 131.

Example: A horizontal agreement may concern, for example, a commitment between competing producers to raise poultry only in accordance with certain animal welfare standards that are higher than what is mandated by Union or national law. A vertical agreement may concern, for example, a commitment between certain producers and distributors to only market poultry raised in accordance with certain sustainability standards that are higher than what is mandated by Union or national law.

- (28) Parties to sustainability agreements must include one or more producers of agricultural products. Parties can also include other operators at different levels of the food supply chain, including production, processing, distribution and trade. These guidelines refer generically to parties to sustainability agreements as ‘operators’. In practice, the following are the different types of operators relevant for the purposes of Article 210a:
- (a) producers: producers of agricultural products defined in Annex I to the TFEU and further detailed in Annex I to the CMO Regulation. They include producers of raw agricultural products and producers of certain processed agricultural products (such as sugar processors producing sugar, or millers producing flour) ⁽²⁴⁾;
 - (b) operators at the ‘production level’: suppliers of inputs for agricultural production such as seeds, pesticides, equipment and works, and suppliers of packaging, to the extent that all these suppliers play a role in applying the sustainability standards specified in Section 3.2 by implementing the sustainability agreement;
 - (c) operators at the ‘processing level’: operators, also referred to as ‘processors’ or ‘manufacturers’, that process agricultural products to produce other products not listed in Annex I to the TFEU ⁽²⁵⁾ to the extent that they aim to help attain the sustainability standards specified in Section 3.2 by implementing the sustainability agreement;
 - (d) operators at the ‘trade level, including distribution’: traders, wholesalers, retailers and food service suppliers, including operators such as hotels, restaurants and cafés, and transport and logistics companies, to the extent that these operators aim to help attain the sustainability standards specified in Section 3.2 by implementing the sustainability agreement.
- (29) Operators that act on the market both as producers and operators at other levels of the agri-food supply chain, for example retailers, may participate in the sustainability agreement as producers provided that they genuinely act as producers. Otherwise, at least one other producer must be party to the sustainability agreement.
- (30) As long as the conditions laid down in Article 210a are met, sustainability agreements may be bilateral agreements, for example between producers and retailers; tripartite agreements, for example between producers, processors and distributors; or even multilateral agreements involving operators at more than three levels of the agri-food supply chain.
- (31) Parties to sustainability agreements may be individual operators and associations or other collective entities involving producers or other undertakings referred to in paragraph (28), regardless of their legal nature or whether they are formally recognised under Union or national law, provided that at least one of the parties to the sustainability agreement is a producer or an association of producers. Such collective entities can be, for example, producer organisations (POs), associations of POs or interbranch organisations (IBOs), or agricultural cooperatives.

⁽²⁴⁾ The participation in the sustainability agreement of producers of processed products listed in Annex I to the TFEU does not necessarily imply the simultaneous participation in the agreement of producers of primary products that are needed for the production of those processed products. For instance, in a sustainability agreement with beet-based sugar producers, it is not compulsory that beet growers are also party to that agreement.

⁽²⁵⁾ This may involve several successive processing steps.

- (32) Collective entities may also develop sustainability agreements without cooperating with any other entity in the agri-food supply chain. Given that at least one of the parties to the sustainability agreement must be a producer or an association of producers, the applicable rules governing decision-making in those organisations, particularly as laid down in their statutes, must ensure that the producers' participation in the agreement is effective at all levels of the organisation and that the requirements laid down in Article 210a are respected. For example, producers in an IBO may also be represented by trade unions or other organisations collectively representing producers' interests, if the statutes or other contractual relations provide so ⁽²⁶⁾.

Example: A cheese IBO represents three levels in the agri-food supply chain: milk producers, cheese producers and distributors. The rules of the IBO provide that the IBO may enter into an agreement or reach a decision upon approval by a majority of members at each level. When concluding a sustainability agreement in the IBO for the more sustainable production and distribution of cheese, a majority of 70 % of milk producers (first level), 60 % of cheese producers (second level) and 55 % of milk and cheese distributors (third level) vote in favour. In this scenario, the decision-making bodies of the IBO can conclude a sustainability agreement that is binding on all its members. For the purpose of applying Article 210a, all producers and distributors who are members of the IBO, either directly or indirectly through their representative bodies and associations, are party to the sustainability agreement, including those that have not voted in favour of the agreement.

- (33) It does not matter whether a party to a sustainability agreement is based inside or outside the Union. What matters is that the sustainability agreement is implemented in the Union, even if only partially, or that is capable of having an immediate, substantial and foreseeable effect on competition in the internal market ⁽²⁷⁾. For example, if among the parties to an agreement there are cocoa bean producers, based outside of the Union, who sell their products to distributors for further resale in the Union, the agreement may constitute a sustainability agreement within the scope of Article 210a.
- (34) Mere compliance with a sustainability standard is not in itself sufficient to constitute an agreement for the purposes of applying Article 210a. In order for compliance with a sustainability standard to give rise to an agreement, another step is necessary, namely that the operators in the agri-food supply chain concerned express their intention to jointly implement the agreement, that is to say there is a concurrence of wills. In practice, the difference between an agreement on adopting a sustainability standard and mere compliance with a standard is that in the case of mere compliance, the operator can decide unilaterally to stop applying the standard at any time.
- (35) An operator becomes a party to a sustainability agreement for the purposes of Article 210a when there is a concurrence of wills with other parties on an agreement. The concurrence of wills should constitute the faithful expression of the parties' intentions ⁽²⁸⁾.
- (36) In order for a sustainability agreement to fall within the scope of Article 210a(2), at least one producer must be a party to it. Producers are thus essential parties to sustainability agreements, even if the initiative to conclude a sustainability agreement may come from other operators. Producers that are party to an agreement at the time it is set up must be involved in the negotiation, adoption and implementation of the standard.
- (37) Producers may become parties to the agreement at a later stage without having taken part in the negotiation or adoption of the agreement, provided that they demonstrate a concurrence of wills to be bound by the sustainability agreement. In that case, the adherence of the producer or producers to the sustainability agreement needs to be subject to the rules on the temporal scope of the agreement (see Section 6).

⁽²⁶⁾ Judgment of 15 June 2023, *Saint-Louis sucre*, ECLI:EU:C:2023:486, C-183/22, paragraph 38 *et seq.*

⁽²⁷⁾ See, to that effect Judgment of 6 September 2017, *Intel*, C-413/14 P, ECLI:EU:C:2017:632, paragraphs 40 to 45 and case-law cited therein.

⁽²⁸⁾ See, to that effect, Judgment of the Court of 26 October 2000, *Bayer AG v Commission*, T-41/96, ECLI:EU:T:2000:242, paragraph 69; Judgment of 13 July 2006, *Commission v Volkswagen*, C-74/04 P, ECLI:EU:C:2006:460, paragraph 39; Judgment of 30 April 2009, *CD-Contact Data GmbH*, T-18/03, ECLI:EU:T:2009:132, paragraph 48.

Example 1: To promote the sustainable cultivation of apples, a group of supermarket chains that collectively account for 70 % of wholesale purchases of apples in a Member State agrees that they will only purchase apples that have been certified to be pesticide-free. Since this group accounts for a large share of purchases, most apple producers feel that they have no choice but to follow the standard set by the group of supermarket chains to ensure their products are not excluded from the market. They stop using pesticides and certify their apples as pesticide-free, rather than risking being unable to sell their apple production. There is clearly an agreement between the supermarket chains. However, the apple producers are not parties to such agreement. Although the producers are supplying products that meet a sustainability standard, they themselves have not agreed with the supermarket chains on the content of the standard, and their choice to comply with the standard is not conditioned on other apple producers complying with that standard. As a result, the producers will not be party to the agreement concluded between the group of supermarket chains. However, that does not prevent producers from becoming parties to a sustainability agreement with the supermarket chains in the future.

Example 2: In a slightly different scenario, a group of supermarket chains agrees to only purchase apples that have been certified pesticide-free. An organisation of apple producers develops a certification mark certifying the pesticide-free nature of the products of its members. The organisation licenses the certification mark for use on the supermarkets' packaging and in their marketing materials. The licensing fees are distributed to the producers that are members of the organisation. In such case, the organisation is an association of producers that took a decision to adopt and supply the certification mark. That decision is a sustainability agreement between producers. In addition, the same sustainability agreement may also include the licensing agreement signed between the organisation and the supermarkets.

- (38) While agreements on sustainability standards for agricultural products are likely to involve improvements in *production*, Article 210a also applies to agreements on sustainability standards that relate to *trade* in agricultural products. When agreements on sustainability standards relate to trade in agricultural products, the involvement of at least one producer is also required.

Example 1: Producers of pears and a group of wholesalers conclude an agreement. Under the agreement, producers will adopt production techniques that, while eliminating the use of chemical treatments that improve the shelf life of the pears, will result in increased food waste as such production techniques will increase the risk of the pears becoming blemished or spoiled before they reach the consumer. To ensure that the pears stay in good condition before they are delivered to retailers, the wholesalers must adapt the storage facilities conditions and make the required construction modifications. In such a case, the sustainability improvements relate both to the production and to the trade of agricultural products. Article 210a would be applicable to the part of the sustainability agreement that concerns the wholesalers' storage modifications, because that part would be intrinsically linked to making a more sustainable product available on the market.

Example 2: A group of retailers and wholesalers agree to use a system of recycled containers for the transportation and in-store placement of fresh fruits and vegetables. Although the agreement concerns a sustainability standard that may go beyond what is mandated by law, Article 210a will not apply, because the agreement will not involve any producer.

Example 3: A group of food retailers and producers agree on a circular economy initiative to create a joint waste collection system. Retailers commit to collect their waste turning it later into fertilisers while producers commit to use the fertilisers in their production. Given that the agreement involves the commitment of producers to use the fertiliser generated through the waste collection system, Article 210a will apply.

2.3. Products within the scope of Article 210a

- (39) To be covered by Article 210a, a sustainability agreement must: (i) concern one or more agricultural products listed in Annex I to the TFEU other than fishery and aquaculture products ('Annex I products'); and (ii) relate to the production of, or trade in, such products.
- (40) The limitation of Article 210a to agricultural products is a consequence of the scope of Article 1 of the CMO Regulation, which only includes agricultural food products and therefore excludes all other food products ('non-Annex I products').
- (41) A sustainability agreement can be valid even if it concerns both Annex I products and non-Annex I products. However, the exclusion pursuant to Article 210a will only apply to the part of the sustainability agreement that concerns Annex I products.

Example 1: An agreement relates to the sustainable packaging of malt in fully recyclable waterproof shipping bags, and of beer in casks made entirely from recycled metals. Article 210a will only apply to the part of the agreement on malt as beer is a non-Annex I product.

Example 2: An agreement relates to the supply of food waste from several restaurants and from the producers that supply those restaurants. That waste will then be used for the production and commercialisation of biofuels. Article 210a will apply only to the part of the agreement on the supply of waste to produce biofuels and not to the commercialisation of biofuels not included in Annex I.

Example 3: An agreement relates to the supply of sustainably produced poultry to canteen services. The agreement involves poultry producers that supply poultry to prepared-meal producers, and an organisation representing food canteens that purchase prepared meals from the meal producers. Article 210a would only apply to the part of the agreement that relates to the supply of poultry to the prepared meals producers and not to the part relating to the supply of prepared meals to canteens. Only poultry meat is a product listed in Annex I; the prepared meals incorporating that meat are not.

Example 4: An agreement relates to the supply of sustainable tomatoes, mushrooms, vegetables and herbs for processing into different sauces, such as pesto, tomatoes with mushrooms, tomatoes with aubergine, onions and capers, and the commercialisation of such sauces. Article 210a would only apply to the part of the agreement on the production and supply of sustainable tomatoes, mushrooms and herbs, and not the commercialisation of the sauces, because sauces are non-Annex I products.

3. MATERIAL SCOPE OF ARTICLE 210A

- (42) It is necessary to distinguish between the sustainability objectives listed in Article 210a(3), the sustainability standards required to reach those sustainability objectives, and the implementation measures set out in a sustainability agreement to attain those standards.

Example: The sustainability objective could be preventing soil erosion. The sustainability agreement would aim to apply a standard that could involve setting measurable targets in the form of quantitative or qualitative criteria going beyond a mandatory standard, for example, using a cover crop in winter to avoid soil erosion. The agreement could include specific implementation measures, such as obligations to use certain machinery or equipment, to implement risk management tools, or to support the dissemination of technical knowledge, including training, advice, cooperation and knowledge exchange, digital technologies or practices for sustainable management of nutrients.

3.1. Sustainability objectives pursuant to Article 210a

- (43) To fulfil the conditions of Article 210a, a sustainability agreement must aim to attain a sustainability standard that contributes to one or more of the following sustainability objectives:
- (a) environmental objectives, including climate change mitigation and adaptation; the sustainable use and protection of landscapes, water and soil; the transition to a circular economy, including the reduction of food waste; pollution prevention and control; and the protection and restoration of biodiversity and ecosystems;
 - (b) the production of agricultural products in ways that reduce the use of pesticides and manage risks resulting from such use or that reduce the danger of antimicrobial resistance in agricultural production;
 - (c) animal health and animal welfare.
- (44) The examples of environmental objectives listed in Article 210a(3), point (a), are illustrative; there may be different types and variations of objectives. For example, any objective pursued by an operator that has a positive effect on the environment in relation to the production or processing of agricultural products or to trade in agricultural products, including distribution, may constitute a sustainability objective within the scope of Article 210a. However, the objectives listed in Article 210a(3), points (b) and (c) are exhaustive.

Examples of sustainability objectives covered by Article 210a:

Example 1: While not explicitly mentioned in Article 210a(3), reducing air pollution, improving air quality and reducing greenhouse gas emissions relate to environmental objectives. They therefore fall within the scope of Article 210a(3), point (a).

Example 2: While not explicitly mentioned in Article 210a(3), avoiding plastics pollution relates to the objective of the transition to a circular economy and the objective of pollution prevention and control. The objective therefore falls within the scope of Article 210a(3), point (a).

Example 3: Improving the resistance of soil to erosion, increasing soil biodiversity, improving soil composition, and ensuring maritime protection all relate to the objective of the sustainable use and protection of landscapes, water and soil. Those objectives therefore fall within the scope of Article 210a(3), point (a).

Example 4: Mitigating the impact of irrigation practices on water resources and ecosystems, saving water, and protecting water quality relate to the objective of the sustainable use of water. They therefore fall within the scope of Article 210a(3), point (a).

Example 5: Reducing waste, such as management and valorisation of by-products, residual flows, and food waste, by for example increasing resource efficiency or promoting innovative solutions, relate to the objective of the transition to a circular economy. They therefore fall within the scope of Article 210a(3), point (a).

Example 6: Improving natural ecological process in agriculture, including nutrient cycling, soil fertility, natural plant pest control and quarantine and water conservation through techniques like composting, cover cropping and the use of beneficial insects, are types of environmental objectives. They therefore fall within the scope of Article 210a(3), point (a).

Example 7: Mitigating the impact of adverse weather conditions and adaptation measures are types of environmental objectives. They therefore fall within the scope of Article 210a(3), point (a).

Example 8: Improving the quality of life of animals, including their emotional state, their ability to express certain normal behaviour and ensuring that they have sufficient space, proper facilities and the ability to enjoy the company of other animals of their own kind, falls under the animal welfare objective laid down in Article 210a(3), point (c).

Example 9: Protecting animals from injury and disease through suitable prevention practices, rapid diagnosis and treatment, falls under the animal health objective laid down in Article 210a(3), point (c).

- (45) A sustainability standard may aim to contribute to one or more of the objectives covered by Article 210a(3).
- (46) To help the assessment of whether a sustainability agreement satisfies the conditions for exclusion under Article 210a, the sustainability agreement should identify the sustainability objective or objectives that the sustainability standard aims to contribute to.
- (47) If a sustainability agreement aims to contribute to several objectives, some of which are not covered by Article 210a(3), only the objectives listed in Article 210a(3) are relevant for assessing whether the sustainability agreement falls within the scope of Article 210a.
- (48) A sustainability standard may aim to contribute to objectives that are not covered by Article 210a(3). These could include social objectives, such as working conditions for farm workers or healthy and nutritious diets for consumers, or economic objectives, such as the development of brands that remunerate farmers in a fairer manner. In such cases, the aspects of the sustainability standard that aim to contribute to those social or economic objectives cannot be taken into account when determining whether a sustainability agreement satisfies the conditions for exclusion under Article 210a, in particular whether any restrictions of competition in the sustainability agreement are indispensable to attain the sustainability standard, as further explained in Section 5.

Examples of sustainability agreements aiming at objectives covered by Article 210a:

Example 1: Cereal producers enter into an agreement with cereal processors under which the cereal producers will adopt improved landscape features, such as hedges, and the cereal processors agree to pay a higher price for the sustainability efforts of the cereal producers. This may fall under the objective of protecting and restoring biodiversity and ecosystems laid down in Article 210a(3), point (a), if the sustainability agreement aims to contribute to that objective.

Example 2: Honey producers and mead processors agree to market products that come from honey harvested from beehives that only use non-chemical products to fight varroosis. This agreement may fall under the objective of animal health and animal welfare laid down in Article 210a(3), point (c), if the sustainability agreement aims to contribute to that objective.

Example 3: Cereal producers agree to apply precision farming techniques to reduce the use of pesticides and fertilisers. This may fall under the environmental objectives laid down in Article 210a(3), if the sustainability agreement aims to contribute to that objective.

Example 4: Dairy producers and processors agree to allow the grazing of milk cows in order to improve the quality of life of animals. This may fall under the animal welfare objective laid down in Article 210a(3), point (c), if the sustainability agreement aims to contribute to that objective.

Examples of sustainability agreements aiming at objectives which are either not within the scope of Article 210a or are partially within its scope:

Example 1: Dairy producers and processors agree to develop brands ensuring fairer remuneration for producers. The increase in income of dairy producers may lead to an increase in investments pursuing environmental or animal welfare objectives. If the objective of the agreement is to ensure a fairer remuneration for the producers, that objective would not be within the scope of the objectives covered by Article 210a(3).

