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New EU Antitrust Regime for Agricultural Cooperation – Green Shoots

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Antitrust authorities around the globe are debating how best to assess sustainability agreements, i.e., agreements to achieve environmental objectives. In the space of a few months in 2023, three leading regulators – the EU Commission, the Dutch Authority for Consumers and Markets, and the UK Competition and Markets Authority adopted guidance on the antitrust assessment of sustainability agreements. These guidelines agree on many points, including that many sustainability agreements raise no antitrust concerns. But they take different approaches to the treatment of sustainability agreements that do raise antitrust issues, especially as regards the treatment of benefits to so-called "*out-of-market consumers*".

The Commission, in its guidelines on the assessment of horizontal cooperation agreements (the HGL), takes the view that if a sustainability agreement involving competitors results in harm to consumers of downstream products, benefits in other markets cannot be taken into account, no matter how great they are, unless the consumers in question are substantially the same. The Commission's position significantly limits the scope for companies to enter into sustainability agreements that may result in price increases in one market but create benefits across multiple markets, for instance in global supply chains.

The EU's approach to sustainability agreements in the food & agri sector offers a radically different, and arguably better, approach. Article 210a of Regulation (EU) 1308/2013 on the EU's common agricultural policy (the CMO Regulation) exempts restrictions of competition in agreements that are indispensable to achieving sustainability standards in the agriculture sector higher than EU or national mandatory standards. Article 210a entered into effect in late 2021, but the Commission has only now completed the necessary legal framework by adopting guidelines on the design of sustainability agreements of agricultural producers (the Guidelines). Sustainability agreements entered in reliance on Article 210a before publication of the Guidelines should be promptly aligned with them.

The Guidelines will increase legal certainty for a wide range of businesses exploring possibilities to increase sustainability in the food & agri sector without running afoul of EU antitrust rules. As of December 2023, companies can also make use of a new mechanism to seek further comfort in the form of opinions from the Commission on proposed agreements.

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 extends EU antitrust rules to agricultural producers but also contains a number of carve-outs. Article 210a is broader than other relevant 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 the EU or national law (subject to 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.

On the other hand, Article 210a covers agreements among several agricultural producers or among one or more producers and one or more operators at various levels of the production, processing, and trade steps in the food supply chain. 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 mitigate farmers' exposure to 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. This is similar to Article 101(3) TFEU, which excludes exemption restraints of competition that are "not indispensable" to attain pro-competitive objectives. But Article 210a does not include Article 101(3) TFEU's requirement that an exempted agreement allows "*consumers a fair share of the resulting benefit*". This is a key difference, since the Commission's unwillingness to take account of benefits to out-of-market consumers, no matter how great, significantly limits companies' ability to enter into sustainability agreements that could result in higher prices for downstream products.

Article 210a and the Guidelines

The 71-page Guidelines describe 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.

Personal and Material Scope of the exclusion

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. Producers include producers of raw agricultural products and certain processed agricultural products (such as sugar processors producing sugar, or millers producing flour). Other parties can include suppliers of inputs for agricultural production, such as seeds, pesticides, equipment, and works, as well as suppliers of packaging; processors or manufacturers that process agricultural products to produce other products; and traders, wholesalers, retailers, and food service suppliers, including operators such as hotels, restaurants and cafés, and transport and logistics companies, in each case to the extent that these operators aim to help attain the relevant sustainability standards.

Parties to a sustainability agreement can be based inside or outside the European Union (EU), provided that the sustainability agreement is implemented in the EU, even if only partially, or is capable of having an immediate, substantial, and foreseeable effect on competition in the EU. The Commission provides the example of a sustainability agreement among cocoa bean producers based outside of the EU, who sell their products to distributors for further resale in the EU.

Article 210a only applies to agreements that aim to attain a sustainability standard that contributes to one or more of the following sustainability objectives:

- 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;
- 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; or
- Animal health and animal welfare.

While sustainability agreements are likely to involve improvements in production, Article 210a also applies to agreements on sustainability standards that relate to trade in agricultural products. On the other hand, Article 210a only applies to agricultural products covered by the CAP. For example, in the case of an agreement relating to the use of sustainable packaging of malt and for beer, Article 210a will only apply to the part of the agreement on malt (since beer is not covered by the CAP).

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.

Restrictions of competition

Restrictions of competition potentially covered by Article 210a include restrictions affecting not only price but also other parameters of competition such as product quality, customer service, or innovation. Relevant restrictions can include so-called "*by object*" restrictions such as price fixing, as well as restrictions whose effects must be considered on a case-by-case basis. As an example of

an agreement likely to restrict competition, the Guidelines describe a hypothetical agreement among soya farmers in a region to stop using chemical fertilisers to reduce pollution and protect water systems.

Indispensability

Sustainability agreements can only benefit from Article 210a if any restrictions of competition are indispensable to achieving the sustainability standard. Operators must apply a two-step test to determine whether a restriction in a proposed agreement is indispensable.

