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**COMMISSION STAFF WORKING DOCUMENT**

**STAKEHOLDER CONSULTATION - SYNOPSIS REPORT**

***Accompanying the document***

**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 Artcile 210a of Regulation (EU) No 1308/2013**

{C(2023) 8306 final}

## 1. INTRODUCTION

1) The aim of this report is to summarise the results of all consultation activities undertaken in the process of adoption of the Commission Guidelines on the application of the exclusion from Article 101(1) TFEU for sustainability agreements pursuant to Article 210a of Regulation (EU) 1308/2013 ("Article 210a").

2) The report outlines the consultation activities that have taken place and the different views expressed by stakeholder groups throughout the process. Furthermore, the report explains how the input of stakeholders has been taken into account and provides a clarification why certain suggestions could not be implemented.

3) This document should be regarded solely as a summary of the contributions made by stakeholders in the public consultations for the Guidelines. It cannot, in any circumstances, be regarded as the official position of the Commission or its services. Responses to the consultation activities cannot be considered as a representative sample of the views of the EU population.

## 2. BACKGROUND

4) Article 210a was adopted by the EU Parliament and the Council of the EU in December 2021 as part of the EU Common Agricultural Policy (CAP) reform for the programming period 2023-2027. It provides for an exclusion from Article 101(1) TFEU for sustainability agreements in the field of agriculture. Under the text of the exclusion, agreements between producers and/or between one or more producers and other operators from the agri-food supply chain (e.g. at the processing or distribution level) aimed at achieving a sustainability standard higher than mandated by EU or national law are excluded from the scope of application of Article 101(1) TFEU.

5) In order to benefit from the exclusion, operators must aim at achieving standards in the field of environmental protection, reduction in the use of pesticides or antimicrobial resistance, animal health and animal welfare. Based on the exclusion operators are allowed to conclude agreements that would otherwise fall within the scope of Article 101(1) TFEU provided that any restrictions of competition that they agree on are indispensable for the purpose of achieving the sustainability standard sought by the agreement.

6) Under Article 210a(5) the Commission was mandated to adopt Guidelines concerning the conditions for the application of the exclusion by 8 December 2023. Pursuant to Article 210a, paragraph 6 from 8 December 2023 onwards producers may request an opinion from the Commission concerning the compatibility of agreements with the exclusion.

7) In the process for adoption of the Guidelines, the Commission has undertaken two rounds of consultations to inform its decision making. The first consultation was undertaken in 2022 and aimed to prepare the drafting of the Guidelines. The second consultation was undertaken in 2023 on the basis of a draft of the Guidelines. Further information on this can be found below.

8) The adoption of the Guidelines was a co-led initiative by DG Competition and DG Agriculture and Rural Development.

## 3. CONSULTATION ACTIVITIES

First set of consultation activities (February 2022-May 2022)

9) The initial aim of consultation activities was to gather data on the design and functioning of sustainability agreements, including their link to the legal framework at the EU and national level. For this reason, during the first set of consultation activities a questionnaire was addressed to stakeholders in the agri-food supply chain. The types of stakeholders mapped for this consultation were agri-food supply chain participants (e.g., primary agricultural producers, input providers, processors, traders, wholesalers and retailers and their associations); agricultural, environmental and sustainability experts (e.g., NGOs, interest groups, independent); public authorities with competence in agriculture, food, food safety, environment, climate, health and other relevant areas; competition law enforcers; consumers and their associations; academia.

10) The goal was to understand the types of sustainability objectives operators would be most interested in pursuing; the methods of pursuing them (e.g., through what types of agreements); the indispensability of the joint action in relation to unilateral actions and other alternative methods; the types of participants, duration and market coverage of sustainability agreements; the impact that such agreements could have on productivity, income of agricultural producers, stability of the markets, agricultural, food and consumer prices, output and innovation. In addition, the objective was also to understand more generally the challenges and hurdles that operators have in implementing higher sustainability standards.

11) The public consultation opened in EUSurvey on 28 February 2022 and closed on 22 May 2022. It was available in English, German and French. The questionnaire was accompanied by the consultation of stakeholders on the consultation strategy and on the call for evidence. A reference to the questionnaire, consultation strategy and call for evidence could be found on the "Have your say" website of the Commission.

12) The consultation and its results, which are described further below, were summarized in a Factual summary report published on the Commission's website. The information drawn from this consultation was used as a basis for the preparation of a draft of the Guidelines in the course of the second half of 2022.

Second set of consultation activities (January 2023 – April 2023)

13) The draft guidelines were published for stakeholder consultation on DG Competition's website in the period from 10 January 2023 to 24 April 2023.