Example 2: Dairy producers and processors agree to improve animal welfare and at the same time agree to ensure fair working conditions for farm workers. Only the aspects of the agreement aiming to reach the objectives covered by Article 210a(3), such as animal welfare, can benefit from the exclusion under Article 210a. By contrast, the other aspects, such as the fair working conditions for farm workers, cannot be taken into account for the assessment.

3.2. Sustainability standards applied pursuant to Article 210a

3.2.1. *The sustainability agreement must identify a sustainability standard relating to a sustainability objective*

- (49) A sustainability agreement that fulfils the conditions laid down in Article 210a needs to identify a sustainability standard which is to be respected by the parties to the agreement in order to contribute to one or more of the sustainability objectives covered by Article 210a(3).
- (50) The sustainability standard may be a pre-existing standard, a standard drawn up for the agreement by the parties to the agreement or a standard established by third parties.
- (51) Sustainability standards may prescribe a target to be met, with or without imposing specific technologies or production methods. Consequently, the parties to a sustainability agreement may not only need to commit themselves to attaining the target or targets set by the standard but may also need to use a particular technology or production practice to reach that target, for example, soil protection methods and animal grazing practices.
- (52) Adopting a sustainability standard may lead to the creation of a voluntary label, logo or brand name for products that meet the requirements of the standard.
- (53) Only the part of the production of agricultural products covered by the agreement that meets the sustainability standard can benefit from the exclusion laid down in Article 210a.

Example: A sustainability agreement aims to decrease the use of pesticides by 8 %. A producer, party to the agreement, is active in two different geographic locations. At one of the locations, the producer commits to meet the standard whereas, at the other, the producer continues to use the pesticides as much as possible. Only the location in which the producer aims to meet the standard can benefit from the exclusion laid down in Article 210a.

- (54) In assessing whether a sustainability standard is covered by Article 210a, it is irrelevant whether the sustainability agreement is or has been supported by Union or national funding. However, the fact that implementation of a given standard is supported by Union or national funding is relevant for assessing the indispensability of any restrictions of competition described in Section 5.

3.2.2. *Sustainability standards should lead to tangible and measurable results or, where that is not possible, observable and describable results*

- (55) The sustainability standard may set quantified targets or may set specific methods or practices to be adopted. For example, the standard may prescribe not using a certain input or a certain agricultural practice.
- (56) Results obtained by the application of a sustainability standard need to be tangible and measurable. Where it is not possible to quantify the results obtained in numerical terms, those results should nonetheless be observable and describable. In those cases, there is no need to quantify the impact that the sustainability agreement aims to achieve.

Example 1: An agreement with the objective to reduce pesticides sets a standard prescribing a 40 % reduction in pesticide use. In that case, it would be necessary to demonstrate that applying the standard leads to a measurable reduction in the pesticide use. However, it would not be necessary to demonstrate that the reduction in pesticide use by individual producers led to an improvement in water quality in the region, such as the reduction of pesticide leakage in groundwater.

Example 2: If a sustainability agreement aims to increase biodiversity through the cultivation of certain insect-friendly wild plants and original varieties, it may not be possible to quantify the results of improved biodiversity in numerical terms. However, the efforts made, and results achieved must be describable, although not necessarily in numerical terms: for example, the parties should identify which plants are more insect-friendly, or which original varieties should be planted.

3.2.3. Sustainability standards must be higher than the relevant mandatory standard

(57) The sustainability standard that a sustainability agreement covered by Article 210a aims to apply must be higher than what is mandated by Union or national law. That means that the sustainability standard must impose sustainability requirements that exceed what is required by an existing mandatory standard. If neither Union nor national law imposes a specific sustainability requirement, the agreement must introduce sustainability requirements.

(58) A mandatory standard is a standard set at Union or Member-State level that sets out the levels, substances, products, or techniques to be attained/used or avoided by individual producers or operators. Standards or targets that are binding on Member States, but not on individual undertakings, are not considered mandatory standards for the purposes of Article 210a.

Example of a target binding on Member States, but not on individuals: The Commission's proposal for a regulation for the sustainable use of pesticides ⁽²⁹⁾ sets targets to reduce by 50 % both the overall use and risk of chemical pesticides and the use of 'more hazardous' pesticides by 2030. While those targets would be binding on Member States, they would not bind individuals. Therefore, those targets would not be considered mandatory standards for the purposes of Article 210a.

Example of a target binding on a region, but not on individuals: In a scenario where the proposal for a regulation for the sustainable use of pesticides is adopted, a region could decide to impose on itself a target to progressively reduce the use of pesticides by 50 % by 2030. While such a decision would be binding on the region, it would not bind individuals. Therefore, such a decision would not be considered a mandatory standard for the purposes of Article 210a.

Example of a target binding on individuals: In a scenario where the proposal for a regulation for the sustainable use of pesticides is adopted, a Member State could decide to implement a binding requirement on producers to progressively decrease the pesticides usage by different levels (for example 30/50/70 %) in different sectors by 2030. Such national provisions would be binding on individuals and would therefore be considered mandatory standards for the purposes of Article 210a.

(59) Regardless of whether non-EU country operators are parties to a sustainability agreement, mandatory standards are to be understood as Union standards or standards set by the Member States. Where the sustainability agreement refers to a non-EU country standard, the non-EU country standard needs to go beyond the corresponding mandatory Union standard or, in its absence, of mandatory Member State standards in order to benefit from the exclusion under Article 210a.

Example 1: A non-EU country cocoa producer enters into a sustainability agreement with a Union chocolate manufacturer that aims at going beyond a mandatory Union or Member-State standard. The sustainability agreement may therefore benefit from the exclusion under Article 210a.

⁽²⁹⁾ Proposal for a Regulation of the European Parliament and of the Council on the sustainable use of plant protection products and amending Regulation (EU) 2021/2115 (COM(2022) 305 final).

Example 2: A non-EU country cocoa producer enters into a sustainability agreement with a Union chocolate manufacturer that aims at going beyond a mandatory non-EU country standard. The sustainability agreement may benefit from the exclusion under Article 210a only insofar as it goes beyond a mandatory Union standard or, in its absence, a mandatory standard of a Member State.

- (60) If a mandatory standard in a Member State is more stringent or ambitious than the corresponding Union standard, producers and operators active in that Member State must respect that higher standard.
- (61) Depending on the legal order of each Member State, a mandatory standard may exist at the regional or local level. A mandatory standard should be understood as the relevant standard for the purpose of Article 210a if it is set at regional or local level, and the relevant production or trade under the sustainability agreement takes place within that specific region or locality. If a sustainability agreement covers several regions or localities, each with different mandatory standards, the standard under the sustainability agreement should exceed the applicable standard of the region or locality where the production or trade covered by the agreement takes place. For instance, if the agreement aims to improve the sustainable production of apples, the relevant standard will be the one applicable to the region or locality where the production of apples occurs.
- (62) Sustainability agreements may cover quality schemes set out in Regulation (EU) No 1151/2012 ⁽³⁰⁾, Commission Delegated Regulation (EU) 2019/33 ⁽³¹⁾, or quality labels that are subject to relevant national law, but only to the extent that those schemes and labels reflect higher sustainability standards than what is mandated by Union or national law.
- (63) In the absence of mandatory standards at Union or national level, sustainability agreements aimed at increasing the level of sustainability will be eligible to benefit from the exclusion under Article 210a. The same applies to sustainability agreements aimed at accelerating the transition or early conversion to mandatory Union or national standards that have been either adopted or agreed upon but have not yet entered in force. Operators must bear in mind that the continued use of the same production and trade practices used prior to and following the entry into force of an agreement i.e. not making any improvements in terms of employing more sustainable production or trade practices, could put into question the fulfilment of the indispensability test as described in Section 5 below. Nevertheless, there may be situations where operators have begun facing significantly increased difficulties in maintaining the same production and trade practices (significantly higher costs, significant restrictions of access to essential inputs, etc.), which would potentially justify the need to cooperate.
- (64) Sustainability agreements will cease to be covered by Article 210a from the moment that equivalent or more ambitious Union or national standards enter into force (See Section 6.5).
- (65) Due to the extensive variety of types and combinations of mandatory sustainability standards at Union and national levels for each of the sustainability objectives laid down in Article 210a(3), it is not possible to set out in these guidelines an exhaustive list of sustainability standards mandated by Union or national law.
- (66) Similarly, it is not possible to indicate in these guidelines the minimum amount by which the adopted sustainability standard must exceed the mandatory standard. Instead, the amount by which the sustainability standard exceeds the mandatory standard will need to be assessed on a case-by-case basis, taking into account the restrictions of competition imposed by the sustainability agreement and whether such restrictions are indispensable (see Section 5).

⁽³⁰⁾ Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ L 343, 14.12.2012, p. 1).

⁽³¹⁾ Commission Delegated Regulation (EU) 2019/33 of 17 October 2018 supplementing Regulation (EU) No 1308/2013 of the European Parliament and of the Council as regards applications for protection of designations of origin, geographical indications and traditional terms in the wine sector, the objection procedure, restrictions of use, amendments to product specifications, cancellation of protection, and labelling and presentation (OJ L 9, 11.1.2019, p. 2).

Example 1: Producers and operators agree to reduce by 50 % the volume of food wasted in producing and processing peas by optimising harvesting techniques, investing in more efficient storage capacity and improving packaging. There is no mandatory sustainability standard for food waste reduction set at Union level and no applicable national sustainability standard. In such a case, the sustainability standard would be higher than what is mandated by Union or national law.

Example 2: Milk producers and retailers agree to support the conversion to organic milk production as specified in Regulation (EU) 2018/848 of the European Parliament and of the Council⁽³²⁾. Although Regulation (EU) 2018/848 lays down production methods that farmers need to follow to be able to label their products as organic, those production methods are not mandatory standards at Union or national level. In such a case, a standard requiring milk to be produced in accordance with organic production methods would be higher than the one mandated by Union or national law.

4. RESTRICTIONS OF COMPETITION

(67) This section explains the types of restrictions that are likely to fall under Article 101(1) TFEU, and that could therefore potentially benefit from the exclusion under Article 210a if they fulfil the conditions of Article 210a.

(68) This section does not consider whether restrictions of competition that are likely to fall under Article 101(1) TFEU would also likely meet the requirements for exemption under Article 101(3) TFEU. This section is also not intended to provide an exhaustive discussion of when sustainability agreements do or do not restrict competition.

4.1. What is a restriction of competition?

(69) A key concept for understanding what constitutes a restriction of competition is the concept of ‘parameters of competition’. Businesses compete by making an offer to customers that is more attractive than the offers of alternative suppliers in the given circumstances. Although price may be the most important factor for some buyers, other factors can also play a role. For example, one supplier may offer a better-quality product, better features, more variety, better service, more innovation. Certain factors may affect a supplier’s ability to reduce its price or improve features, such as the supplier’s ability to produce a given level of output at a lower cost than its competitors, more efficient production methods and technologies, supply sources, transportation, and logistics. Such price and non-price factors are collectively referred to as ‘parameters of competition’.

(70) An agreement restricts competition within the meaning of Article 101(1) TFEU if it is likely to have an impact on the relevant parameters of competition in a given market. An agreement can restrict competition because it contains an explicit or implicit obligation not to compete with respect to one or more parameters of competition. It can also restrict competition by reducing rivalry between the parties to the agreement or reducing rivalry between them and third parties⁽³³⁾. Annex E provides an overview of some of the main types of restrictions of competition that may be found in sustainability agreements, together with how the different types of restrictions might be applied in practice.

(71) In some cases, the sustainability agreement at stake can be regarded, by its very nature, to restrict competition. For example, an agreement between a group of competing undertakings that they will each charge the same prices to their respective customers is inherently likely to restrict competition.

⁽³²⁾ Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 (OJ L 150, 14.6.2018, p. 1).

⁽³³⁾ Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.04.2004, p. 97) (‘Guidelines on Article 101(3) TFEU’). Article 81(3) is referred to in the title because the notice was issued before the adoption of the Lisbon Treaty. When the Lisbon Treaty was adopted, Article 81 of the Treaty establishing the European Community became Article 101 of the Treaty on the Functioning of the European Union.

- (72) In other cases, while the sustainability agreement concerned cannot be regarded, by its very nature, to restrict competition, it might nonetheless have the effect of restricting competition. In such cases, whether a sustainability agreement is likely to restrict competition will depend on several factors, including the share of the market that is affected by the sustainability agreement or whether there are other undertakings that would be able to begin producing competitive products. That is because, if there are enough producers who are not covered by the sustainability agreement, customers will continue to have competitive alternatives, and thus the sustainability agreement in question is unlikely to restrict competition.
- (73) A sustainability agreement may contain multiple restrictions of competition. For example, an animal welfare initiative might contain a specific agreement on a mandatory surcharge to be paid to farmers who meet certain animal welfare criteria, where the agreement on the surcharge is an agreement on a component of the price. These criteria might also include requirements for the amount of space available to individual animals, which could reduce the number of animals that can be reared (an output restriction) or might specify particular feeding requirements (an input restriction).
- (74) For a sustainability agreement to restrict competition within the meaning of Article 101(1) TFEU, the number of restrictions in that agreement is irrelevant as long as the agreement includes at least one such restriction.

Example of an agreement restricting competition: To reduce pollution and protect water systems, soya farmers in a region want to stop using chemical fertilisers. However, due to the potential yield reduction and financial losses if they were to implement such an initiative on their own, they agree not only to stop using chemical fertilisers but also to increase their prices per tonne to maintain the previous level of profitability. The sustainability agreement is likely to restrict competition by limiting the farmers' ability to set their own selling prices.

Example of an agreement unlikely to restrict competition: A group of farmers who wish to stop using chemical fertilisers create a quality mark for 'sustainable soya' that has been produced without chemical fertilisers. Eliminating the use of chemical fertilisers is likely to reduce yields, which could potentially reduce farm incomes. The group therefore invests heavily in raising consumers' awareness of the quality mark and of the environmental benefits of eliminating chemical fertilisers to convince consumers that sustainable soya is worth more than soya produced with chemical fertilisers. Any farmer that certifies that their soya has been produced without chemical fertilisers may participate in the scheme and can leave the scheme at any time. Unlike the previous example, there are no provisions setting prices.

The sustainability agreement is unlikely to restrict competition. It is possible that the scheme has the effect of restricting competition if a large number of soya producers join the scheme, effectively limiting the ability of customers who do not want to purchase sustainable soya to do so. However, if only a limited number of soya producers join the scheme, for example producers who account for less than 10 % of supply, any restriction of competition is likely to be insignificant, because the resulting reduction in output levels will be insignificant and customers will continue to have alternatives if they are unwilling or unable to pay more for sustainable soya.

4.2. What is not a restriction of competition?

- (75) Not all sustainability agreements restrict competition. Where such sustainability agreements do not affect the parameters of competition, such as price, quantity, quality, choice or innovation, they are unlikely to restrict competition. The examples in the following paragraphs are illustrative and not exhaustive.
- (76) First, sustainability agreements that do not concern the economic activity of competitors, but their internal corporate conduct, are unlikely to restrict competition. For example, competitors may seek to improve the overall reputation of the industry being environmentally responsible. For that purpose, they may agree on measures to eliminate single-use plastics on their business premises, not to exceed a certain ambient temperature in buildings, or to limit the number of printed materials per day.

- (77) Second, sustainability agreements are unlikely to restrict competition within the meaning of Article 101(1) TFEU if they concern: the creation of a database containing information about suppliers that have sustainable value chains, using sustainable production processes and providing sustainable inputs, or distributors selling products in a sustainable manner, without requiring the parties to the agreements to purchase from those suppliers or to sell to those distributors.
- (78) Third, sustainability agreements between competitors are unlikely to restrict competition within the meaning of Article 101(1) TFEU if they concern: the organisation of industry-wide awareness campaigns or campaigns raising customers' awareness of the environmental footprint of their consumption, without such campaigns amounting to joint advertising of particular products.
- (79) Where a sustainability agreement does not impose a restriction of competition, Article 101(1) TFEU will not apply and therefore the sustainability agreement will not need to benefit from the exclusion under Article 210a. In those cases, parties to the sustainability agreement will be free to proceed with the implementation of the agreement.

5. **INDISPENSABILITY UNDER ARTICLE 210A**

5.1. **Introduction**

- (80) Article 210a(1) provides that Article 101(1) TFEU does not apply to agreements that relate to the production of or trade in agricultural products and that aim to apply a sustainability standard higher than mandated by Union or national law, if those agreements only impose restrictions of competition that are 'indispensable' to the attainment of that sustainability standard. Therefore, indispensability is one of the conditions that operators need to fulfil to benefit from the exclusion pursuant to Article 210a.
- (81) This section explains how the concept of indispensability should be understood for the purposes of Article 210a. It provides guidance on how the indispensability condition applies to various restrictions of competition depending on the sustainability standards that are pursued. This section does not aim to set out specific forms and types of restrictions that parties may or may not adopt in their sustainability agreements. However, it instead aims to lay down a methodology for assessing the circumstances in which the main types of restrictions would likely be indispensable for attaining a sustainability standard, and to illustrate such methodology using a set of non-exhaustive examples.
- (82) Before assessing whether a restriction of competition resulting from a sustainability agreement is indispensable, the parties must first determine whether there is a restriction of competition (see Section 4). If the sustainability agreement in question does not restrict competition, there is no need to assess indispensability. In those cases, operators can directly proceed with implementing the sustainability agreement.
- (83) The indispensability of a restriction of competition pursuant to Article 210a must be assessed in relation to the standard that the sustainability agreement seeks to attain. Attaining the sustainability standard could mean either producing or trading agricultural products in compliance with the standard.
- (84) Lastly, if a sustainability agreement is not indispensable, the Commission or national competition authorities may investigate that agreement and assess whether it infringes Article 101(1) TFEU, whether it qualifies for an exemption under Article 101(3) TFEU or whether it may benefit from another exclusion from Article 101(1) TFEU. That may lead to imposing a fine if an infringement of Article 101(1) TFEU is found and where no other exemption or exclusion applies.