In step 1, operators must: analyse whether (i) it is necessary for them to cooperate to achieve the sustainability standard and (ii) the sustainability standard could be achieved in a less restrictive way. Operators must look at the sustainability agreement in its entirety to assess whether its provisions, taken together, attain the sustainability standard in question, as well as individually assessing each restriction. For example, a sustainability agreement's provisions on price might be reasonably necessary to attain a given sustainability standard, while others relating to output might not be.

There are a number of reasons why operators may need to cooperate. Producers may lack the necessary experience or knowledge or the incentive to make required investments. A larger volume of products may need to be produced or traded for more sustainable practices to be profitable. Cooperation may be required to provide consumers with information and persuade them to buy more sustainable products, or to prevent first-mover disadvantages from arising (e.g. if competitors could free-ride on innovations resulting from a first-mover's investments). In general, the easier it is to attain the desired sustainability standard compared to what is already mandated by the EU or national law, the less likely it is that operators would need to cooperate.

If the sustainability standard cannot be attained by the parties acting individually, they will need to examine whether any provisions of the agreement restrict competition and, if so, whether they are indispensable to attaining the sustainability standard compared to possible alternatives. Examples include agreements on price versus certification schemes; restricting output versus pooling of equipment; or exchanging information versus cooperation on promotion. If a choice exists between two or more such approaches, the indispensable provision will be the one that restricts competition the least.

In 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. 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, which in turn depends on the nature and the intensity of the restriction.

The nature of a restriction relates to the parameter of competition that is restricted, such as price, output, quality, choice, or innovation. For example, if a provision relates to prices, operators may need to choose between fixing a minimum price fixing the total price, or introducing a price premium. If complying with the sustainability standard would impose costs that are easily separable from the other costs, a price premium may be preferable because it 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.

The intensity of the restriction depends on its quantitative level, on price, output, and possibly quality, choice and innovation, as well as the duration of the restriction. For example, if a restriction would directly or indirectly lead to a price increase, the assessment should focus on the level of price increase reasonably necessary to attain the sustainability standard, considering the estimated costs incurred and estimated income foregone; the level of certainty that the expected costs incurred and income foregone will materialise; and the likely return on an investment relative to other alternatives.

When assessing duration, the question is whether a shorter duration of the restriction would make attaining the sustainability standard less likely. 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), for instance, a restriction may only be necessary for the period of time necessary for operators to recover their investment.

On the other hand, unlike Article 101(3) TFEU analysis, Article 210a does not require an analysis of the market coverage of a restriction of competition to determine whether the restriction is indispensable. If a high level of market coverage leads to a high degree of negative effects on the market, however, this may lead to an ex-post intervention by competition authorities.

The opinion system and antitrust authorities' intervention powers

Article 210a envisages two main roles for antitrust authorities: parties to a proposed sustainability agreement may request an opinion from the Commission to obtain greater legal certainty, while the Commission and national authorities can decide to modify, discontinue, or prevent implementation of an agreement to prevent competition from being excluded in a relevant market or the EU's CAP objectives being jeopardized.

Requests for a Commission opinion should contain, among other things: (a) the identities of all parties; (b) a single point of contact; (c) the terms of the sustainability agreement; (d) a description of the sustainability objective(s) pursued; (e) an explanation of the sustainability standard set by the sustainability agreement and evidence as to why the agreement's sustainability standard is higher than what is mandated by EU or national law; and (f) a detailed explanation of how each of the conditions laid down in Article 210a is satisfied. The Commission is required to provide its opinion within four months of receiving a complete request, including responses to requests for information.

Conclusion

Article 210a CMO Regulation reflects strong EU support for more sustainable practices in the food & agri sector. Article 210a goes considerably further than the Commission has been prepared to in other contexts, bypassing the conditions in the HGL that any competitive harms suffered by downstream customers because of a sustainability agreement – normally increased prices – be more than offset by benefits for substantially the same consumers. Article 210a's approach is arguably more suitable to the assessment of sustainability agreements than the HGL's narrow focus on horizontal issues since agreements aiming to improve the sustainability of supply chains are

likely to involve both horizontal and vertical aspects.

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 late 2021, legal uncertainty and fear of antitrust sanctions may have deterred companies from entering into potentially restrictive sustainability agreements in the food & agri sector. The Guidelines, combined with the possibility for companies to seek comfort from the Commission, will play an important role in providing legal certainty.

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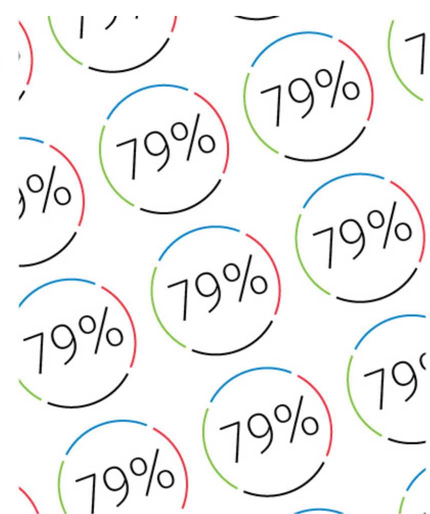

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