14) The target group for the consultation were stakeholders from the agri-food supply chain, public authorities (in particular, national competition

authorities, ministries of agriculture and regional authorities); consumer organisations; organisations dealing with sustainability (offering/developing knowledge sharing, standards, certification, etc.). The contributors to the first consultation have been encouraged to provide their feedback on the draft of the Guidelines.

15) The aim of the consultation on the draft of the Guidelines was to obtain:

   a) The stakeholders' opinion on whether the draft text exhaustively addresses their points of concerns regarding the way Article 210a should be used in order to benefit from the exclusion, in particular whether the draft Guidelines addressed those points in a manner that is sufficiently clear and intelligible.

   b) The stakeholders' remarks on the content of the text, in particular on how the draft Guidelines detailed the scope of the exclusion, the conditions for application of the exclusion, and the possibility for the Commission's intervention. The stakeholders were invited to provide their suggestions on how the text could be enhanced.

   c) The stakeholders' views on the accuracy and usefulness of the examples. The draft Guidelines included many examples to illustrate their content to provide concrete illustrations to the reader. The stakeholders were invited to provide their opinion on whether the examples were clear and realistic enough, and to propose ways to update the examples based, for instance, on their own experience.

16) In addition, a conference under the title "Sustainability Guidelines: Enhancing cooperation for a greener agri-food supply chain" took place on 12 June 2023 aiming to give an opportunity to those stakeholders that had participated in the public consultation on the draft Guidelines to personally share their views and concerns. Another goal of the conference was to reach out to the wider stakeholder audience who could ask and receive a response to their questions in relation to Article 210a via an online platform.

17) The conference was structured around four different panels. Speakers in the different panels included representatives of agricultural producers (Copa Cogeca, Fresh Produce Centre), retailers (Eurocommerce and Independent Retail Europe), consumers (BEUC), national competition authorities (the Dutch Authority for Consumers and Markets) as well as an academic from Wageningen University. There were also speakers representing ongoing sustainability initiatives that fall within the scope of Article 210a (Initiative Tierwohl and Bioland). The recording of the conference is publicly available using the password found here.

18) The Conference was structured in different thematic panels. Panel I dealt with the relationship between Article 210a and other exclusions from competition rules as well as with the relevance of local and regional sustainability standards. Panel II was on the topic of "Empowering farmers for a sustainable agriculture" and discussed the role of farmers in shaping the sustainability standard and related agreements, and the cost recovery and remuneration for farmers in sustainability agreements. Panel III focused on the indispensability

test and on different aspects relating to its interpretation. Panel IV dealt with theon monitoring and ex-post intervention by competition authorities.

19) Finally, the Commission services had various meetings with different stakeholder groups during which it presented the text of the Guidelines and received direct feedback. This included meetings with representatives of producers, retailers, brand manufacturers and academics.

## 4. STAKEHOLDER GROUPS

20) The types of stakeholder groups that replied to the first consultation were business associations, NGOs, EU citizens and a consumer organisation. The largest part of them belong to the sector of primary production within agriculture followed by the sector of food processing and retail. The overall number of responses to the first public consultation was 35.

21) The types of stakeholder groups that responded to the second consultation (i.e. on the draft of the Guidelines) were international and national NGOs; representatives of sustainability agreements; national governmental authorities; representatives of manufacturers of branded products; representatives of the production, wholesale and retail sectors; academics; EU citizens. The overall number of responses was 34.

## 5. RESULTS OF CONSULTATION ACTIVITIES

First set of consultation activities (February 2022-May 2022)

22) In the first public consultation stakeholders rated as the most important sustainability objective covered by Article 210a that of “climate change mitigation and adaption” while “reduction of food waste”, “pollution prevention and control” and “reduction of the use of pesticides” had the lowest levels of importance according to stakeholders.

23) In terms of the level of the agri-food supply chain which was considered as the most important for meeting higher sustainability objectives, a significant majority of them (86%) identified “primary production” as such.

24) When it comes to the expected impacts of sustainability agreements, most respondents agreed that they would have a positive impact on “income of the persons engaged in agriculture”, the “agricultural productivity” and the “stability of markets”. Around 34% of the respondents stated that sustainability agreements would have a negative impact on “consumer prices”.

25) In relation to the type of agreement through which sustainability objectives are pursued, 43% of the respondents to the consultation qualified “agreements on price or other aspects of price” as the most suitable in attaining higher goals. “Producers” were identified as the type of operators that is the most crucial for achieving higher sustainability standards.

26) In terms of duration, “four or more years” was most widely identified as the period needed to achieve a sustainability standard.

Second set of consultation activities (January 2023 – April 2023)

27) The replies of stakeholders received during the second set of consultation activities addressed different aspects of the draft Guidelines.