5.2. The concept of indispensability

- (85) The concept of indispensability is already used in Union competition law. Article 101(3) TFEU provides that the prohibition in Article 101(1) TFEU may be declared inapplicable to agreements that help improve the production or distribution of goods or help promote technical or economic progress while allowing consumers a fair share of the resulting benefits, and that do not: (i) impose restrictions that are *not indispensable* to the attainment of those objectives; and (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned.
- (86) The concept of indispensability under Article 101(3) TFEU is further explained in the Guidelines on Article 101(3) TFEU ⁽³⁴⁾ and is regularly applied in the case law of the Court of Justice of the European Union ⁽³⁵⁾.
- (87) Due to the similar wording of Article 210a and Article 101(3) TFEU, the test for determining whether a restriction is indispensable under Article 101(3) TFEU is a useful starting point for the indispensability assessment for the purposes of Article 210a. Nevertheless, there are certain key differences between the two articles, as a result of which the standard for indispensability necessarily differs.
- (88) The guidelines on Article 101(3) TFEU describe a two-step test for determining whether restrictions of competition are indispensable. Step 1 of the test looks at whether *the agreement* itself, that is to say the agreement that falls under Article 101(1) TFEU, is reasonably necessary to attain the efficiencies created by the agreement. The second step assesses whether *the individual restrictions* of competition that flow from the agreement are also reasonably necessary to attain those efficiencies.
- (89) Although the indispensability assessment under Article 210a is also subject to a two-step test, such a test applies in a different legal framework than the two-step test for the purposes of Article 101(3) TFEU. The Union co-legislators, that is to say the European Parliament and the Council of the European Union, considered that certain vertical and horizontal initiatives concerning agricultural products, which aim to apply requirements that are more stringent than the mandatory requirements, can have positive effects on sustainability objectives ⁽³⁶⁾. The Union co-legislators also considered that such agreements can strengthen the position of producers in the supply chain and increase their bargaining power ⁽³⁷⁾. Given the challenges faced by operators in the agricultural sector and the urgent need to advance on sustainability, the Union adopted Article 210a to create a framework excluding the application of Article 101(1) TFEU ⁽³⁸⁾ to incentivise operators to enter into such agreements, provided that certain conditions are met. Therefore, the standard of scrutiny when assessing the nature and intensity of a restriction of competition for the purposes of Article 210a is different than that for the purposes of Article 101(3) TFEU. That means, among others, that for the purposes of Article 210a restrictions that would be considered to be serious restrictions for the purposes of Article 101(1) TFEU, such as agreements on price fixing or reducing output, may be considered as indispensable if the conditions described in Sections 5.3 and 5.4 are satisfied whereas such restrictions are unlikely to satisfy the conditions of Article 101(3) TFEU.

⁽³⁴⁾ Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97).

⁽³⁵⁾ Judgment of the Court (Grand Chamber) of 23 January 2018, *F. Hoffmann-La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato*, C-179/16, EU:C:2018:25, para 98; Judgment of the Court (Tenth Chamber), 7 February 2013, *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.*, C-68/12, EU:C:2013:71, para 35; Judgment of the General Court (Second Chamber, Extended Composition) of 24 September 2019, *HSBC Holdings plc and Others v European Commission*, T-105/17, EU:T:2019:675, para 159.

⁽³⁶⁾ Preamble 62 to Regulation 2021/2117.

⁽³⁷⁾ *Ibid.*

⁽³⁸⁾ Under Article 42 TFEU, the provisions of the chapter of the Treaty relating to rules on competition apply to production of and trade in agricultural products only to the extent determined by the European Union Parliament and the Council of the EU.

- (90) In practice, to conduct the assessment under step 1, operators must: (i) analyse whether it is necessary for them to cooperate in order to achieve the sustainability standard instead of doing so individually; and (ii) analyse whether the sustainability standard could be achieved by means of another less restrictive type of provision. To conduct the assessment under step 2, operators must consider the nature and intensity of the restriction and determine whether such restriction is the least restrictive means available to achieve the sustainability standard.

5.3. Step 1 – The indispensability of the sustainability agreement

- (91) Step 1 of the indispensability test for the purposes of Article 101(3) TFEU looks at whether the sustainability agreement as such is reasonably necessary to attain the efficiencies created by the agreement. By analogy, for the purposes of Article 210a, step 1 assesses whether the sustainability agreement is reasonably necessary to attain the sustainability standard pursued. That means that the attainment of the sustainability standard should be specific to the agreement in question. This section explains what that entails in practice.

- (92) As a general consideration, the nature and the objectives of Article 210a presuppose that a sustainability agreement has one or more provisions. At the minimum, each sustainability agreement should have a provision by which operators agree to collectively apply a sustainability standard that is higher than the mandatory Union or national rules. In addition to agreeing on the sustainability standard, operators may need to agree on one or more other matters related to the production of or trade in agricultural products to effectively develop or implement the sustainability standard. Such provisions could relate to parameters of competition, for example, the price at which the product is sold, the price of the inputs needed for its production, the amount of the product that would be produced, how the product is distributed or marketed and the certification of the product.

- (93) When assessing the indispensability of a sustainability agreement, one must individually assess each provision of the agreement. For example, although a certain sustainability agreement's provisions on price might be reasonably necessary to attain a given sustainability standard, other provisions in the agreement, relating for example to output, might not be reasonably necessary. That is because the issue that the provision on output aims to address can be effectively solved by the parties unilaterally rather than by means of cooperation, or because the issue considered would also be effectively addressed by provisions that are less restrictive of competition.

- (94) Nevertheless, operators must also look at the sustainability agreement in its entirety to assess whether the implementation of its various provisions, taken together, attains the sustainability standard in question. That is further discussed in Sections 5.3.1 and 5.3.2.

- (95) In addition, the easier it is to make the improvement of the sustainability standard that operators aim to attain, when compared to what is already mandated by Union or national law, the less likely it is that operators would need to cooperate or that the chosen restrictions would need to be of a more serious nature or intensity. There may however be cases where achieving even small improvements beyond the mandatory standard in terms of production or trade may involve significant difficulties for operators, which would justify cooperation between them or the agreement on certain restrictions of competition (stopping the use of a certain chemical pesticide that has no affordable organic alternative on the market). At the same time, there may also be situations where the achievement of significant improvements beyond the mandatory standard may actually imply no difficulties for operators and where as a result cooperation or the agreement on restrictions is not deemed indispensable (stopping the use of a set of pesticides for which there are affordable organic alternatives).

Example 1: Producers of grapes operating on low margins and located in a certain region collectively decide to reduce chemical pesticide use by 52 % whereas the standard mandated by law only requires a 50 % reduction. They decide to reduce their use of chemical pesticides by purchasing organic pesticides instead. The additional costs that the producers incur to purchase organic pesticides are slightly higher than the costs they would otherwise have incurred to purchase chemical pesticides. To attain the standard, producers collectively agree on a fixed price that they will charge for the more sustainable grapes.

Given that the organic pesticides are slightly more expensive and that producers operate on low margins and have thus no incentive to individually absorb these costs, cooperation is likely to be necessary. However, the agreement to charge a fixed price downstream is unlikely to be necessary given the improvement in terms of sustainability that the agreement is aiming for. Although agreeing on a fixed price would provide the producers with sufficient remuneration and ensure that the standard is attained, there appears to be a less restrictive alternative. In that case, an agreement to collectively reduce pesticide use by an additional 2 % appears to be the least restrictive way to attain the standard, given that the additional costs for purchasing organic pesticides are low and would be incurred by all producers in the region. That would prevent a situation where only some of the producers would no longer be competitive due to the additional costs incurred.

Example 2: To improve the welfare of poultry raised for meat, producers agree to carry out yearly checks of the quality of water consumed by the animals. The aim of the checks is to assess the level of water contaminants such as heavy metals and chemicals and, where they are found, to address excessive levels of such contaminants. Under the agreement, the producers must carry out the checks themselves using affordable equipment that must only be purchased once and does not require scientific expertise to be used. There is no specific Union or national standard mandating that such checks be carried out, beyond a general requirement that animals receive drinkable water. Due to the yearly water checks, the production costs increase slightly. As a result, the poultry producers agree on exclusive purchase obligations by poultry meat buyers to recover the additional costs by having certainty that their production will be purchased.

Cooperation of poultry producers is unlikely to be necessary, given that the improvement in terms of animal welfare does not appear to justify the restrictions envisaged. Each producer could effectively attain the standard on its own, as producers do not need their competitors' knowledge or expertise to attain the standard. Moreover, an individual producer could attain the sustainability standard without incurring significant additional costs that would otherwise put them at a disadvantage with other producers who do not implement the standard. In addition, even if cooperation was deemed necessary, it is unlikely to be indispensable for producers to agree with buyers on exclusive purchase obligations, given the relatively low costs producers would incur for testing the water quality.

- (96) Lastly, operators must assess the indispensability of the restriction in the actual context in which the sustainability agreement operates, taking into account the structure of the market, the risks associated with the sustainability agreement and the incentives facing the parties. If achieving the sustainability standard becomes more uncertain in the absence of the specific restriction, it is more likely that the restriction is necessary to ensure the attainment of the standard.

5.3.1. *Can the sustainability standard equally be attained by acting individually?*

- (97) To assess whether a sustainability agreement is reasonably necessary to attain a sustainability standard, it is necessary to assess whether it is possible for the parties to attain the sustainability standard on their own, acting individually, rather than through cooperation. Therefore, operators must identify why they need to cooperate and what would prevent them from attaining the standard on their own. In making such assessment, they must take into account the market conditions and business realities facing them that are relevant for attaining the sustainability standard in question. There may be situations where a sustainability standard could be attained through individual action, but the operators could attain it more quickly and with less costs and effort through cooperation. As a result, cooperation may be reasonably necessary to attain the standard although the operators would still need to ensure that any restrictions of competition provided for in the agreement are also indispensable, as explained in section 5.4.
- (98) For example, if producers of agricultural products are unable to attain a sustainability standard because they lack the necessary experience or knowledge in a given area, then cooperation with other operators at different levels of the agri-food supply chain who have such experience or knowledge could be indispensable. However, if the producers of agricultural products could easily obtain such knowledge on their own without a significant investment in time or money, it is unlikely that they will need to cooperate to attain the sustainability standard.
- (99) Likewise, producers of agricultural products may not have the incentive to pay the necessary costs or make the investment needed to attain the sustainability standard because they would be unable to recover those costs or that investment or cannot incur those costs or investments on their own. Cooperation with other operators at different levels of the agri-food supply chain who are willing to co-finance the attainment of the sustainability standard could then be indispensable. By contrast, cooperation between producers might not be indispensable if attaining the sustainability standard requires an investment of an amount that does not materially add to the seasonal or yearly investment that producers would otherwise make for their conventional production.
- (100) Furthermore, producing or trading a product in a more sustainable way may only be profitable if a larger volume of products is produced or traded sustainably. In this case, an agreement between operators that they will all produce or trade the given product sustainably could be considered as indispensable. An example would be the use of logos/labels to identify products that meet certain sustainability requirements, gaining more trust from consumers. Another example would be the use of a platform enabling producers to share innovative equipment and the costs for purchasing/maintaining such equipment to produce in a more sustainable manner. In the first example, the more operators that produce or trade in a sustainable way and use the corresponding logo, the more likely it is that retailers and consumers will perceive that logo as trustworthy, which in turn improves the potential economic return to operators that would sell products carrying the logo. In the second example, the more producers there are who agree to use the platform and make their equipment available to others, the greater the benefit each individual producer will obtain from participation in the platform.
- (101) There may be situations where operators need to cooperate because otherwise there is a risk that each operator would spend significant resources and time on developing different production methods to attain the sustainability standard.
- (102) By contrast, there may be situations where the joint development of a production method does not create efficiencies and where independent development by an individual producer creates more added value by attaining the standard faster through competition with other operators. There may also be situations where cooperation would not enable operators to attain the sustainability standard with significantly less investment in terms of time or resources compared to individual action. In such cases, cooperation might not be deemed indispensable.

Example: Producers in a Member State envisage entering into a sustainability agreement setting a target of dedicating 25 % of their land to biodiversity purposes. The producers already dedicate a significant part of their land to biodiversity purposes. There is demand by buyers covering the quantity of products that the producers will be able to cultivate from the other 75 % of their land. Buyers of those products will also pay a price that will financially compensate producers for the biodiversity improvements they will make.

In such case, there is no issue preventing producers from achieving the sustainability standard on their own because each producer already has the experience and knowledge required to implement the biodiversity improvements. In addition, producers would be able to recover from buyers the costs of achieving the sustainability standard.

- (103) There may also be situations in which operators need to cooperate to deal effectively with the lack of information consumers have about the sustainability qualities of the products they purchase. Individual action may be unable to effectively draw the attention of consumers to the issue and convince them to purchase more sustainable products. However, individual action may suffice in those cases where there is untapped consumer demand for a more sustainable product, but where the existence of sustainability benefits is not presented clearly enough in the products offered by individual producers and where each producer acting independently can easily provide such information.
- (104) In case an operator would suffer from a first-mover disadvantage if it aimed to attain the sustainability standard individually, cooperation may be necessary to prevent competitors from free-riding on the first mover's investment. Otherwise, competitors could simply implement the production or trading method developed by the first mover without incurring any costs. However, if the first mover could prevent free riding through the use of intellectual property rights that would prevent competitors from using that method without compensating the first mover, it may be unnecessary for operators to cooperate to attain the standard.
- (105) An operator acting individually could also suffer from a first-mover disadvantage if they wish to produce a more sustainable product whose price is significantly higher than that of the non-sustainable alternative. In such a case, the operator might have difficulties marketing the more sustainable product: their customers may have no incentive to offer the higher-priced product to final consumers because those consumers would likely continue purchasing the cheaper alternative. That would make the production or trade of the sustainable product unlikely. In that case, cooperation between operators might be necessary to ensure that the financial burden and risk of producing or trading the more sustainable product on the market is shared among different operators.
- (106) A sustainability agreement may aim to meet a sustainability standard for which operators will individually receive remuneration or subsidies from a public authority (e.g. subsidies from the CAP). In addition to identifying the reason or reasons why they will need to cooperate, operators will also have to carefully assess the indispensability of cooperating to attain the standard bearing in mind such remuneration or subsidies. If, on the one hand, the remuneration or subsidy in question is sufficient for operators to incur the expenditure necessary to attain the sustainability standard on their own, they may not need to cooperate to attain the standard. If, on the other hand, the remuneration or subsidy covers only part of the costs that would need to be incurred in attaining the sustainability standard, operators may need to cooperate to cover the outstanding costs.
- (107) Lastly, when assessing whether individual action is sufficient to achieve a specific sustainability standard, operators may refer to existing unilateral initiatives that have successfully achieved the same or similar standard while producing or trading a similar amount of products as an indication. At the same time, the existence of unilateral initiatives that have achieved the same or similar standard does not in and of itself preclude the indispensability for operators to cooperate. Rather, a case-by-case assessment will be necessary, given that the specific circumstances of the operators wishing to cooperate, the prevailing market conditions at the time of the agreement and the issues in individually achieving the standard in question may vary.

5.3.2. *Indispensability of the provision(s) of the sustainability agreement*

(108) After checking that the sustainability standard cannot be attained by the parties acting individually, the parties to a sustainability agreement will need to examine whether the different provisions of the agreement, for example relating to price, output, innovation and distribution, restrict competition and, if so, whether they are indispensable to attaining the sustainability standard. At step 1 of the indispensability test, operators need to compare the types of provisions on which they agree with possible alternatives, for example price versus certification; output versus pooling of equipment; information exchange versus promotion. The indispensability of the restrictions of competition resulting from a provision, for example fixing the total price as opposed to a price premium, is assessed in step 2 of the indispensability test.

(109) In practice, to determine whether a particular provision is indispensable to attain a sustainability standard, parties to a sustainability agreement must identify the issues that prevent them from attaining that standard. For each issue, operators must assess what would be a suitable provision to solve it to attain the sustainability standard. There may be situations where there are suitable alternative provisions to address the issue in question. If a choice exists between two or more such provisions, the indispensable provision will be the one that restricts competition the least. There may also be situations where two or more suitable alternative provisions are equally restrictive or where determining the provision that is the least restrictive can be highly complex. In such cases, operators are free to choose which provision to use, provided they comply with the other parts of the indispensability test explained in Section 5.4.

(110) For example, operators may be faced with the issues below:

- (a) If the issue relates to a lack of consumer confidence in the sustainability standard, provisions that could be suitable to address the issue, depending on the individual circumstances of the case, may include requiring the creation of a logo/label, compliance with which is verified by an independent certification system; or jointly promoting and commercialising the products. By contrast, it is unlikely that a provision relating to the price paid to producers or to the production volumes made available to customers downstream would be suitable to address the issue, because it would not increase consumer confidence in the sustainability standard.

If the two potentially suitable provisions identified above are the only suitable options addressing the consumer confidence issue, the provision on the creation of a logo/label is likely to least restrict competition and thus be indispensable.

- (b) If the issue relates to a lack of knowledge and experience about more sustainable production methods, provisions that could be suitable to address the issue, depending on the individual circumstances of the case, may include exchange of information regarding production methods, for example the use of certain inputs or equipment; the pooling of certain activities, infrastructure and equipment; or joint research and development activities. By contrast, it is unlikely that a provision on the volume of products that may be produced or on the distribution or promotion of the products would be suitable to address the issue, because it would not improve the knowledge or experience of operators.

If the three potentially suitable provisions identified in the first paragraph are the only ones available to address the lack of production knowledge and experience, the provision on joint research and development is likely to be the one that restricts competition the least and, therefore, to be indispensable. If the provisions on exchanging information on production methods and pooling activities are the only two potentially suitable provisions, a detailed assessment of the circumstances of the case must be made to determine which provision would be the least restrictive.

- (c) If the issue relates to uncertainties about the commercialisation of the product, that is to say uncertainties about the volumes that could be sold, provisions that could be suitable to address the issue, depending on the individual circumstances of the case, may be offtake commitments by some customers, for example the purchase of a minimum amount of products per year; and specific distribution arrangements between producers or between producers and their customers, such as allocation of customers and exclusivity of supply or of purchases. By contrast, it is unlikely that a provision on the price at which the products may be further resold downstream or a provision to cease production of alternative non-sustainable products would be suitable to address the issue, because it would address issues other than uncertainties in terms of volumes of commercialisation.

