

Kluwer Competition Law Blog

New EU Antitrust Guidelines for Food & Agri Sustainability Agreements

Jay Modrall (Norton Rose Fulbright, Belgium) and Julia Kampouridi, Flupke van den Bogart (Norton Rose Fulbright) · Thursday, February 9th, 2023

On 10 January 2023, the European Commission (Commission) published Draft guidelines on the application of a new EU antitrust exemption for sustainability agreements involving producers of agricultural products (the [Draft Guidelines](#)). Article 210a of Regulation (EU) 1308/2013 ([CMO Regulation](#)), which entered into effect in early 2022, exempts restrictions of competition in agreements that are indispensable to achieving sustainability standards in the agriculture sector higher than EU or national mandatory standards.

The Draft Guidelines complement the Commission's work on the assessment of sustainability agreements under Article 101 of the Treaty on the Functioning of the EU (TFEU), which will be addressed in guidelines to be finalized in the coming months (the Horizontal Guidelines). A number of other national antitrust authorities – including the Austrian, Dutch, Japanese and UK authorities – are also working on the antitrust assessment of sustainability agreements. The EU's approach to sustainability agreements in the agriculture sector is unique, differing not only from the approach taken by international antitrust authorities but also from the Commission's own assessment of sustainability agreements in other sectors.

The Draft Guidelines clarify the application of Article 210a and will increase legal certainty for a wide range of businesses exploring possibilities to increase sustainability in the food and agri sector without running afoul of EU antitrust rules.

EU antitrust rules in the agricultural sector

Articles 101 and 102 TFEU do not apply directly to producers of agricultural products listed in Annex I TFEU but are incorporated by reference in the TFEU's provisions on the Common Agricultural Policy (CAP) and subject to implementing regulations adopted under the CAP, such as the CMO Regulation. The CMO Regulation applies EU antitrust rules to agricultural producers but also contains a number of carve-outs.

Article 210a is broader than other potential exemptions in key respects but narrower in others. Article 210a exempts agreements of producers of agricultural products that aim to apply a sustainability standard higher than mandated by EU or national law from the prohibition of anticompetitive agreements under Article 101(1) TFEU, subject to certain conditions. Article 210a

defines ‘*sustainability standard*’ as a standard that contributes to environmental objectives such as climate change mitigation and adaptation, the sustainable use of water and soil, the reduction of the use of pesticides or animal health and animal welfare. In this regard, Article 210a is narrower than Article 101(3) TFEU, which could, in principle, exempt an agreement that enables compliance with mandatory standards more quickly or efficiently than would otherwise be possible.

Article 210a covers agreements among several agricultural producers or among 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. As such, Article 210a is broader than Articles 209 and 210 CMO Regulation, which cover agreements between farmers, farmers’ associations, and recognized producer organizations (Article 209) and so-called inter-branch organizations (Article 210). Article 172a CMO Regulation does cover agreements including downstream operators, but only authorizes so-called “*value sharing*” clauses that help spread the risk to farmers of market price fluctuations. Thus, Article 210a potentially applies to a much wider range of agreements, and a wider range of stakeholders, than other antitrust exemptions under the CMO Regulation.

To be covered by Article 210a, an agreement must concern the production or trade in agricultural products and can only impose restrictions of competition that are “*indispensable*” to the attainment of the sustainability standard, similar to Article 101(3) TFEU, which excludes from exemption restraints of competition that are “*not indispensable*” to attain pro-competitive objectives.

On the other hand, Article 210a does not include Article 101(3) TFEU’s requirement that an exempted agreement allow “*consumers a fair share of the resulting benefit*”. Article 210a thus differs significantly from the Commission’s generally sceptical approach to sustainability agreements under Article 101 TFEU. The Commission’s 2011 Guidelines on Horizontal Cooperation Agreements eliminated a chapter on environmental agreements contained in the previous version. While the Commission reversed course again in March 2022, including a chapter on sustainability agreements in its draft Horizontal Guidelines, this draft takes a strict approach to the application of the “*fair share of benefits*” test that would limit the availability of Article 101(3) TFEU for agreements aiming to improve the sustainability of supply chains.

Article 210a and the draft Guidelines

The 65-page draft Guidelines describe, in great detail, the conditions under which agreements between actors in the agricultural and food chains can benefit from Article 210a’s exemption from Article 101(1) TFEU’s prohibition of anti-competitive agreements.