28) The main issues raised by stakeholders could be structured along the following topics:

   a) The interaction of Article 210a with other exclusions from competition rules under the CMO Regulation;

   b) The recovery of costs and the remuneration for producers participating in sustainability agreements;

   c) Different aspects in assessing the indispensability of restrictions of competition;

   d) The intervention and enforcement activities of national competition authorities and the Commission services in the context of Article 210a, paragraph 7;

   e) Requests for clarification and alignment of the text as well as requests for the addition of further examples.

29) The views expressed on the main topics identified above differed depending on the stakeholder group.

*Producers*

30) There were in total 8 contributions by representatives of producers.

31) Three representatives of producers of agricultural products stressed the importance of incentives that producers must be given to effectively make use of Article 210a. In their view, operators must be given a sufficiently high remuneration to be incentivised to enter into sustainability agreements and to cover the risks associated with the changes of the business and the investments required.

32) Two representatives of producers also mentioned the complexity of the indispensability test and the difficulty of assessing consumers' willingness to pay as a factor determining whether cooperation as opposed to individual action may be needed to attain a sustainability standard. They also stated in this regard that conclusions on the willingness of consumers to pay may be unreliable and that therefore they cannot constitute a benchmark in the indispensability test. In particular, the producers were concerned that although there might be willingness to pay at the level of consumers, this may not translate into a higher price at their level.

33) One representative of producers stressed the need for clarifying the interaction of Article 210a with other rules contained in the CMO Regulation, such as Article 164.

34) Finally, generally representatives of producers considered that further examples of the types of operators that may benefit from Article 210a (e.g. producer organisations, inter-branch organisations, etc.) and of agricultural products (such as products normally produced outside the territory of the EU) that may benefit from the exclusion may be necessary.

*Consumers*

35) There was only one contribution on behalf of consumers and consumer organisations.

36) The representative of consumers and consumer organisations raised concern with the risk of greenwashing done by operators benefitting from Article 210a and requested further clarification in the text of the Guidelines that the higher consumer prices for sustainable products must effectively reach those operators who incur the additional costs for producing or trading more sustainably (which in many cases would be producers due to the nature of Article 210a) as well as further transparency in the chain that would inspire consumer confidence in sustainability agreements. It also emphasized that any labels or logos used to showcase the benefits of more sustainable products that would be produced through sustainability agreements should be clear and comprehensive for consumers.

37) The consumer representative also called for the implementation of the same indispensability test under Article 210a as under Article 101(3) TFEU in terms of strictness. It considered that the Commission and national competition authorities should actively involve third parties and, in particular, consumer organisations in their market monitoring activities and intervene in cases where sustainability agreements lead to unreasonable consumer prices. There was also a call to provide a more precise definition of when prices are considered unreasonable for the purpose of intervention under Article 210a, paragraph 7. Finally, the consumer representative considered that the most hardcore restrictions of competition (e.g. price fixing or output limitation) must be seen as measures of last resort by operators when entering into sustainability agreements under Article 210a.

*Retailers*

38) There were two contributions by representatives of retailers.

39) Representatives of retailers welcomed the inclusion of examples of cooperation in the text of the Guidelines which could serve as inspiration for future initiatives. Generally, they asked for the introduction of additional examples clarifying certain aspects of the Guidelines. One representative of retailers expressed a view that the indispensability test under Article 210a should not be less stringent than the one under Article 101(3) TFEU.

40) One representative of retailers had a specific question on the involvement in sustainability agreements of operators active at more than one level in the agri-food supply chain. It also drew attention to the fact that agreements whereby restrictions on the free movement of goods are imposed must be seen as not fulfilling the indispensability test.

*NGOs*

41) There were 7 contributions by representatives of NGOs.

42) Two representatives of NGOs shared their concerns about the lack of enough incentives for operators following the interpretation of Article 210a done in the draft Guidelines for sustainability agreements to effectively be undertaken by them. They suggested the introduction of an additional payment for operators compensating them for the uncertainties of engaging into a sustainability agreement as well as incentivizing them to make the necessary investments on

top of the recovery of costs and income foregone that is otherwise within the scope of Article 210a. A specific proposal in that regard was the introduction of an incentive payment of up to 20% of the compensation due for costs incurred and income foregone to implement a higher sustainability standard.

43) Furthermore, two of the producers' representatives raised concern with the possibility for intervention in case of unreasonable consumer prices on the market as a result of a sustainability agreement. Representatives of NGOs also generally suggested ways to improve some of the examples laid down in the Guidelines as well as provided ideas for additional ones.