If the two potentially suitable provisions identified, that is to say offtake commitments and distribution arrangements, are the only ones addressing the issue of uncertainties in volumes of commercialisation, a detailed assessment of the circumstances of the case must be made to determine which provision would be the least restrictive one.

- (d) If the issue relates to covering the additional costs created by complying with the standard, provisions that could be suitable to address the issue, depending on the individual circumstances of the case, may include payments or price commitments by buyers, or commitments to purchase a minimum amount of products. By contrast, a provision prohibiting the development of other sustainable or non-sustainable products is unlikely to be suitable, because it would not directly lower the costs of producing in accordance with the sustainability standard in question.

If the two potentially suitable provisions identified are the only ones addressing the issue of covering the additional costs, a detailed assessment of the circumstances of the case must be made to determine which provision would be the least restrictive.

- (e) If the issue relates to a lack of consumer knowledge about the added value of producing or selling the product more sustainably, it could be suitably addressed by a provision relating to the joint promotion of the product by producers or by downstream customers. By contrast, it is unlikely that a provision relating to customer or market allocation would suitably address the issue, because it would not improve consumer's knowledge about the added value of producing or selling more sustainably.

In such a situation, if there is only one suitable provision (joint promotion) to address the issue it is also considered to be the least restrictive and therefore indispensable.

- (f) If the issue relates to a first-mover disadvantage (a more sustainable product would face strong competition from less sustainable and cheaper alternative products), provisions that could be suitable to address the issue, depending on the individual circumstances of the case, may include the joint promotion of the more sustainable product; a commitment by retailers to purchase a certain share of their requirements from the producers of the more sustainable product, expressed in the form of a percentage of all substitutable products; or a commitment by a certain number of retailers to purchase their requirements exclusively from the producers of the more sustainable product. By contrast, it is unlikely that a provision on the exchange of information on production would be suitable to address the issue, because it fails to address the issue related to substituting the sales of products.

If the three identified provisions, that is to say joint promotion, minimum purchases and exclusive purchases, are the only ones suitable to address the issue, the provision that is likely to be the least restrictive, and therefore the indispensable one, is the one on the joint promotion of the more sustainable product. If the provisions on minimum purchases by retailers and exclusive purchases by retailers are the only suitable options, the one on minimum purchases is likely to be the least restrictive and, therefore, indispensable.

In carrying out the assessment, operators need to consider realistic and not purely hypothetical alternatives to the provisions that could help them attain the sustainability standard.

- (111) Where there are alternative provisions and operators choose one that is: (i) not suitable for addressing a given issue preventing them from attaining the sustainability standard in question or; (ii) not the least restrictive one as compared to the others, the particular provision chosen would be found incompatible with Article 210a and thus fall outside of the scope of the exclusion. If the sustainability agreement contains also other provisions that allow operators to attain the sustainability standard pursued, those provisions may nonetheless be indispensable and therefore benefit from Article 210a if they, on their own without having recourse to the provision that would be invalidated, attain the sustainability standard in question.
- (112) Lastly, agreements that exclude operators from other Member States from participation in the sustainability standard without a legitimate justification will not fulfil the indispensability test for the purposes of Article 210a.

Example 1: Dairy producers from a region in a Member State agree with a cheese manufacturer that they will produce only soft and fresh cheese since the production of hard cheese leads to relatively higher CO₂ emissions. In addition, the dairy producers agree to use the cow manure for energy production using an anaerobic methane digester system. To reduce the carbon footprint of transporting the cheese, the agreement also sets out that the soft and fresh cheese will only be sold within the Member State where the producers are located. However, some neighbouring Member States lie at the same distance as other regions in the Member State where the producers are based.

Such an agreement will not be indispensable for the purpose of achieving the standard of reducing CO₂ emissions associated with cheese production and trade since there is a less restrictive way to ensure the decrease of CO₂ emissions, namely, the determination of an objective distance-based condition calculated from the area of production to the area of sale, for example 200 km.

Example 2: The scenario is the same as in Example 1. However, the dairy producers decide to restrict participation in the agreement to dairy producers that are based in the same Member State: this is to make it easier to audit compliance with the production criteria since the producers have had a long-standing collaboration with a national auditor who does not operate outside of that Member State.

Such an agreement will not be indispensable for the purpose of achieving the standard since there is a less restrictive way to ensure the decrease of CO₂ emissions, namely, that the auditing process could be carried out in other Member States or be carried out either by the same auditor or by another one, who is willing to perform the service.

5.4. Step 2 – The indispensability of the restrictions of competition

- (113) If entering into a sustainability agreement is reasonably necessary to attain the sustainability standard, one must then determine whether each restriction of competition imposed by the agreement is indispensable to attain that standard.
- (114) For the purposes of Article 210a, a restriction of competition is indispensable to the attainment of a sustainability standard if such restriction is reasonably necessary to attain that standard.
- (115) In step 1, the analysis focused on whether the type of provision chosen is suitable to address the impediment of attaining the sustainability standard and whether there were alternative provisions that would suitably address the issue in a less restrictive manner. By contrast, in step 2, the analysis focuses on whether the restriction of competition contained in each provision of the sustainability agreement is the least restrictive option to attain the standard in question. That in turn depends on both the nature and the intensity of the restriction.

5.4.1. *Nature of the restriction*

- (116) The nature of a restriction relates to the parameter of competition that is restricted by the provision or provisions of the sustainability agreement, such as price, output, quality, choice or innovation.
- (117) Assessing the 'nature' of a restriction requires a consideration of: (i) the way in which a specific parameter of competition is restricted by an individual provision; and (ii) whether a realistic and less restrictive alternative to that provision exists. Parties to a sustainability agreement need to choose the restriction that has the least negative effect on competition while attaining the sustainability standard.
- (118) If a provision relates to prices, assessing the nature of the restriction may require operators to choose whether to agree on a restriction in the form of price fixing, that is to say fixing a minimum price or fixing the total price, a price premium, or some other price-setting restriction. For example, if complying with the sustainability standard would impose costs on operators that are easily separable from the other costs that they would normally incur, a price premium may be an appropriate restriction. That is because a price premium would reflect the costs that operators incur for complying with the sustainability standard without affecting the other costs that they would incur independently of the sustainability standard.
- (119) An example in this regard would be a provision that requires payment of a price premium to compensate poultry producers for the use of organic feed rather than conventional feed. An alternative to that provision could be to fix the total price at which processors are able to purchase the poultry at a level that compensates producers for the additional costs incurred from using organic feed. In such a case, fixing the total price at which processors are able to purchase poultry would likely be more restrictive than agreeing on a price premium that is separate from the purchase price. This is because the price-premium restriction only affects one component of the overall price paid for poultry meat, thereby leaving scope for competition on the other components that determine the whole price of the poultry, for example infrastructure, land management, provision of water and electricity.
- (120) By contrast, if attaining the sustainability standard would impose additional costs throughout the entire production process, fixing the total price at which producers are able to purchase poultry may be reasonably necessary. For example, that could be the case where the sustainability standard relates to higher animal welfare and animal health requirements for poultry, such as more sustainable food, more space in cages, more time spent outside and professional veterinary care. Fixing the total price may be necessary where the costs of producing or trading more sustainably make up a majority of the overall costs of production and/or trade. This could happen when there are few or no elements of production and/or trade that are not affected by the sustainability agreement. Nevertheless, operators must be aware that fixing the total price is a serious restriction of competition and must therefore be seen as a last resort in a situation where no other restriction would effectively attain the sustainability standard in question.
- (121) A provision may relate to the proportion of requirements that buyers obtain from producers who are party to the sustainability agreement. To assess the nature of the restriction, operators may have to choose whether to agree on requirements to purchase a minimum volume against requirements to purchase a fixed volume or some other purchasing obligation. If producers need certainty that they can sell a sufficient quantity of their products to cover their costs, but do not know the exact volume needed, agreeing on a minimum volume could be the least restrictive provision to attain the sustainability standard. For example, if a standard for raising ducks aims to reduce antimicrobial resistance by prohibiting the use of antimicrobials and employing alternatives instead, for example vaccines, probiotics and prebiotics, producers may need to ensure that they are able to sell a minimum amount of duck meat per year to cover the additional costs of using alternatives to antimicrobials. However, if the amount of meat that can be processed is limited, then an exact or maximum amount may be reasonably necessary to ensure that all of the duck meat produced is effectively processed.

5.4.2. Intensity of the restriction

- (122) Determining the intensity of a restriction involves assessing the quantitative level of the restriction, on price, output and possibly quality, choice and innovation and the duration of the restriction.

5.4.2.1. Quantitative level of the restriction

- (123) The concept of the quantitative level of the restriction refers to the extent to which the restriction in question is likely to affect the relevant parameters of competition. The quantitative level of a restriction will be indispensable if agreeing on a lower level of the restriction makes it less likely for the parties to attain the sustainability standard.
- (124) If the restriction in question would directly or indirectly lead to a price increase, the assessment should focus on the level of price increase reasonably necessary for the operators to attain the sustainability standard in question. That assessment should take into account three elements: (i) the estimated costs incurred and estimated income foregone; (ii) the level of certainty that the expected costs incurred and income foregone will materialise; and (iii) the likely return on investment relative to other alternatives.
- (125) Given that the calculation of costs incurred and income foregone will depend on a number of uncertain factors, operators cannot be expected to calculate the precise price increase at which they will be able to attain the sustainability standard. Rather, they should seek to calculate an average estimate of the costs incurred and income foregone over all the operators that incur such costs and forego such income under the most plausible scenario in terms of market conditions and developments. A restriction is unlikely to satisfy this step of the indispensability analysis if the result of the calculation of estimated costs and estimated income foregone is erroneous. This would be the case where the result is based on unlikely assumptions in terms of market developments for the costs of inputs or where the calculation of the income foregone does not fully take into account the possible revenue that sustainable production or trade could lead to.
- (126) The three elements described above serve complementary purposes. Element (i) seeks to ensure that parties to the sustainability agreement are compensated for the additional costs and income foregone by the implementation of the sustainability standard. Element (ii) seeks to ensure that parties to the sustainability agreement are protected against unexpected variations in costs and loss of income. Element (iii) seeks to ensure that the parties to the sustainability agreement will find it more profitable to implement the sustainability standard than either to not implement any standard or to undertake a different investment that may lead to less sustainable production or trade.
- (127) Elements (ii) and (iii) referred to in the previous paragraph thus constitute an incentive payment for parties to the sustainability agreement to enter into the sustainability agreement. The level of the incentive payment, that is to say the sum of elements (ii) and (iii) referred to in paragraph (124) is likely to satisfy the quantitative part of the indispensability test if it does not exceed 20 % of the compensation otherwise receivable for costs incurred and income foregone (element (i)). In cases where the incentive payment is more than 20 % a case-by-case indispensability analysis needs to be made.
- (128) Certifying that the relevant payment is received by those operators that actually incur costs and forego income may be ensured by way of third-party auditing. It may also be ensured by providing transparency to the final consumers as to the percentage or amount that the relevant operators receive for the purchase of an agricultural product from the final consumer price.

Example: While there is demand for pesticide-free strawberries, there is also a low acceptance of higher prices among consumers. Producing pesticide-free strawberries would require additional investment in equipment and create additional labour costs and thus result in price increases. Consumers would be less likely to buy the more expensive pesticide-free strawberries, and as a result the producers' sales may decrease. Moreover, if consumers do not buy the pesticide-free strawberries, a greater proportion of the strawberries would perish. That leads to a first-mover disadvantage for anyone that wishes to produce pesticide-free strawberries.

A group of producers and retailers develop an initiative under which retailers agree to pay participating farmers an additional EUR 1,20 per kilogram for pesticide-free strawberries. The incentive payment is based on a study that found that:

- (a) the additional labour and equipment costs for pesticide-free strawberries production are expected to amount on average to EUR 1 per kilogram for all producers participating in the agreement;
- (b) producers need an additional incentive of EUR 0,12 per kilogram to enter into the agreement as consumers may lose interest in purchasing sustainable strawberries, the strawberries may perish and the cost of production may therefore increase. As a result, the agreement may also need to be terminated, leading to losses for the producers that made the necessary investments;
- (c) producers can obtain a return of EUR 0,05 per kilogram on investment by not entering into the agreement and instead shifting to a different mix of pesticides without the increased risk of perishing. They would therefore need to achieve a return on investment on the production of pesticide-free strawberries higher than EUR 0,05.

The overall price premium of EUR 1,20 per kilogram is higher than the EUR 1 per kilogram of costs incurred and income foregone to achieve the sustainability standard. Nevertheless, the price premium also comprises an incentive payment of up to 20 % of the compensation for costs incurred and income foregone, in this case EUR 0,20 per kilogram. This is indispensable: (i) to ensure that the sustainability standard will be effectively taken up by the producers, (ii) considering the risk that the agreement may be terminated by the producers due to a potential loss of interest by consumers in purchasing sustainable strawberries and considering the increase in the costs of production and (iii) considering the fact that producers can obtain a return on an alternative investment of EUR 0,05 per kilogram if they choose not to enter into the sustainability agreement. The amount of EUR 0,12 per kilogram allocated for uncertainty (see point (b) above), matches the expected increase in costs and income foregone. The amount allocated for return on investment of EUR 0,08 per kilogram (see point (c) above) exceeds the alternative non-sustainable investment opportunity of EUR 0,05 per kilogram.

However, if the incentive payment was more than EUR 0,20 per kilogram, a case-by-case assessment would need to be made on the compatibility of the price increase with the indispensability condition.

5.4.2.2. Duration of the restriction

- (129) When assessing the duration of the restriction, that is to say the number of months or years the restriction would be in place, the question is whether a shorter duration of the restriction would make attaining the sustainability standard less likely. On the one hand, if the costs of implementing the sustainability standard are incurred throughout the lifetime of its implementation, the restriction may need to be in place throughout the duration of the sustainability agreement. That may be the case where producing a more sustainable product requires the purchase of a more costly input that the buyers of the product would need to finance continuously throughout the existence of the sustainability agreement. On the other hand, where only a one-off investment is needed to attain a sustainability standard (for example, the standard requires the purchase of equipment or infrastructure on a single occasion which can then be used again in the future), the restriction may only be necessary for the period of time necessary to secure the recovery of the funds spent on the investment.

Example 1: Retailers agree to pay watermelon farmers a price premium in order for them to purchase innovative irrigation tools. The price premium payment is needed for 3 years as farmers do not have the required sum upfront. After 3 years, the farmers will have managed to recover the costs incurred for purchasing the equipment and will start saving on water usage by using the tools. Therefore, continuing the price premium payment after 3 years would not be indispensable in terms of duration.

Example 2: In a similar scenario to Example 1, watermelon farmers agree, along with retailers, to produce watermelons without pesticides, and use organic pesticides to chemical pesticides only when they have no alternative. Retailers agree to pay a higher price premium than the one referred to in Example 1. The price premium payment also provides compensation for the purchase of the irrigation tools. However, as using no or only organic pesticides is a recurring expense for watermelon farmers, the part of the price premium payment that relates to the non-use of pesticides, or the use of organic alternatives when necessary, will need to be paid continuously throughout the duration of the sustainability agreement, while the payment that relates to the irrigation tools will need to end after 3 years.

5.4.2.3. No requirement to assess the market coverage of the restriction

- (130) When drafting Article 210a, the co-legislators aimed to ensure the widest adoption possible of sustainability standards by operators. In order to incentivise operators to attain standards higher than mandated by Union or national law, they created a specific balance between: (i) the *ex ante* conditions for the determination of indispensability; and (ii) the possibility for *ex post* intervention. That aims to stimulate the wide-scale adoption of sustainability standards without the risk of intervention by competition authorities unless a certain high degree of negative market effects is experienced. In addition, it is burdensome for operators to assess market coverage as it would require them to define an exact number of operators with whom they will need to cooperate at the initial stages of an agreement, potentially excluding other operators. This may ultimately lead to a lower uptake of the sustainability standard.
- (131) For example, if a group of producers successfully achieves a sustainability standard in a given region together and their success becomes known to a second group of producers also operating in that region, who wish to join the first group's agreement, Article 210a allows the second group to join the agreement and implement the sustainability standard even though the sustainability standard could be achieved, and may already have been achieved, with a lower market coverage of producers.
- (132) Therefore, unlike Article 101(3) TFEU, Article 210a does not require an analysis of the market coverage of a restriction of competition to determine whether the restriction is indispensable. By contrast, market coverage may lead to an *ex post* intervention by competition authorities if it leads to a high degree of negative effects on the market, as explained in Section 8.
- (133) However, the lack of need to assess market coverage does not eliminate the need to assess the type of operators with whom a producer or producers must cooperate, as described in step 1 of the indispensability test.

Example 1: 10 producers from Ecuador decide to improve cultivation standards of cocoa by only producing organic cocoa. They agree with a chocolate manufacturer to receive a price premium payment of EUR 0,50 per kilogram of organic cocoa, which will be used as the ingredient for chocolate products carrying a sustainable logo. Before the agreement is implemented, another group of producers and another chocolate manufacturer also show interest in participating. The first 10 producers assesses that the 10 producers and the chocolate manufacturer that initially decided to create the agreement could achieve the standard on their own (as a group) without the help of the second group of producers and chocolate manufacturer. Nevertheless, they invite the latter to join.

In this example, the indispensability test does not preclude all interested producers and chocolate manufacturers from participating in the agreement. This is because the establishment of the agreement demonstrates that in order for the standard to be achieved, producers need to join forces with at least one buyer (in this case – a chocolate manufacturer). The fact that the initial group of producers and the buyer is expanded leading to a higher market coverage of the agreement is not an issue under the indispensability test.

Example 2: In the same scenario of Example 1, after the 10 producers and the chocolate manufacturer have implemented the agreement, an input provider of seeds indicates that it wishes to join the agreement.