The Draft Guidelines are divided into a number of chapters, each discussing an aspect of Article 210a. These include the following:

Scope of the exclusion

Article 210a only applies to agreements including at least one agricultural producer as a party, but Article 210a does not limit the number or type of non-producer parties to such agreements. Provided Article 210a’s other requirements are satisfied, sustainability agreements including all or any part of a food supply chain can benefit from the exclusion if at least one producer is involved.

Sustainability objectives and standards

Article 210a only applies to agreements that have a sustainability objective as their material scope. To clarify the scope of the notion of “*sustainability objective*”, the Commission states in its Draft Guidelines that the agreement must pursue at least one of the following objectives: i) environmental protection; ii) reduction of pesticide use and antimicrobial resistance; and/or iii) animal health and welfare.

To benefit from Article 210a, a sustainability agreement must aim to achieve a sustainability standard higher than what is legally mandatory. The sustainability standards covered by the agreement in question must also lead to tangible and measurable results, or, where this is not appropriate, observable and describable results.

Indispensability

Sustainability agreements can only benefit from Article 210a if any restrictions of competition are indispensable to achieving the sustainability standard. The indispensability assessment includes four different elements:

1. Identifying the obstacles that would prevent the parties from attaining the sustainability standard on their own and explaining why collaboration is necessary;
2. Determining the appropriate type of agreement;
3. Identifying indispensable restrictions to competition; and
4. Determining the appropriate level and duration of the restriction(s).

If different approaches are available to achieve the relevant sustainability objective, the parties must choose the option that is the least restrictive to competition. For example, an exclusive purchase obligation would not be indispensable to an agreement intended to offset extra costs for annual checks of the quality of water consumed by chickens, as the inspections would only marginally benefit animal welfare, the costs of the inspection would be very low and no cooperation between the producers is necessary to attain the goal (each producer would buy its own testing equipment).

Antitrust authorities' role

The draft Guidelines explain that the Commission and the national competition authorities retain the right to stop or require amendments to the sustainability agreement if necessary to prevent exclusion of competition or if the agreement is not in line with the objectives of the CAP. As of December 2023, stakeholders can request the Commission's opinion on Draft agreements.

Conclusion

Article 210a CMO Regulation reflects strong EU support for more sustainable practices in the food

and agri sector. Article 210a goes considerably further than the Commission has been prepared to in other contexts, bypassing the conditions in the Commission's draft Horizontal Guidelines that any competitive harms suffered by consumers as a result of a sustainability agreement – normally increased prices – be more than offset by benefits for substantially the same consumers.

Article 210a also goes further than other exemptions available to agricultural producers, potentially covering entire food supply chains provided at least one producer is a party to the agreement. Article 210a is non-exclusive, in that agreements not covered by Article 210a (for example because they do not aim to attain environmental standards higher than those required by law) may still qualify for other exemptions.

Although Article 210a has been in effect since early 2022, legal uncertainty and fear of antitrust sanctions may deter companies from entering into potentially restrictive sustainability agreements in the food and agricultural sector. The Draft Guidelines, combined with the possibility for companies to seek comfort from the Commission, will play an important role in providing legal certainty.

The Commission is seeking comments on the Draft Guidelines until 24 April 2023. Given the potentially broad application of Article 210a, this consultation deserves the attention of all stakeholders in the agri-food supply chain.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).

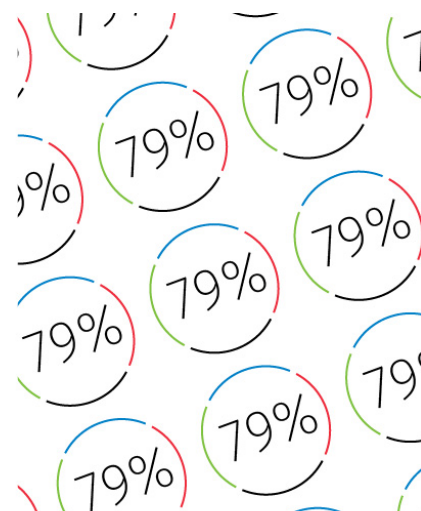
Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Thursday, February 9th, 2023 at 9:00 am and is filed under [Anticompetitive agreements](#), [Enforcement](#), [European Union](#), [Sustainability](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.