44) Moreover, two representatives of NGOs questioned that there can be an exclusion of competition within the meaning of Article 210a(7) if a sustainability agreement eliminates from the market food products with a lower standard than that of the sustainability agreement, but that comply with mandatory food standards and for which there is substantial consumer demand. They considered that this jeopardizes the achievement of the goal of Article 210a, namely, to achieve a more sustainable supply chain. They also took the view that providing a safe harbour of 15% market share in the case of horizontal and 30% market share in the case of vertical agreements in the Guidelines for the purposes of defining situations where operators may safely conclude that there is no exclusion of competition does not pertain to the nature of Article 210a and suggested to remove the indication.

45) Finally, a majority of the representatives of NGOs shared the concerns of producers that having to assess consumer willingness to pay as part of the indispensability test is not the right approach. Two of them also suggested a definition of the term "reasonable prices", which would be incorporating the costs of the externalities that producing a given product generates.

*Academics*

46) There were three contributions by academics.

47) Representatives of academia had different positions on the Guidelines. One of them called for a more lenient interpretation of the indispensability test, including for a removal of the requirement to assess consumer willingness to pay as part of the test as well as a statement in the Guidelines of the fact that reasonable consumer prices must include all externalities generated by production. Another academic stated that sustainability goals can be achieved through normal competition on the market and the innovation it brings without the use of exclusions as well as that sustainability agreements pursuing standards in domains where there is no specific mandatory standard in place must not benefit from Article 210a. The same academic held the view that operators should not be allowed to be given a sufficient amount of time to recoup investments in cases where a sustainability agreement is unsuccessful.

*Governmental authorities*

48) There were 4 contributions by governmental authorities.

49) Representatives of governmental authorities had detailed comments on specific sections of the Guidelines. They generally made proposals on correcting inconsistencies and providing further clarifications on the approach to be taken. For example, one of them requested a clarification to be inserted stating that

sustainability agreements that do not fulfil the conditions of Article 210a may not necessarily be prohibited as they may still benefit from Article 101(3) TFEU or from any other exclusion from competition rules. Another governmental authority posed a question on the extent to which producers participating in a sustainability agreement through their membership of a producer organisation must have given their individual consent to the participation. Another governmental authority made the suggestion that providing a safe harbour of 15% market share in the case of horizontal and 30% market share in the case of vertical agreements for the purposes of defining situations where operators may safely conclude that there is no exclusion of competition could have a dissuasive effect and suggested to remove the indication. Finally, a few governmental authorities also suggested the creation of a summary document (e.g., a leaflet or brochure) after the adoption of the Guidelines which would present in a user-friendly manner a concise description of the conditions of application of Article 210a.

## 6. HOW HAS THE INPUT BEEN TAKEN INTO ACCOUNT

50) The feedback of stakeholders has been thoroughly assessed and taken into account during the adoption process of the Guidelines.

51) The process led to the following conclusions:

a) Concerning the question whether an agreement benefiting from Article 210a can also benefit from other the provisions of the CMO Regulation (such as Article 164 CMO), this issue cannot be addressed in the text of the Guidelines on Article 210a as it goes beyond the mandate given to the Commission by the co-legislators. The point was instead discussed in the conference organised on 12 June 2023.

b) Concerning the incentives for operators to make effective use of Article 210a and to enter into sustainability agreements, the Guidelines clarify that an incentive payment of up to 20% of the compensation due for recovery of costs incurred and income foregone (i.e. payments which fall within this margin) will be considered as fulfilling the indispensability test. The exact figure takes into account the contributions to the second consultation made by NGOs.

c) Concerning the call for simplification of certain aspects of the indispensability test, the requirement to assess consumer willingness to pay was removed from the text of the Guidelines as operators may not have sufficient information to make such assessment and sometimes information on this issue may not be reliable. The Guidelines however recommend operators to check the existence of products fulfilling similar standards to the one set by them in their sustainability agreements as an indication that cooperation is justified as opposed to individual action, while taking into account the individual situation and prevailing market conditions.

d) Concerning the comments that a safe harbour threshold for exclusion of competition (of 15% for horizontal and 30% for vertical agreements) may have a negative effect and dissuade operators from participating in sustainability agreements, the safe harbour has been removed from the Guidelines. In addition, the interpretation that there can 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 that comply with mandatory food standards and for which there is substantial consumer demand, is kept to allow competition authorities to intervene in cases where a substantial part of consumers has no access to products which are of lower sustainability qualities and of lower price.

e) A number of examples clarifying the types of agricultural products, sustainability objectives and sustainability standards that may benefit from Article 210a were added. The Guidelines also provide further explanation on the type of actors that may participate in sustainability agreements under Article 210a.