In this example, the indispensability test precludes the subsequent participation by the input provider. That is because the indispensability analysis indicated that participation of producers and of at least one buyer suffices. The participation of the input provider is therefore not indispensable.

5.5. Examples of application of the indispensability test

Example 1: A certain rice cultivation technique uses less water than traditional rice cultivation techniques, it does not use artificial fertilisers and is pesticide-free. The use of such technique contributes to the sustainable use and protection of landscapes, water and soil, and reduces pesticide use. The technique, however, requires additional investment of financial resources and time by the rice producers and it is only profitable if carried out on a medium to large scale. Three rice cooperatives agree to produce ‘sustainable rice’ in accordance with the aforementioned cultivation technique. The retailer agrees to purchase a certain quantity of the sustainable rice – 100 tonnes a year for 3 years.

The three cooperatives have calculated that they would need to produce at least 95 tonnes of rice a year for 3 years in order for their investment to reach the necessary economies of scale to attain the sustainability standard and receive a reasonable return on investment. To encourage consumers to buy the sustainable rice, the three cooperatives and the retailer agree that the retailer’s resale price will be no more than 15 % above the average price charged by the retailer for conventional rice. However, given the cost of inputs and labour, the sustainable rice costs the retailer 30 % more than conventional rice.

Most other buyers in the market, such as retailers, manufacturers and wholesalers are predominantly interested in buying conventional rice sold at a lower price. Consumers show interest in buying more sustainable rice but are unaware of the extent to which the production of conventional rice implies using fertilisers and pesticides and the amount of water consumed for that purpose.

Step 1:

Can the sustainability standard also be attained by acting individually?

The rice cooperatives would be unable to finance the production of sustainable rice individually. This is because they would have no certainty that they could market the rice, given that most buyers are interested in purchasing conventional rice, which is sold at a lower price. Individually, the three cooperatives cannot therefore effectively adopt the standard. In that case, an agreement with a retailer that the retailer would purchase a minimum 100 tonnes of the sustainable rice a year is likely to be indispensable.

A separate assessment must be made of the agreement that the retailer’s resale price for sustainable rice would not be more than 15 % above the average price of conventional rice. Sustainable rice costs 30 % more than conventional rice, and there is a risk that consumers would purchase insufficient quantities of the rice. An agreement to promote the sustainable rice is therefore likely to be indispensable given that, otherwise, the retailer would be unable to keep purchasing from the three cooperatives. Individually, each of the three cooperatives and the retailer cannot promote the rice as they need each other’s assistance to do so, given that the production and sale of the sustainable rice are interlinked.

Indispensability of the provision of the sustainability agreement

The agreement to purchase a certain quantity of sustainable rice a year is likely to be indispensable because there is only one retailer participating in the sustainability agreement, and producing sustainable rice implies additional costs for the producers. Another type of provision addressing the issue of covering costs could be that the retailer would merely commit to promoting the sustainable rice without committing to purchase a minimum quantity. That would, however, not provide enough certainty for the three cooperatives because conventional rice is 30 % cheaper, and consumers are not generally aware of the implications of conventional rice production.

In the case of the agreement on charging a resale price for sustainable rice that is not more than 15 % higher than that of conventional rice, there is a less restrictive way to promote the purchase of sustainable rice. Since the issue is the lack of consumer awareness of the benefits of sustainable rice, the three cooperatives and the retailer could conclude a certification agreement, for example to develop a label for the sustainable rice through the services of a third party. The third party would assess compliance of the rice with the sustainable production methods and testify to its conformity. The label could inform consumers about the environmental impact of conventional rice production. The retailer would therefore be free to determine the resale price of sustainable rice while, through the use of the label, it would be able to effectively meet consumer demand for sustainable rice.

Step 2: Indispensability of the nature and intensity of the restriction

When assessing the nature of a commitment to purchase 100 tonnes of sustainable rice a year, the alternative could be a commitment by the retailer to purchase all the sustainable rice needed for resale from the three cooperatives. However, that would not attain the sustainability standard, as the three cooperatives would have no certainty that the retailer would actually purchase the necessary quantity of rice produced. That is because the retailer might not need all 100 tonnes of sustainable rice in a given year and the cooperatives would therefore have no incentive to make the necessary investment.

When assessing the intensity of the restriction to commit to purchasing 100 tonnes of sustainable rice a year for 3 years, the restriction appears indispensable as the three cooperatives need to produce at least 95 tonnes of sustainable rice per year for 3 years in order to receive a return on their additional investment. Due to the novelty and uncertainty of the sustainability standard, by purchasing the additional 5 tonnes of sustainable rice the retailer aims to provide a safety net in case of miscalculation. The commitment to purchase 100 tonnes of sustainable rice is therefore likely to be indispensable for attaining the sustainability standard at stake.

Example 2: There is a regional initiative to improve pigs' living conditions. Participating farmers agree with a slaughterhouse and two meat processors to increase the amount of space per pig on their farms above the legal minimum. Due to local laws on maintaining land for biodiversity purposes, it is difficult for most farmers to increase the amount of space for raising pigs, as it would force them to reduce the number of pigs reared to comply with the standard. As a result, participating farmers would be financially disadvantaged compared to farmers who do not participate in the initiative.

The initiative therefore provides for the processors to pay the farmers an additional EUR 1 per kilogram of meat sold as a price premium to compensate them for their reduced output and increased costs. The price premium payment corresponds to the profit that farmers would have otherwise made had they reared more pigs in the conventional way and a small margin to encourage the farmers to enter into the agreement. One processor would have been able to process the farmers' entire production and cover the related financial burden. However, a second processor has joined the initiative since it would like to tap into the market for more sustainable products. The initiative also sets out that the slaughterhouse involved would exclusively slaughter pigs reared in accordance with the animal welfare standards concerned to avoid that their meat gets mixed with that of animals reared conventionally.

Step 1:**Can the sustainability standard equally be attained by acting individually?**

The first alternative that needs to be considered is whether the sustainability standard could be attained by the participants in the agreement acting individually rather than together. A farmer who would increase the amount of space per pig on their farm alone would lose a part of their income, and possibly also access to their buyers, to other farmers due to the decrease in their supply in quantity or the increase in their selling price. At the same time, while farmers acting together without the involvement of processors would compete against each other on equal terms, they would still suffer from a disadvantage compared to farmers who decided not to participate in the sustainability agreement. They would also have difficulties finding buyers who would agree to pay a higher price for the meat from the animals reared sustainably. Therefore, an agreement between the farmers themselves and between the farmers and the processors as buyers of the meat products is likely to be indispensable, unlike unilateral action. Finally, the involvement of the slaughterhouse is in principle necessary as it ensures the separation of the meat sourced from the pigs that are subject of the agreement and the meat sourced from those that are not.

The indispensability of the provision of the sustainability agreement

Next, regarding the price premium payment, as an alternative the processors could commit to purchasing all meat originating from pigs reared in accordance with the initiative at the price of conventional pigs. Farmers do not usually have problems finding buyers and would easily be able to sell the meat products coming from their pigs. However, if they were to apply the sustainability criteria, they would have to sell at a loss as they would have to reduce the number of animals while receiving nothing in exchange. A price premium payment is therefore likely to be indispensable.

As regards the commitment by the slaughterhouse to only slaughter animals reared in accordance with the sustainability standard, an alternative could be for farmers to request the slaughterhouse to separate and clearly identify the meat that comes from their pigs. That would likely lead to some additional costs since the maintenance of two separate lines in a slaughterhouse may result in inefficiencies in slaughtering the animals. Nevertheless, provided that the slaughterhouse manages to find an efficient way of managing the two lines, slaughtering both types of animals would let it achieve a higher turnover and thus be compensated for the costs of separating the two types of meat for processing. The agreement with the slaughterhouse to only slaughter animals reared sustainably is therefore unlikely to be indispensable.

Step 2: Indispensability of the nature and intensity of the restriction

In the case of the price premium payment received by farmers for granting more space to pigs, an agreement on the total price or on a minimum price for the meat products could be an alternative restriction. However, agreeing on the total price would cover many aspects of the cost of production that are unrelated to the sustainability standard, for example, input prices, weather events and diseases. Moreover, while a minimum price, set at a sufficiently high level that the costs for the sustainability improvement are accounted for, could ensure that producers are compensated for their efforts, it would ignore the possibility that the other elements of the price for pig meat, such as inputs, infrastructure and seasonality of the product, may be subject to change in the future and the minimum price agreed upon would no longer reflect accurately the costs of farmers. The price premium payment is therefore likely to be indispensable because it corresponds to a loss of profit that farmers incur by rearing fewer pigs and keep the possibility that other price components may freely fluctuate subject to changes in the market.

Setting the price premium payment at EUR 1 per kilogram of meat produced is also likely to be indispensable. This would be the case if the payment reflects the loss of profit that farmers incur by not having the same output had they reared pigs conventionally as well as a small margin, less than 20 % of the compensation for costs incurred and income foregone, to encourage farmers to enter into the agreement. Without this margin, and if farmers were merely compensated for the additional costs incurred and income foregone, they may not be interested in making the necessary efforts to attain the sustainability standard.

There is no need to assess whether the number of farmers or processors that have joined the initiative is indispensable, as explained in Section 5.4.2.3.

Example 3: A group of three dairy cooperatives develops a quality mark for cheese. The quality mark requires producers to certify that the milk used in their cheese is exclusively produced using organic methods. The quality mark requires that all milk production in the cheese is carried out using a specific predefined list of organic methods to guarantee that there is no mixing of organic and other types of milk. Such production method implies additional costs for producers, reduces their freedom to choose alternative methods of organic cheese production and their ability to continue to offer conventional milk for cheese products. Similar volumes of products to the ones envisaged by the dairy cooperative and produced through similar production methods have already been successfully launched. Consumer demand for organic cheese is high and consumers are already paying a higher price for that cheese. That, in turn, leads to demand among the customers of the cooperatives to source organic cheese and the dairy cooperatives can recover the costs linked with the additional requirements.

Step 1: Can the sustainability standard equally be attained by acting individually?

Certain producers already individually apply sustainability standards higher than mandated by Union or national law and products produced in accordance with those standards are of comparable quality and volumes to the ones envisaged by the agreement. There is also both consumer and buyer demand for organic cheese. Cooperatives will therefore be able to apply the standard individually and meet the increasing customer demand for sustainable cheese by creating their own label. The need to cooperate does not therefore appear to be indispensable.

Example 4: At certain times every year, the volume of certain vegetables available exceeds demand. As a result, between 7 % and 15 % of the yearly harvest of spinach is wasted. Cooperatives have tried to implement different strategies individually to plan or store the excess produce, but they have not managed to keep their losses below the average 7 %. They have also tried to dry the spinach and sell it, but there is no customer demand for such a product.

To reduce such waste, a group of spinach cooperatives decides to exchange information on the monthly deliveries of spinach to customers so that they can plan the supply and demand more accurately. The cooperatives justify such exchange by stating that they will put in place a rotational system where the different cooperatives take turns every month in reducing their production by a certain percentage to match the expected demand for spinach the following month.

Step 1:

Can the sustainability standard equally be attained by acting individually?

The need for cooperation appears to be indispensable as individual action to address food waste has failed.

The indispensability of the provision of the sustainability agreement

Spinach cooperatives aim to attain the standard through an exchange of information on supply and demand. Alternatively, they could agree on reduced production volumes for each cooperative. However, that would not address the issue as it would be difficult to anticipate with certainty how much the cooperative should decrease its production. In addition, there would still be periods when demand is higher so the cooperatives would be unable to fulfil their customers' orders. Moreover, an agreement on production volumes would be more restrictive than one on exchanging information.

The agreement to exchange information tackles the issue by providing regular information about the state of the market and enables adjusting the supply precisely in the following month. It therefore appears to be reasonably necessary to attain the standard of reducing food waste.

Step 2: Indispensability of the nature and intensity of the restriction

In terms of the indispensability of the restriction of competition that flows from the agreement, exchanging information on a parameter such as monthly deliveries to customers is a significant restriction of competition. Sharing aggregate information on a bimonthly or trimonthly basis rather than on a monthly one would be a less restrictive and realistic alternative. Aggregating and compiling the data less frequently results in individual cooperatives' sales to individual customers not being identifiable. At the same time, by sharing data on a bimonthly or trimonthly basis producers would still be aware of the market demand for spinach in the preceding 2-3 months so they could adjust their own production the following months.

As a result, the agreement to share information on a monthly basis would fail to meet step 2 of the indispensability test.

6. **TEMPORAL SCOPE OF ARTICLE 210A**

6.1. **Sustainability agreements concluded before the publication of the guidelines**

- (134) Article 210a entered into force on 8 December 2021. Sustainability agreements that were concluded before that date may benefit from the exclusion laid down in Article 210a only as from 8 December 2021. Before 8 December 2021, sustainability agreements cannot benefit from the exclusion laid down in Article 210a and are subject to the competition rules in force at the time.
- (135) Any sustainability agreement concluded between 8 December 2021 and the publication of these guidelines should be promptly aligned with Article 210a and Article 101 TFEU after the date of publication of these guidelines.

Example: Several producers enter into an agreement before the publication of these guidelines. They commit to stop using an authorised herbicide, which is frequently detected in drinking water supplies. To finance the transition towards this more sustainable method of production, they agree to temporarily fix prices at EUR 0,50 per kilogram produced.

After publication of these guidelines, it is clear to the parties that a price premium payment would have been sufficient to reach the standard. Therefore, the agreement does not fulfil step 2 of the indispensability test. As a result, the parties should update their agreement as soon as possible to comply with Article 210a, by replacing the price fixing by a price premium payment.

6.2. **Force majeure**

- (136) If some terms of the agreement that are instrumental in applying Article 210a are temporarily no longer met due to *force majeure*, the agreement can still benefit from the exclusion for a certain period provided that: (i) the parties take all the necessary steps without delay to restore compliance with the terms in question; and (ii) the agreement complies with the other requirements of the exclusion.

- (137) *Force majeure* is not limited to absolute impossibility but must be understood in the sense of unusual and unforeseeable circumstances, outside the control of the producer or the operator. Despite the exercise of all due care, its consequences could not have been avoided, except at the cost of excessive sacrifice⁽³⁹⁾. *Force majeure* includes extreme weather events, for example excessive droughts or floods, natural disasters (for example earthquakes), infrastructure failures (for example the failure of the transportation system and the accidental destruction of livestock buildings), civil unrest (for example wide and long-term protests of operators in the agri-food supply chain), the outbreak of disease (for example the COVID-19 outbreak, an epizootic or a plant disease outbreak) or other exceptional circumstances at the individual operator level. Such unusual circumstances must have a direct and considerable impact on the production of or trade in agricultural products.

6.3. Transition period

- (138) A sustainability agreement may benefit from the exclusion for a certain period after it is concluded and before the sustainable activity starts. That can only be the case where a certain timeframe is necessary to implement the sustainable activity, and provided that the restriction of competition during the transitional period is indispensable. That means that the sustainable activity is less likely to occur if the restriction of competition is not applied during this period.

Example: Several agricultural producers agreed in January 2023 to change their production method to stop using an authorised polluting herbicide which is frequently detected in drinking water supplies. As some time was needed to change the production method, the launch of the final less-polluting product is due in September 2023. The producers agreed on a price premium payment for the product using the problematic herbicide as of January 2023, to finance the investment necessary for the transition.

The price premium payment may be granted from January 2023 if the producers are unable to cover their investment costs only by granting the price premium payment from September 2023, after the launch of the alternative product. In the absence of a price premium starting from January 2023, they would otherwise not consider taking up the sustainability initiative. However, if the parties are able to cover their investment costs by granting the price premium payment from September 2023, then applying the price premium payment before that date is not indispensable.

6.4. Failure to attain the standard

- (139) In the absence of *force majeure*, if the parties fail to attain the sustainability standard, they cannot continue to benefit from the exclusion.
- (140) Failure to attain the sustainability standard can happen, for example, when the parties do not manage to attain the standard within the planned timeframe. It could also happen when, due to an initial miscalculation, applying the standard would represent an unaffordable expense for the parties. It could also happen because implementing the standard is not possible in practice due to a factor that does not amount to *force majeure*, such as unexpected economic difficulties of the parties or the temporary shortage of an essential input for which there are substitutes or alternative solutions.
- (141) In such cases, the parties cannot continue to benefit from the exclusion and should stop applying the restriction of competition. The exclusion ceases to be valid when the attainment of the standard is no longer possible. If the immediate withdrawal from the agreement has significant economic consequences for the parties, they may keep applying it for a necessary transitional period, in accordance with Section 6.5 on the ongoing and continuous review of the indispensability condition.
- (142) The parties may also decide to reduce the level of ambition they aimed for with the sustainability standard. In such a case, they should adapt the level of restriction or amend the type of restriction, as required by the indispensability criterion.

⁽³⁹⁾ For further information on *force majeure*, see (by analogy) the Commission notice concerning '*force majeure*' in European agricultural law, C(88) 1696.

Example: Two producers have agreed to invest together in research and development on a new production method that promises to be more sustainable. That implies fixing prices to finance such new investment. Due to the start of an economic crisis after they have concluded the agreement, the parties are no longer able to finance the research, and decide to stop the research investment.

Since the parties have failed to implement the standard for a reason unrelated to force majeure, they cannot continue restricting competition, that is to say fixing prices.

6.5. Ongoing and continuous review of indispensability

6.5.1. *In which cases is indispensability likely to be no longer fulfilled?*

(143) Passing the indispensability test under Article 210a at an initial stage of the process does not guarantee that the test will be passed at later stages, in particular when there are material changes in the economic and legal context in which the sustainability agreement is operating. Therefore, the parties must continuously review whether the agreement's implementation continues to meet the indispensability condition.

(144) When a sustainability agreement or the restrictions of competition therein can no longer be considered indispensable, Article 210a no longer applies. Any restrictions of competition that the parties maintain after they cease to be indispensable are no longer covered by Article 210a.

(145) An example of a change in material circumstances that makes it necessary to reassess the indispensability of a sustainability agreement or a restriction is the change in the cost of developing or implementing the sustainability agreement or sustainability standard. Changes in costs may call into question the indispensability of the agreement or of the specific restrictions of competition initially decided upon by the participants.

Example: Producers and retailers agree on growing a new variety of maize that is more resistant to pests and so requires using fewer pesticides than other varieties of maize. However, the seeds for the new variety are more expensive and are sold at EUR 6 per kilogram. Retailers agree that they will finance the purchase of the more expensive seeds by offering a price premium payment for the maize grown. In the later stages of implementing the sustainability agreement, the cost of the seeds drops to EUR 1 per kilogram as the crop becomes more widely sought after, and there are more seeds on the market.

The change in the price of seeds, which are an input for the maize, means the parties must reassess how much the price premium should be and whether retailers need to support the agreement through a price premium payment at all.

(146) Another change calling for a re-assessment of the indispensability of a restriction of competition would be a regulatory intervention that raises the level of ambition of a previously existing sustainability standard in the given area. In such a case the indispensability of the agreement or the restrictions it contains should be reassessed as they were initially decided upon on the basis of a different mandatory legal framework. Once the mandatory rules impose a higher standard, the agreement or restrictions may need to be changed to accommodate the now lower level of ambition of the initial agreement. The need for cooperation may no longer be indispensable and a restriction of a different nature or intensity may be more appropriate. In certain cases, the reassessment may lead to the parties concluding that a restriction of competition is no longer indispensable.

Example: Producers, processors and retailers agree on a price premium payment for rearing animals without using cages. The law requires each animal to have at least 0,2 m² of space. Sometime after that, the mandatory legislation is amended and imposes a new requirement of 0,5 m².

The sustainability standard imposing the requirement that animals be reared in 'free-range' might still justify applying a price premium. However, as the law has raised the mandatory standard, the level of the price premium needs to be reassessed, which in certain cases could lead to a lower price.

- (147) Another example is when the parties wish to change the sustainability standard that the agreement aims to meet. The parties may wish to set a sustainability standard that is still higher than the mandatory Union or national rules, but less ambitious than the sustainability standard initially agreed on. In that case, the agreement itself or the initial restrictions may no longer be indispensable to meet the newly set standard. An adjustment of the agreement or of the restrictions may therefore be warranted.
- (148) The fact that products of similar qualities and volumes to the ones covered by the agreement have been successfully launched unilaterally or without the same restrictions of competition could potentially indicate a material change in circumstances. Demand for a sustainable product can increase because of the sustainability agreement or other factors, such as an increase in consumer interest in purchasing products of a similar sustainability quality. As a result, a large majority of operators, if not all, could have a strong incentive to switch to the sustainable production method or trade in that product. In that case, the parties should reassess the indispensability of the agreement or the restriction.
- (149) Innovations in production or distribution processes may also make it necessary to reassess the indispensability of a restriction in an agreement. That may be the case where the agreement was necessary to jointly develop a certain product or process or to jointly introduce a certain product onto the market, but where, after some time and investment, the parties would be able to produce and market the goods without the need for cooperation.

Example: An agreement between a producer organisation and manufacturers enables the manufacturers to invest in artificial intelligence ('AI') technology which can detect diseases in plants early, leading to higher yields. The manufacturers agree to buy the technology for the producers and cover the operating costs of the technology by agreeing on a minimum price for the products produced by the PO. In return, the agreement requires the members of the PO to license the technology, to ensure that there are enough licensees, and thus licence fees, to cover the costs of the investment.

Once the technology has been tested and leads to higher yields, the indispensability of the minimum price will have to be re-assessed by the producers. As they are now producing more, they may be able to cover by themselves the technology's operating costs.

- (150) There is no exact requirement as to how often operators must carry out a review of indispensability. Operators engaged in a sustainability agreement are best placed to assess when a material change in the economic and legal context in which they operate occurs. They should take due care to keep themselves informed about relevant developments and act in good faith.

6.5.2. *What are the parties' options where restrictions are no longer deemed to be indispensable?*

6.5.2.1. Option 1: amendment of the sustainability agreement

(151) Where a sustainability agreement is no longer indispensable, it can be amended. For example, if the issue is that the agreed sustainability standard is no longer attainable, a different standard that is still higher than the one mandated by Union or national law can be agreed upon. If the issue is that the type of provision is not indispensable for attaining the sustainability standard, a type of provision that is indispensable could be adopted. Similarly, if the issue is that the specific restrictions that the agreement imposes are no longer indispensable for attaining the sustainability standard, the restrictions could be amended to make them indispensable or simply repeal those restrictions altogether.

6.5.2.2. Option 2: termination of the sustainability agreement

(152) If the parties are unable, or do not wish, to amend their sustainability agreement so that it continues to fulfil the requirements of Article 210a, they should terminate the agreement as soon as it ceases to be indispensable.

(153) However, where the parties made investments relying on the existing restrictions of competition that were indispensable for attaining the sustainability standard at the time they were made, Article 210a does not prevent them from recovering all the costs that they had incurred in developing or implementing the sustainability standard in question. Therefore, a sustainability agreement may still benefit from the exclusion laid down in Article 210a for the period necessary to unwind the agreement and recover the investments. That would not be the case where a sustainability agreement ceases to be indispensable due to a regulatory change establishing a mandatory Union or national standard equal to or higher than the standard laid down in the agreement if the adoption of the regulatory change was foreseeable at the time of the conclusion of the agreement.

Example: Local poultry farmers jointly agree to provide more living space per animal. To reduce their transition costs, they enter into an agreement with their buyers, by which the latter agree on a fixed price premium, to cover the additional cost of the new sustainability standard. The agreement is signed in March 2024, with a 1-year formal notice period in case of unilateral termination. The notice period ensures adequate planning for the buyers, who want to position themselves on the market as suppliers of sustainable poultry and have made investments to do this. New local legislation is adopted in June 2024 and applies from December 2024. It requires all agricultural production in that region to allocate the exact same amount of space to animals as provided for in the agreement.

As the minimum space requirement becomes a legal obligation in December 2024, the restriction of competition is no longer indispensable. However, terminating the agreement with the buyers before the end of the formal notice period could have serious financial consequences for the parties. The parties have acted in good faith because the new law was not foreseeable when they concluded the agreement. They can, therefore, continue to benefit from the exclusion laid down in Article 210a until the formal notice ends i.e. until June 2025.

7. **OPINION SYSTEM PURSUANT TO ARTICLE 210A(6)**

7.1. **Applicants of the request**

(154) As of 8 December 2023, Article 210a(6) allows producers or associations of producers to request an opinion from the Commission on the compatibility of their sustainability agreements with Article 210a. Parties to the sustainability agreement who are not producers may join the request. IBOs may also submit a request for an opinion pursuant to Article 210a(6).

- (155) An opinion may be requested only in accordance with the procedure laid down in Article 210a(6) of the CMO Regulation. For the exclusions laid down in Articles 209 and 210 of the CMO Regulation, operators should use the relevant procedure for requesting the opinion indicated in those articles. For any other uncertainty regarding cases that present novel or unresolved questions on the application of Article 101 or 102 TFEU, operators are invited to consult the Commission on the compatibility of an agreement with competition law on the basis of the relevant commission notice ⁽⁴⁰⁾.
- (156) Producers or associations of producers may request an opinion any time after the sustainability agreement has been concluded, including before its implementation.
- (157) The request must be submitted to EC-210A-CMO-OPINION-REQUEST@ec.europa.eu. Alternatively, the request may be sent to one of the following postal addresses:
- European Commission; DG Competition; Antitrust and General Registry; Avenue de Bourget/Bourgetlaan 1; 1140 Bruxelles/Brussel; BELGIQUE/BELGIË;
 - European Commission; DG Agriculture and Rural Development; Rue de la Loi/Wetstraat 130; 1049 Bruxelles/Brussel; BELGIQUE/BELGIË.

7.2. Content of the request

- (158) There is no standard form for a request for opinion under Article 210a(6).
- (159) However, to be assessed, the application should contain:
- (a) the identities of all parties to the agreement including, where appropriate, their registration number;
 - (b) a single point of contact, including name and email or postal address, or both, for all communications with the Commission;
 - (c) a copy of any document setting out the terms of the sustainability agreement or, if it is an oral agreement, a detailed written explanation of the agreement, including the market coverage of the agreement if available, its duration and the restrictions of competition imposed;
 - (d) a description of the sustainability objective(s) pursued;
 - (e) an explanation of the sustainability standard set by the sustainability agreement and reference to existing mandatory standards, including explanations and evidence as to why the agreement's sustainability standard is higher than what is mandated by Union or national law;
 - (f) a detailed explanation of how each of the conditions laid down in Article 210a(1), (3) and (7) is satisfied;
 - (g) information on any ongoing proceedings before a national court or national competition authority regarding compliance of the sustainability agreement to which the request refers with Article 210a or Article 101 TFEU;
 - (h) any references and sources, including webpages, where the applicant has made public the terms of the sustainability agreement or parts of it;
 - (i) any other information or documents relevant to assessing the sustainability agreement.

7.3. The Commission's assessment and content of the opinion

- (160) The Commission will assess the request on the basis of the information provided. It may ask the applicant, other parties to the sustainability agreement or third parties for additional information necessary to assess the request.

⁽⁴⁰⁾ Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters) (OJ C 381, 4.10.2022, p. 9).

- (161) The Commission may share the information submitted to it with national competition and agricultural authorities or ministries, as appropriate, provided that those authorities and ministries are subject to the obligation to use that information only for the purpose for which it was acquired by the Commission. The Commission may also invite and receive input from those authorities and ministries. An applicant can withdraw their request at any point in time. However, the Commission may retain any information supplied in the context of a request for an opinion pursuant to Article 210a(6) and may use that information in any proceeding for the enforcement of Article 210a or Article 101 TFEU.
- (162) The opinion issued by the Commission will state whether or not the sustainability agreement is compatible with Article 210a and provide reasons for that statement.
- (163) The Commission will notify its opinion to the single point of contact.
- (164) An opinion that the sustainability agreement is not compatible with Article 210a does not prejudice whether the sustainability agreement is compatible with Article 101(3) TFEU or other provisions of Union law.
- (165) If appropriate, the Commission may state that the opinion is valid only for a certain period or that the opinion is conditional on the existence or absence of certain facts.
- (166) The opinion will be published on the Commission's website, having regard to the legitimate interest of the applicant or applicants in protecting their business secrets. The Commission will agree with the applicant or applicants on a non-confidential version before it publishes the opinion.

7.4. **Time limit for delivering an opinion**

- (167) The Commission will provide the applicant or applicants with its opinion within 4 months of receiving a complete request, that is to say after the receipt of all information needed to assess the request. That period will begin on the day following the receipt of a complete request.

7.5. **Change in circumstances after the adoption of the opinion**

- (168) The Commission will issue the opinion based on the information provided by the applicant.
- (169) Article 210a(6) requires the Commission to declare that Article 101(1) TFEU shall apply in the future to the sustainability agreement in question, and inform the applicant that submitted the request accordingly, if it finds at any time after issuing the opinion that the conditions referred to in Article 210a(1), (3) and (7) are no longer met. The Commission can make such a finding on its own initiative or at the request of a Member State. While such a finding will not lead the Commission to impose any penalty, it may have consequences on the assessment of the sustainability agreement by national competition authorities or national courts.
- (170) Where the Commission has reason to believe that an applicant has submitted inaccurate information, the Commission may request additional information from the applicant.
- (171) After the entry into force of Union or national legislation setting sustainability standards, the Commission may have reason to believe that the sustainability standard which the sustainability agreement aims to attain is no longer higher than what is mandated by Union or national law. The Commission may then invite the applicant to demonstrate that the standard which the sustainability agreement aims to attain is in fact higher than that mandated in Union or national law. If the applicant fails to do so, the Commission may inform it that the opinion is no longer valid and publish its findings on its website.

7.6. Effects of an opinion

- (172) Under the fifth paragraph of Article 288 TFEU, opinions have no binding force. They are intended instead to help operators carry out a self-assessment on the compatibility of the sustainability agreement with Article 210a. However, national competition authorities and national courts may take account of opinions issued by the Commission as they see fit in the context of a case.
- (173) An opinion cannot prejudice the assessment of the same question by the Court of Justice, national courts or national competition authorities.
- (174) Where a sustainability agreement has formed the factual basis for an opinion, the Commission is not precluded from subsequently examining that same agreement in a procedure under Council Regulation 1/2003⁽⁴¹⁾. In that case, the Commission will take its previous opinion into account, subject in particular to: (i) changes in the underlying facts; (ii) any new aspects discovered by the Commission or raised in a complaint; (iii) developments in the case law of the Court of Justice; or (iv) wider changes of the Commission's policy and developments on the markets concerned.

8. EX POST INTERVENTION BY NATIONAL COMPETITION AUTHORITIES AND THE COMMISSION UNDER ARTICLE 210A(7)

- (175) Article 210a(7) sets out a safeguard mechanism by which either a national competition authority or the Commission (the 'relevant competition authority') may decide, after the conclusion or the implementation of a sustainability agreement, to modify, discontinue or prevent it from being implemented. Such a decision may be necessary to prevent competition from being excluded in the market or where the objectives of the CAP, as laid down in Article 39 TFEU, are jeopardised.

8.1. CAP objectives are jeopardised

- (176) In accordance with Article 42 TFEU, competition rules only apply to the production of, and trade in, agricultural products, to the extent determined by the co-legislators in accordance with Article 43(2) TFEU, taking into account the five objectives of the CAP laid down in Article 39(1) TFEU⁽⁴²⁾.
- (177) On that basis, Article 210a(7) gives competition authorities the power to intervene where a sustainability agreement, which has been entered into or implemented, jeopardises the five objectives of the CAP laid down in Article 39 TFEU. When doing so, the relevant competition authority must consider the effect of the sustainability agreement on all five objectives. In some cases, it will be sufficient for one of the five objectives to be jeopardised to satisfy the requirement laid down in Article 210a(7). However, in cases where some objectives may be negatively impacted but other objectives are positively impacted, it could be necessary to reconcile the five objectives⁽⁴³⁾.

⁽⁴¹⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

⁽⁴²⁾ Those objectives are:

- (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
- (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
- (c) to stabilise markets;
- (d) to assure the availability of supplies;
- (e) to ensure that supplies reach consumers at reasonable prices.

⁽⁴³⁾ Judgment of 14 May 1997, *Florimex and VGB v Commission*, joined cases T-70/92 and T-71/92, ECLI:EU:T:1997:69, paragraph 153, confirmed on appeal by Judgment of 30 March 2000, C-265/97 P, ECLI:EU:C:2000:170.

- (178) The objective laid down in Article 39(1), point (a) TFEU, increasing agricultural productivity, could be jeopardised in cases where the sustainability agreement reduces the parties' incentives to innovate. That might be the case for example if the sustainability agreement lays down a sustainability standard that reduces the parties' incentive to invest in new technologies that could help attain an even higher sustainability standard, or if the sustainability agreement covers such a large part of the market that it also reduces the incentives for other market participants to innovate.
- (179) The objective laid down in Article 39(1), point (b) TFEU aims at ensuring a fair standard of living for farmers. In determining whether that objective could be jeopardised, the relevant competition authority should assess how the sustainability agreement affects the living standards of all farmers, not just those farmers who are parties to the sustainability agreement.

Example: To reduce pesticide use more than what is mandated by Union and national law, three maize producers, representing only one small part of the number of producers on the market, agree with a feed producer that they will switch to organic production methods. Since that switch will increase their costs, they jointly agree that the three maize producers will fix prices for a period of 2 years. After 1 year of implementing the sustainability agreement, the three maize producers realise that they underestimated how much the switch to organic production would increase their costs, and that the fixed price does not cover these extra costs. The three maize producers therefore reduce their revenue in order to cover these costs, given that they cannot increase the fixed price.

In this example, the reduction of revenue is merely due to a miscalculation by the three maize producers. In addition, it only concerns a limited number of producers. As a result, it is unlikely to jeopardise the objectives of the CAP laid down in Article 39 TFEU.

- (180) The objectives laid down in Article 39(1), points (c), (d) and (e) TFEU relate to the stability of markets, the availability of supplies and ensuring reasonable prices for consumers. Those objectives are often related.

Example: Several grain seed producers, making up 80 % of the grain produced in the relevant geographic area, agree to stop selling grain seeds treated with a certain type of chemical pesticide. That creates a shortage of inputs for processors that use the grains because the producers account for a large share of seed production, leading to a substantial increase in the price of bread. That would likely jeopardise the objectives of ensuring the availability of supplies and reasonable prices for consumers.

- (181) The threshold for considering that the objectives of the common agricultural policy laid down in Article 39 TFEU are jeopardised should be high. If it were to be considered that those objectives are jeopardised any time a sustainability agreement has even a small impact on one of them, that would go against the spirit of Article 210a and the case law of the Court of Justice of the European Union on the need to reconcile the five CAP objectives.

- (182) Moreover, the objective of ensuring availability of supplies is distinct from self-sufficiency ⁽⁴⁴⁾. Security of supplies relates to food security, not necessarily to the widest diversity of market segments for the same foods. If a sustainability agreement results in reducing the market shares of less sustainable segments of the same agricultural products, that does not necessarily jeopardise the objective of security of supply. Similarly, the 'reasonable prices' objective should not be understood as referring to the lowest price possible ⁽⁴⁵⁾.

⁽⁴⁴⁾ Judgment of 14 July 1994, *Greece v Council*, C-353/92, ECLI:EU:C:1994:295.

⁽⁴⁵⁾ Judgment of 15 July 1963, *Germany v Commission*, Case 34/62, ECLI:EU:C:1963:18.

(183) Jeopardising the CAP objectives laid down in Article 39(1) TFEU is also distinct from the exclusion of competition. An exclusion of competition may occur in some situations without jeopardising those objectives. Moreover, those objectives may be jeopardised even if competition is not excluded.

8.2. Exclusion of competition

(184) Article 210a(7) also allows national competition authorities and the Commission to intervene once a sustainability agreement has been entered into or implemented, if intervention becomes necessary to prevent competition from being excluded.

(185) The assessment by the relevant competition authority of whether a sustainability agreement excludes competition is distinct from the assessment of whether the sustainability agreement is indispensable to the attainment of the sustainability standard. That means that a restriction of competition in a sustainability agreement may be indispensable to attaining a sustainability standard, but still exclude competition. However, not every restriction of competition necessarily excludes competition, since that would make the exclusion in Article 210a(1) ineffective. It therefore follows that the exclusion of competition must be sufficiently serious to override the fact that the sustainability agreement fulfils the indispensability test of Article 210a(1).

(186) The concept of exclusion of competition is also distinct from the concept of jeopardising the objectives laid down in Article 39(1) TFEU, in particular those related to reasonable prices and availability of supplies. Therefore, the threshold for exclusion of competition should be high, to avoid the overlap between the two distinct grounds for *ex post* intervention.

(187) There can be an exclusion of competition within the meaning of Article 210a(7) if a sustainability agreement leads to the exclusion of competing products that could meet a substantial part of the demand from consumers. That includes products that attain a higher sustainability standard than the one set out in the agreement, or products that do not attain as high a sustainability standard, regardless of whether the restriction affects goods supplied by the parties to the sustainability agreement or by third parties.

(188) That could be the case, for example, where a sustainability agreement prevents the introduction of alternative products that comply with a higher sustainable standard than the one set out in the sustainability agreement and for which there is substantial consumer demand.

(189) There can also be an exclusion of competition within the meaning of Article 210a(7) if a sustainability agreement excludes food products with a lower standard than those of the sustainability agreement, but which comply with mandatory food standards and for which there is substantial consumer demand.

(190) However, the fact that some products that comply with lower sustainability standards are withdrawn from the market does not imply an exclusion of competition within the meaning of Article 210a(7) if such products were withdrawn because consumers increasingly demand more sustainable products. It is therefore necessary to assess 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.

(191) In principle, the risk of exclusion of competition is related to the level of concentration in a market. Whether competition is excluded also depends on the degree of competition before the sustainability agreement. Where competition was already weak, for example because of a relatively small number of competitors or because there are barriers to entry, even a small reduction in competition caused by the sustainability agreement could exclude competition.

(192) The market coverage of the sustainability agreement is likely to be a factor in deciding whether to intervene under Article 210a(7). The assessment of whether a sustainability agreement excludes competition should be carried out on a case-by-case basis, depending on the extent to which consumer demand is unfulfilled. The mere fact that a sustainability agreement covers the entirety of the market will not necessarily lead to an exclusion of competition.

Example 1: Poultry producers making up around 50 % of the market agree to enter into a purchase agreement to jointly purchase higher-quality feedstuff for poultry. Thanks to the cost savings of the joint purchase, the producers manage to maintain a feed price that is more or less equal to the price of feed for poultry not covered by the sustainability agreement. They also agree to jointly finance an advertising campaign to raise awareness of how better-fed poultry is better for human health and animal welfare. As a result of the campaign, most consumers decide to switch to buying better-fed poultry meat. That increase in demand creates an incentive for other producers to join the agreement and change their production methods. In particular, the joint purchase attracts smaller producers to the higher standard as they could not otherwise have afforded to buy the higher-quality feedstuff. As a result, producers representing more than 90 % of total supply switch to the more sustainable standard.

Although the agreement removes virtually all less sustainably produced poultry from the market, it is unlikely to constitute an exclusion of competition under Article 210a(7). That is because Article 210a does not aim to prevent agreements that are so effective at delivering sustainable products that most consumers want to purchase and other operators adopt that same standard.

Example 2: Turkey breeders making up 60 % of the market decide to improve the living conditions of their turkeys by setting a new animal welfare standard that goes beyond what is prescribed by mandatory law. That involves increasing the turkeys' living space and installing air renewal and water treatment systems. The new sustainability standard also requires that turkeys be fed only premium-quality feed. The producers agree with buyers to receive from them a price premium to cover the costs for the sustainable turkey.

The price premium payment results in a price for sustainably produced turkey meat that is 150 % higher than the price of the non-sustainably produced turkey meat. That increase is necessary because of the need to ensure the recovery of the extensive extra costs of the new standard. Within a few months, all other turkey breeders in the market in question join the new sustainability agreement. Barriers to the import of turkey meat significantly limit the amount of imported non-sustainably produced turkey meat on the market. As a result, there is effectively no longer any non-sustainably produced turkey meat available. In addition, the price of the sustainably produced turkey meat increases further by 200 % compared to the original price of non-sustainably produced turkey meat.

Evidence indicates that, because of the agreement, between 45 % to 50 % of the consumers of turkeys are no longer able to afford to buy any turkey.

As a result, consumers who were only willing to pay for the cheaper – and less sustainable alternative – will no longer be able to buy any turkey, as they cannot afford the 200 % price increase. Such a situation is likely to constitute an exclusion of competition under Article 210a(7).

8.3. Procedural aspects

- (193) Where a sustainability agreement only covers a single Member State, the national competition authority of that Member State may take a decision pursuant to Article 210a(7). Where a sustainability agreement covers more than one Member State, only the Commission may take a decision pursuant to Article 210a(7).
- (194) When determining whether to apply Article 210a(7), the Commission will rely on its own market monitoring and on submissions made by any natural or legal person. Any natural or legal person who has information about a sustainability agreement may inform the Commission or the national competition authority concerned, by means of the appropriate national procedure. Submissions should contain information on the content of the sustainability agreement, the parties to it, and the grounds substantiating the allegations. The Commission may request additional, necessary information from the parties to the sustainability agreement within 2 months after the opening of the formal investigation, taking account of the confidentiality of business information. The Commission may also ask third parties for additional information which is necessary to assess the sustainability agreement in question.

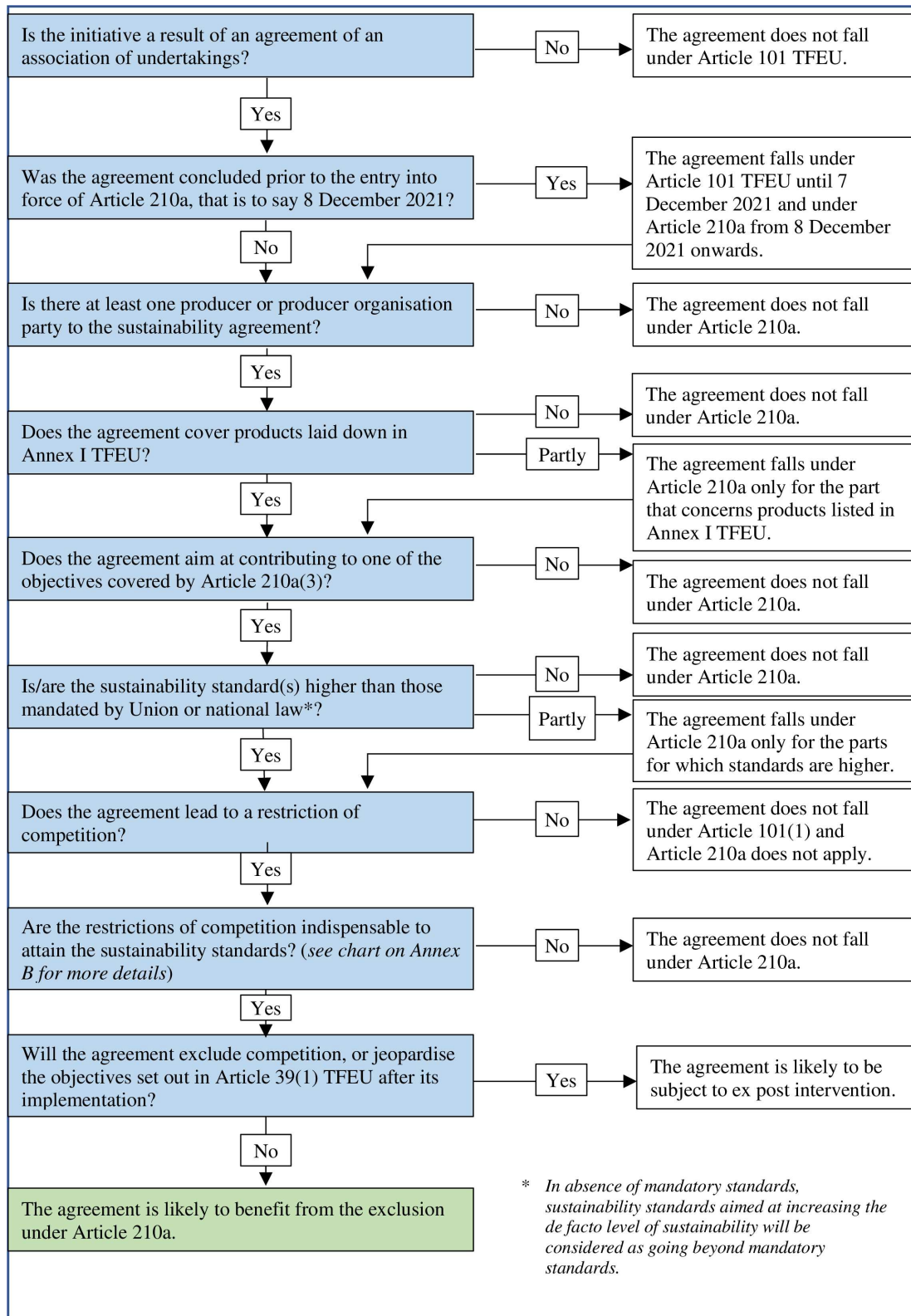
- (195) After opening an investigation, the Commission will normally deliver its decision within 6 months of the date it opened the investigation or within 6 months of the date on which it received the necessary information. The parties are free to continue implementing the sustainability agreement between the opening of the investigation and the delivery of a decision.
- (196) If the Commission determines that competition is being excluded or that the objectives laid down in Article 39(1) TFEU are being jeopardised, it may take the following measures:
- (a) **If the sustainability agreement has been entered into but has not yet been implemented**, and it cannot be modified in such a way as to satisfy the conditions for exclusion under Article 210a, the Commission may adopt a decision ordering the agreement not to be implemented.
 - (b) **If the sustainability agreement has already been implemented**, the Commission may decide that the parties should:
 - (i) modify the sustainability agreement, in the event that doing so would be sufficient to remedy the exclusion of competition or the jeopardising of the objectives laid down in Article 39(1) TFEU or;
 - (ii) discontinue or terminate the sustainability agreement, if modifying it would not be enough to remedy the exclusion of competition or the jeopardising of the objectives laid down in Article 39(1) TFEU.
- (197) Following a decision by the Commission that the sustainability agreement should be discontinued, the sustainability agreement will no longer be excluded from the application of Article 101(1) TFEU. If the parties to the sustainability agreement continue to implement the sustainability agreement after the date of the Commission's decision, proceedings under Article 101 TFEU may be launched with respect to the implementation of the sustainability agreement after that date. Such proceedings may lead to the imposition of a fine.

9. BURDEN OF PROOF FOR THE FULFILMENT OF THE CONDITIONS OF ARTICLE 210A

- (198) In the context of an *ex post* intervention, the Commission and the national competition authorities bear the burden of proving that a decision based on Article 210a(7) is necessary to prevent the exclusion of competition or the jeopardising of the objectives laid down in Article 39(1) TFEU.
- (199) In the context of an investigation before a competition authority or of an action before a court, individuals or entities that are not parties to the agreement concerned (for example consumers or consumer associations, NGOs, other operators in the chain, etc.) may claim that a sustainability agreement does not fulfil the conditions of Article 210a. In those cases, those individuals or entities bear the burden of proving that the sustainability agreement does not fulfil the conditions of Article 210a. If the parties having entered into a sustainability agreement and benefiting from the exclusion under Article 210a claim that the conditions of Article 210a(1), (2) and (3) are fulfilled, they must bring forward substantiated arguments in support of their claim.

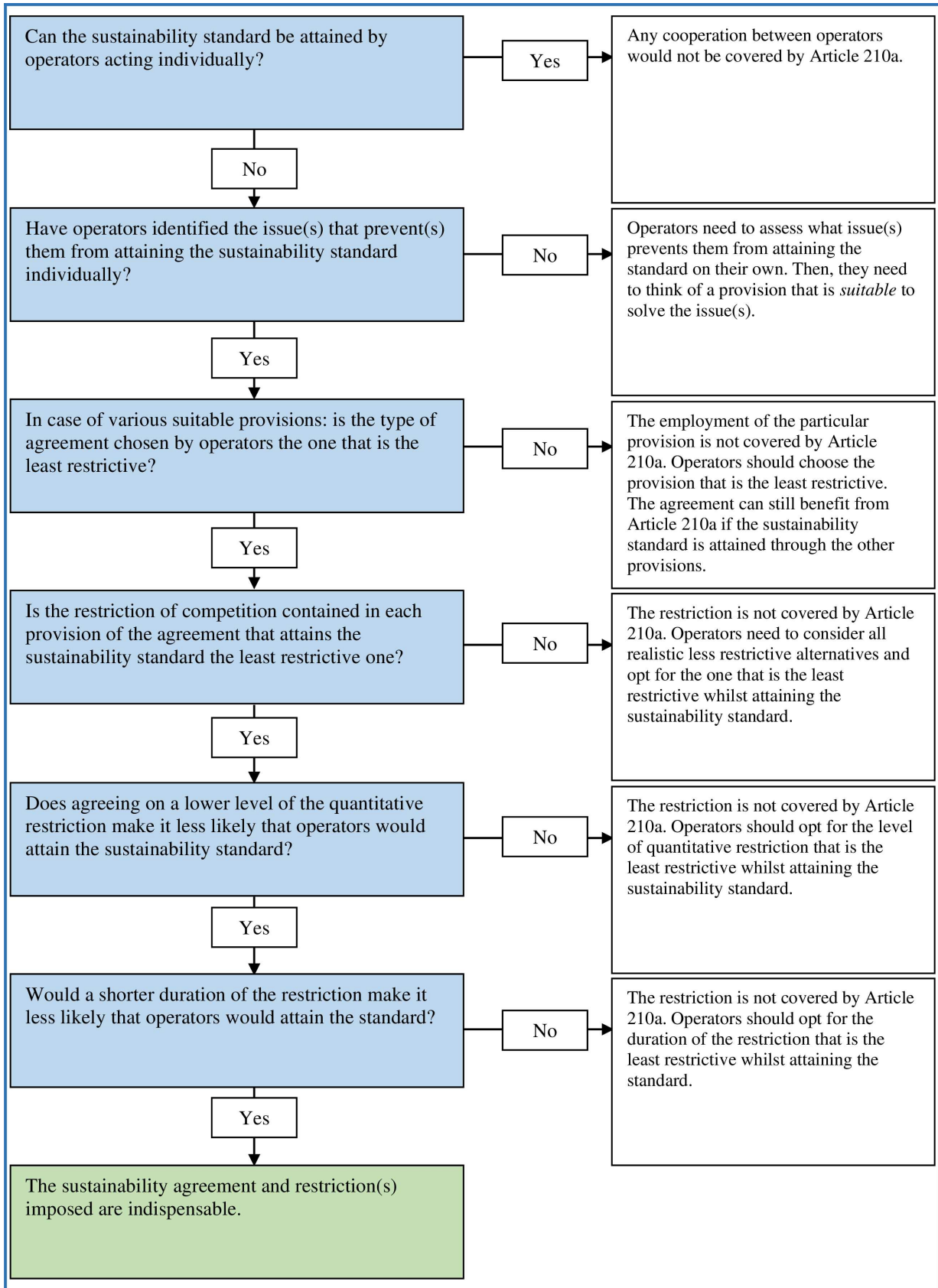
ANNEX A

FLOWCHART OF THE ASSESSMENT UNDER ARTICLE 210A



ANNEX B

FLOWCHART OF THE ASSESSMENT OF THE INDISPENSABILITY TEST



ANNEX C

GLOSSARY

Term	Definition
Agreement	Any type of agreement, decision or concerted practice between undertakings. Agreements falling under Article 210a are those involving at least one producer and relating to the production of or trade in agricultural products, irrespective of the form of cooperation. For the purposes of Article 210a, other operators at different levels of the agri-food supply chain, including production, processing and trade, can also be part of the agreement.
Common Agricultural Policy ('CAP')	The Common Agricultural Policy is the European Union agricultural policy.
CMO Regulation	Regulation (EU) No 1308/2013 of the European Parliament and of the Council ⁽¹⁾ .
Court of Justice	The Court of Justice of the European Union, including the General Court.
Force majeure	Not limited to absolute impossibility, but must be understood in the sense of unusual circumstances, outside the control of the producer or operator, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice.
Horizontal agreement	An agreement between economic operators at the same level of the supply chain, for example an agreement between agricultural producers.
Mandatory standard	A standard that establishes the levels, substances, products or techniques to be attained or to be avoided by individual producers or other operators, excluding standards or targets that are not legally binding on individual producers or operators.
National standard	A mandatory standard set at national level of a Member State, excluding standards or targets that are legally binding only on the Member State or on a given territory or region of it, but not legally binding on individual producers or operators operating in the Member State.
Operator	Producers of agricultural products, including producers of raw agricultural products and producers of certain processed agricultural products that are listed in Annex I; operators at the 'production level', such as suppliers of inputs to agricultural production and of packaging; operators at the 'processing level', such as processors/manufacturers that process agricultural products; and operators at the 'trade level, including distribution', such as traders, wholesalers, retailers and food service suppliers, and transport and logistics companies, to the extent that all those operators aim to help attain the sustainability standard, as referred to in Section 3.2, by implementing the sustainability agreement.
Producer	A producer of agricultural products as listed in Annex I of the TFEU.
Sustainability agreement	An agreement that aims to apply a sustainability standard higher than mandated by Union or national law.

⁽¹⁾ 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 (OJ L 347, 20.12.2013, p. 671).

TFEU	Treaty on the Functioning of the European Union
Undertaking	Any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. An undertaking may comprise multiple legal entities.
Union standard	A mandatory standard set at Union level, excluding standards or targets which are binding on Member States, but which are not legally binding on individual undertakings.
Vertical agreement	An agreement between operators at different levels of the supply chain, for example an agreement to which both producers and other operators in the agri-food supply chain are party.

ANNEX D

ARTICLE 210A OF REGULATION (EU) NO 1308/2013 – VERTICAL AND HORIZONTAL INITIATIVES FOR SUSTAINABILITY

1. Article 101(1) TFEU shall not apply to 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 sustainability standard higher than mandated by Union or national law, provided that those agreements, decisions and concerted practices only impose restrictions of competition that are indispensable to the attainment of that standard.
2. Paragraph 1 applies to agreements, decisions and concerted practices of producers of agricultural products to which several producers are party or to which one or more producers and one or more operators at different levels of the production, processing, and trade in the food supply chain, including distribution, are party.
3. For the purposes of paragraph 1, “sustainability standard” means a standard which aims to contribute to one or more of the following objectives:
 - (a) environmental objectives, including climate change mitigation and adaptation, the sustainable use and protection of landscapes, water and soil, the transition to a circular economy, including the reduction of food waste, pollution prevention and control, and the protection and restoration of biodiversity and ecosystems;
 - (b) the production of agricultural products in ways that reduce the use of pesticides and manage risks resulting from such use, or that reduce the danger of antimicrobial resistance in agricultural production; and
 - (c) animal health and animal welfare.
4. Agreements, decisions and concerted practices that fulfil the conditions referred to in this Article shall not be prohibited, no prior decision to that effect being required.
5. The Commission shall issue guidelines for operators concerning the conditions for the application of this Article by 8 December 2023.
6. From 8 December 2023, producers as referred to in paragraph 1 may request an opinion from the Commission concerning the compatibility of agreements, decisions and concerted practices as referred to in paragraph 1 with this Article. The Commission shall send the applicant its opinion within four months of receipt of a complete request.

If the Commission finds at any time after issuing an opinion that the conditions referred to in paragraphs 1, 3 and 7 of this Article are no longer met, it shall declare that Article 101(1) TFEU shall apply in the future to the agreement, decision or concerted practice in question and inform the producers accordingly.

The Commission may change the content of an opinion at its own initiative or at the request of a Member State, in particular if the applicant has provided inaccurate information or misused the opinion.

7. The national competition authority as referred to in Article 5 of Regulation (EC) No 1/2003 may decide in individual cases that, in the future, one or more of the agreements, decisions and concerted practices referred to in paragraph 1 are to be modified, discontinued or not take place at all, if it considers that such a decision is necessary in order to prevent competition from being excluded or if it considers that the objectives set out in Article 39 TFEU are jeopardised.

For agreements, decisions and concerted practices covering more than one Member State, the decision referred to in the first subparagraph of this paragraph shall be taken by the Commission without applying the procedures referred to in Article 229(2) and (3).

When acting under the first subparagraph of this paragraph, the national competition authority shall inform the Commission in writing after initiating the first formal measure of the investigation and shall notify the Commission of any resulting decisions without delay after their adoption.

The decisions referred to in this paragraph shall not apply earlier than the date of their notification to the undertakings concerned.’

ANNEX E

EXAMPLES OF RESTRICTIONS OF COMPETITION

- (1) This annex sets out examples of agreements that are or are not likely to fall within the prohibition against restrictions of competition contained in Article 101(1) TFEU. They are intended to help the reader understand the types of situations in which they should consider whether the exclusion laid down in Article 210a applies, since Article 210a is only relevant if the contemplated agreement would otherwise infringe Article 101(1) TFEU. In other words, the examples aim to help the reader understand when Article 210a is inapplicable because the contemplated agreement clearly does not restrict competition.
- (2) Importantly, the examples set out in this Annex are not, and should not be understood as, examples of agreements that satisfy or do not satisfy the criteria for exclusion under Article 210a.

1. Restrictions relating to price

- (3) Sustainability agreements that directly or indirectly restrict the freedom of a party to negotiate the price at which it buys or sells a product are likely to restrict competition.

Example 1: A certain rice cultivation technique uses less water than traditional rice cultivation techniques, does not use artificial fertilisers, and is pesticide-free. The use of this technique contributes to the sustainable use and protection of landscapes, water and soil, and to reducing pesticide use. A grain wholesaler agrees with a rice production cooperative that the former will pay a price premium payment per ton over a reference price for Arborio rice that is cultivated using this technique. The premium is calculated based on a composite commodity price index. The rice cooperative is free to produce rice using traditional methods and is free to sell as much rice as it wishes to other customers.

The premium payment is unlikely to restrict competition. It is simply a formula agreed between a buyer and a seller for setting the price at which the buyer buys the product from the seller.

Example 2: An NGO that is promoting the rice cultivation technique referred to in the Example 1 develops a quality mark to be used in marketing Arborio rice produced using such cultivation technique. It licenses the quality mark to wholesalers and producers. Among the conditions for the use of the quality mark is that a grain wholesaler must pay a premium per ton over the reference price referred to in Example 1.

That price premium is likely to restrict competition. Although the grain wholesaler in this example would pay the same price as it would in Example 1, it is no longer the result of a direct negotiation between buyer and seller, but rather an agreement regarding the terms on which one entity is allowed to negotiate with an independent third party.

Example 3: A group of rice cooperatives, rather than an NGO, develop the quality mark and the price premium in order to promote the uptake of the rice cultivation technique.

That price premium is likely to restrict competition. Although in this case the parties are buyers and sellers, each seller is agreeing on the price at which other sellers will also sell their products.

Example 4: In order to promote consumer uptake of rice produced using the cultivation technique referred to in Examples 1, 2 and 3, a cooperative and a retailer agree that the resale price for Arborio rice bearing the quality mark will not be more than a certain percentage above the average price that the retailer charges for Arborio rice.

That agreement is likely to restrict competition because it restricts the retailer's freedom to set the price at which it resells the rice to its customers. Moreover, because the maximum resale price is determined by reference to the price of other types of Arborio rice, it also restricts the retailer's freedom with respect to the price of those other types of Arborio rice. Instead of limiting the price of the rice with the quality mark, the retailer could meet the pricing cap by increasing the average resale price of those other types of Arborio rice.

2. Restrictions relating to output

- (4) Sustainability agreements that restrict output are equivalent to sustainability agreements that restrict a party's ability to set prices. If the quantity that is put on the market is reduced and demand remains the same, the effect will likely be an increase in prices.

Example 1: Desiring to contribute to the mitigation of climate change and to the restoration of biodiversity, an NGO agrees with individual farmers to rent 20 % of their arable farmland. The NGO will leave the land fallow in order to increase local biodiversity. The effect of such agreements would be to reduce the amount of land that individual farmers use at any given time, and thus reduce their crop yields, even though it may contribute to other operations, such as honey production.

Those agreements are unlikely to restrict competition because they are effectively just a real estate transaction. The farmers remain free to use their retained land in whatever manner they see fit.

Example 2: In this example, instead of the NGO renting land, a group of farmers who grow similar crops in the same region agree to reserve at least 20 % of their arable land for use as ecological focus areas. Such an agreement has the effect of reducing the amount of land that the farmers use at any given time, and therefore reducing their crop yields, even though it may contribute to other operations, such as honey production.

That agreement is likely to restrict competition, because the farmers are agreeing to limit the amount of land they each use for production.

Example 3: As part of a regional animal well-being initiative intended to improve living conditions for pigs, participating farmers are required to increase the amount of space per pig on their farms significantly in excess of the legal minimum. Because of national law, it is difficult for most farmers to increase the amount of space dedicated to raising pigs. As a result, participating farmers will reduce the number of pigs reared in a given year. The initiative would therefore ensure that farmers receive a payment to compensate them for their investments and for their reduced output.

That payment is likely to restrict competition, because the participating farmers are implicitly agreeing to rear fewer pigs.

3. Restrictions relating to inputs

- (5) Sustainability agreements that restrict choice with respect to inputs may affect the cost of production, which in turn affects the price at which the product can be profitably sold or limit the type of products that can be produced, because they potentially restrict the producer's ability to meet consumer demand.

Example 1: A group of dairy cooperatives develops a quality mark for cheeses that requires producers to certify that the milk used in their cheese is exclusively produced using specified 'biodynamic' methods that exceed the standards for organic agriculture under Union law. Participating cheese producers are free to produce other cheeses with milk that is not produced using those biodynamic methods.

That certification requirement is unlikely to restrict competition. Although the agreement specifies the use of certain inputs, participating cheese producers remain free to produce cheeses using other source of milk.

Example 2: A group of dairy cooperatives develops a quality mark for cheeses that requires producers to certify that the milk used in their cheese is exclusively produced using the biodynamic methods referred to in the first example. However, unlike the scenario in Example 1, the quality mark requires that all milk used in the dairy be produced using biodynamic methods, in order to guarantee that there is no commingling of biodynamic and other types of milk.

That certification requirement is likely to restrict competition, because unlike the scenario in Example 1, where farmers were free to produce as much cheese as they wanted without using biodynamic milk, here the agreement removes the participating dairies' freedom to use other kinds of milk to produce cheeses that do not carry the quality mark, thus forcing them to use biodynamic milk.

4. Restrictions relating to customers, suppliers or territories

- (6) Sustainability agreements that require an undertaking not to sell to certain customers or groups of customers, or not to sell outside of a certain territory or into certain territories, are likely to restrict competition. Sustainability agreements that require an undertaking not to buy from other suppliers or from other territories are also likely to restrict competition. The same is true of sustainability agreements that restrict the ability of competing resellers to sell to certain customers or territories or to buy from certain suppliers or territories.
- (7) Where such sustainability agreements are concluded between a supplier and a reseller, whether the sustainability agreement is likely to restrict competition will depend on the position of the supplier and reseller on their respective markets. For example, if a supplier accounts for a large share of the supply to resellers in the relevant market, a sustainability agreement between a retailer and a supplier that restricts the supplier's freedom to sell to other resellers could restrict competition if other resellers would be unable to obtain necessary supplies as a result of the sustainability agreement. Similarly, if a reseller accounts for a large share of purchases of a product, a sustainability agreement that restricts its ability to source from other suppliers could limit those suppliers' ability to sell their products. Moreover, although an individual sustainability agreement between a retailer and a supplier on its own might not be restrictive, if other resellers and suppliers who account for a large share or supply or purchases in the market have also entered into similar sustainability agreements, the overall impact of those sustainability agreements may be to restrict competition.

Example 1: A regional development association develops an agritourism initiative to protect and restore biodiversity while meeting increasing consumer demand for sustainable tourism. Participating farms agree to plant a certain percentage of their land with flowering plants that support the insect population while at the same time making the landscape more attractive. In return, they receive remuneration or subsidies from a fund that is financed by participating retailers, food processors and restaurants. Those businesses receive the right to use a special flower logo and are listed in local tourism materials that highlight sustainable businesses in the area. Participation is voluntary and is open to all farms and businesses in the region.

That agreement is unlikely to restrict competition. The sustainability agreement does not directly relate to any parameters of competition. Although the flower logo and marketing scheme could have an impact on the profitability of farms or on the ability of local businesses to attract customers, the scheme is voluntary and open to all.

Example 2: In this example, the same agritourism scheme is introduced in a region that extends across the border of two Member States. Farms typically supply customers on both sides of the border, and tourists who visit the region typically visit destinations on both sides of the border. The scheme is only available to farms and businesses in one of the two Member States.

That scheme is likely to restrict competition. Unlike in the scenario in Example 1, where participation was open to all, in this case only farms and businesses on one side of the border are allowed to participate. Because the scheme may affect both the profitability of participating farms and the ability of participating businesses to attract customers, it is likely to restrict competition vis-à-vis competing farms and businesses on the other side of the border.

Example 3: In order to reduce food waste, a group of cooperatives develops a code of good conduct that details the steps that agricultural producers, processors and retailers should take to reduce food waste. The code has been developed with the participation of academics and NGOs, and does not favour any particular agricultural producers, processors or retailers. Participation is voluntary.

That code is unlikely to restrict competition. Participation is voluntary, and the code does not discriminate between participants.

Example 4: In this example, as part of the code described in Example 3, the members of the cooperative agree to sell their produce only to retailers who have signed up to the code.

That code is likely to restrict competition, because non-participating retailers would no longer be able to purchase agricultural products from as wide a range of suppliers as they had been able to prior to the sustainability agreement.

5. Restrictions relating to information exchanges

- (8) Sustainability agreements can involve exchanges of non-public information between competitors. Exchanging non-public information is likely to restrict competition if the information will have an impact on how the recipient competes in the market. Such information is often referred to as 'commercially sensitive information'.
- (9) A fundamental principle of competition is that each undertaking is supposed to determine its commercial policy independently. By exchanging commercially sensitive information within the framework of a sustainability agreement, competing undertakings can remove uncertainty about how they will respond on the market. That can make it easier to reach a common understanding about how to behave on the market, thereby reducing or eliminating competition between the undertakings.
- (10) Whether information exchanged within the framework of a sustainability agreement is likely to be commercially sensitive will depend on the nature of the information and the context within which it is disclosed. Some information is competitively sensitive by nature. For example, information relating to an operator's pricing intentions or strategic plans is usually commercially sensitive because competitors who become aware of the information can adapt their competitive behaviour accordingly.
- (11) Other information may be commercially sensitive depending on how detailed it is. The more specific the information is, the more likely it is that competitors can use the information to anticipate each other's intentions.
- (12) Similarly, the age of the information may determine whether it is commercially sensitive. The older the information is, the less likely it is to reveal competitors' intended conduct or to help reach a common understanding on how to compete in the market.
- (13) In other cases, certain information may be essential to enable competition. In such cases, sustainability agreements that restrict the ability of some undertakings to have access to that information can make it difficult for excluded undertakings to compete or can create barriers to new entry or to expansion by competing undertakings.

Example 1: Every summer, there are periods where the volume of certain vegetables exceeds demand, as a result of which a certain portion of the harvest ends up rotting in the fields or in storage. In order to reduce such waste, a group of cooperatives collects information about the areas planted and yields per vegetable in the past year as well as the amount of harvest waste across all member farms. That information is aggregated at the regional level and published on a publicly accessible website. The cooperatives prepare a joint recommendation for their members on how to deal with the harvest waste based on the best practices of their members.

That practice is unlikely to restrict competition. The information in this case is historic and aggregated, making it unlikely that any given farm will be able to anticipate in detail what its competitors will do on the market.

Example 2: In this case, the group of cooperatives agrees that, before each planting season, each cooperative member will report its planting plan to its cooperative. The cooperatives will promptly publish the individual planting plans on a publicly accessible website, so that each farm will be able to adjust its planting plans to avoid overproduction that would lead to food waste.

This agreement is likely to restrict competition. The information that is exchanged is sensitive, because it relates to future plans that are detailed and non-aggregated, allowing each cooperative to know what its competitors are planning to produce next season and to reduce its output accordingly.

Example 3: In this example, rather than exchanging planting plans, in order to reduce food waste by ensuring that supply and demand are more balanced, the cooperatives exchange information on their weekly deliveries to specific customers.

That exchange is also likely to restrict competition. The information concerned, including sales volumes and customer identities, is sensitive, and the data is current. Exchanging that data would make it easier for the cooperatives to reach a tacit understanding that they should not compete vigorously for certain customers.

- (14) For more information on the analysis of sustainability agreements under Article 101 TFEU, including agreements that fall outside the scope of Article 210a, see Section 9 of the Horizontal Guidelines ⁽¹⁾.

6. Restrictions relating to the manner in which sustainability standards are set

- (15) In some cases, the way in which the sustainability standard is established may itself be likely to restrict competition. In particular, concerns can arise where participating in a sustainability standard gives participants a competitive advantage over non-participants, or where the way in which the standard is set can give some participants advantages over other participants. The adoption of a sustainability standard necessarily prevents undertakings from adopting other sustainability standards, which can also give rise to concerns.

Example 1: In order to combat anti-microbial resistance, seed companies and an association representing squash producers jointly develop a standard for combatting powdery mildew that reduces the need to use antimicrobial products during cultivation. Farmers who use the standard have the right to use a certain quality mark, and the association representing squash producers invests in raising awareness among consumers about anti-microbial resistance. The standard comprises various agricultural practices and requires the use of squash varieties that have been demonstrated to meet a certain level of resistance to powdery mildew. Membership of the association is open to all squash producers and seed companies, as well as to researchers in the field. All members are allowed to participate in the development of the standard. Meetings of the standards committee of the association are live streamed, and all relevant preparatory documents are published on the association's website. The adoption of the standard is put to a vote of all the members of the association, each of which has one vote. Participation in the standard and quality mark scheme are voluntary.

⁽¹⁾ Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ C 259, 21.7.2023, p. 1).

That standard is unlikely to restrict competition. Participation in the standard setting is open to all members of the association, and standards are adopted in an open and transparent manner. Members of the association are free to choose whether to adopt the standard.

Example 2: In this case, the facts are the same as those in Example 1, except that the standard requires the use of certain proprietary hybrid varieties, even though other varieties offer similar resistance to powdery mildew.

That specific requirement is likely to restrict competition. Although participation in the standard is voluntary, the awareness-raising campaign is to lead squash producers to conform to the standard. It is also likely to affect competition both between squash producers and between seed companies because the standard favours certain squash varieties over others. Moreover, by restricting the freedom of squash producers to choose other varieties, the standard could prevent squash producers from using more effective varieties that would reduce the need for anti-microbial treatments by an even greater amount.

Example 3: In this case, the association in Example 1 has different membership rules and procedures. Here, membership is open not only to all squash producers but also to seed developers. Annual fees are determined on the basis of each member's annual turnover and voting rights are determined in proportion to the member's annual fees. As a result, a small number of large seed companies control sufficient votes to adopt the standard independently of the votes of the squash producers.

The determination of voting rights is likely to restrict competition. The standard setting process would give the large seed companies an incentive to favour their own varieties over those of other seed producers.

Example 4: In this case, the facts are the same as in Example 1, except that the association representing squash producers adopts a decision requiring all members to adopt the standard. Squash producers that do not wish to adopt the standard are free to leave the association, but by doing so would lose access to valuable marketing and technical support.

That decision is likely to restrict competition. Although squash producers can decide not to adopt the standard, having to leave the association to do so makes it likely that many squash producers will adopt the standard and that competition on quality and price will be restricted as a consequence.