



## Sustainability agreements in the agricultural sector: applicable rules and examples

Recent changes to the competition rules provide more leeway for sustainability agreements in the agricultural sector. A specific derogation from the cartel prohibition has been inserted in the CMO Regulation to allow vertical and horizontal agreements promoting higher sustainability standards in the agri-food supply chain. The same amendment provides for the recognition of producer and branch organisations pursuing sustainability objectives. In this factsheet we discuss these amendments and other exemptions that may apply, with examples of the assessment of various sustainability initiatives against the exemption criteria.

### Specific derogation for sustainability agreements in the CMO Regulation

The newly introduced Article 210a of [Regulation \(EU\) No 1308/2013](#) ("**CMO Regulation**") provides for a derogation from the scope of the competition rules. It concerns agreements that relate to the production or trade in agricultural products and that aim to apply a sustainability standard higher than mandated by EU or national law. The derogation applies to horizontal and vertical agreements between producers or between one or more producers and one or more operators active in the agri-food supply chain, such as processors, traders, wholesalers and retailers. Such agreements must aim to contribute to one or more of the following sustainability objectives:

- i. **environmental objectives**, such as 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;
- ii. **production of agricultural products** in a way that reduces the use of pesticides or manages the risks resulting from them such as the use of bio stimulants; and
- iii. **animal health and welfare**.

Moreover, the restriction of competition by the agreement must be indispensable for the attainment of the sustainability objectives mentioned. This entails that there must be no other economically practicable and less restrictive means to achieve these objectives.

The criteria for this specific sustainability exemption are less stringent than the general exemption for sustainability agreements under Article 101(3) Treaty on the Functioning of the European Union ("**TFEU**"). In particular, unlike Article 101(3) TFEU, the specific exemption (a) does not require the sustainability agreement to also result in efficiencies for consumers and (b) is not conditional on evidence of sufficient remaining competition in the market.

The European Commission ("**Commission**") is to adopt guidelines on how to assess whether sustainability agreements fulfil the conditions for granting a derogation from the EU competition rules. Recently, the Commission consulted with stakeholders on their experience with sustainability agreements to identify practical examples of the cooperation most frequently encountered or envisaged in the agri-food supply chain.

In the meantime, national authorities have already reviewed several sustainability initiatives from the entities active in the agricultural, meat production and food retail sectors on their compatibility with the competition rules:

- **Living wages in the banana sector**. Launched by the German retail sector and the German Agency for International Cooperation, this initiative aims to pursue voluntary common standards across the private-label banana supply chain. As explained by the German competition authority, the core objective is to jointly introduce responsible procurement practices and develop processes to monitor transparent wages. At the same time, the participating companies are planning to gradually increase the sales volume of bananas which are produced and procured in line with living-wages criteria. Although the initiative constitutes a horizontal agreement, it has neither as its object nor as its effect the prevention, restriction or distortion of competition. Parties do not plan to exchange information on procurement prices, other costs, production volumes or margins. Nor are compulsory minimum prices or surcharges introduced at any point of the supply chain. Therefore, it was not necessary for the authority to examine the initiative under Article 210a CMO Regulation.
- **Animal welfare premium 'Initiative Tierwohl'**. This initiative was originally launched in 2014 by the German agricultural, meat production and food retail sectors. It aims to reward farmers with a fixed animal welfare premium for improving the conditions in which the animals are kept. The fixed premium paid to farmers does not automatically lead to a fixed price increase for end consumers, as the slaughterhouses and food retailers still negotiate individually. The initiative originally covered only the production of poultry meat and pork, but the parties wished to introduce the same model for cattle

fattening in 2022. The initiative constitutes a horizontal and vertical agreement along the value chain. A coordinated mandatory price mechanism between slaughterhouses and farmers usually constitutes a classic hardcore restriction of price competition. According to the German competition authority, while the agreed standard premium was tolerated for a transitional period due to the project's pioneering nature, competition elements must gradually be introduced. These may include, for example, a recommendation to pay compensation for animal welfare costs, as with regard to calves, rather than a standard premium for animal welfare. The indispensability of the initiative's anti-competitive effects has to be assessed regularly, taking into account changing circumstances. The concept of the initiative is therefore to be further developed for the next project phase starting in 2024. At that time, the authority also intends to assess the applicability of the exemption under Article 210a CMO Regulation in greater detail.

- **'QM industry agreement milk'**. This agreement between associations of farmers and producers, dairies and food retailers aims to introduce a quality label for milk products which fulfil the animal welfare criteria of the QM+ programme. Under the agreement, food retailers are to pay dairies an animal welfare surcharge for these products. The dairies are then supposed to pay out this surcharge to participating farmers. Having assessed the agreement in light of the new derogation in Article 210a of the CMO Regulation, the German competition authority stated that it would tolerate the initiative in the first programme phase until 2024. The authority considered this justified because sufficient competition would remain from private labels and brands. Moreover, the authority took account of the fact that participation in the QM+ programme was voluntary for farmers, dairies and food retailers and only some of the dairies would be participating in this programme. After 2024, the authority will reassess the extent to which additional competition elements can be introduced.
- By contrast, the German competition authority considered the initiative to introduce **surcharges without improved sustainability in the milk sector**, which was submitted before the 'QM industry agreement milk', to be an illegal sector-wide price-fixing agreement in violation of Article 101 TFEU. Launched by German milk producers, dairy companies and food retailers, this initiative aimed to increase and stabilise the price for raw milk. The intention was to retroactively stabilise the contractually agreed 'raw milk price' paid out to dairy farmers. To this end, average milk production costs were to be determined throughout the agricultural sector, which would then form the basis for standard surcharges on the base milk price charged to consumers. The surcharges would constantly be adapted on the basis of a binding clause in contracts between producers, dairies and food retailers. Due to the lack of improved sustainability, the German competition authority ruled that the derogation in Article 210a of the CMO Regulation could not be applied.

## Exemption for sustainability cooperation in recognised producer organisations or interbranch organisations

The recent amendment to the CMO Regulation explicitly introduces certain sustainability goals as legitimate objectives for recognising producer organisations (Article 152(1)(vii)) and interbranch organisations (Article 157(1)(c)(vii)). Specific derogations from the competition rules apply to collaborations in these recognised organisations.

In particular, the derogation for collaborations in recognised producer organisations (Article 152(1a)) provides room for agreements on matters including sustainable production planning and the optimisation of sustainable production costs.

The specific derogations are discussed in detail in the recently published Guidelines regarding collaborations between farmers of the Netherlands Authority for Consumers and Markets (ACM).

## General exemption for sustainability agreements

If a sustainability initiative in the agricultural sector does not comply with the conditions for the specific derogations discussed above, it may still be exempted from the cartel prohibition if it complies with the general exemption conditions (Article 6(3) of the Dutch Competition Act and Article 101(3) TFEU). ACM has published the revised version of the [draft Guidelines on sustainability agreements](#) (see our News Update of 3 August 2020) and the Commission has published a Competition Policy Brief and the [draft revised Horizontal Guidelines](#) in this regard.

Both the Commission and ACM clarify that there are various types of sustainability agreements that do not restrict competition and therefore fall outside Article 101(1) TFEU. ACM identifies five clear categories:

- i. Joint non-binding sustainability initiatives where each undertaking determines its own contributions and the way it wishes to realise them;
- ii. Joint standards or certification labels promoting environmentally conscious, climate conscious or socially responsible practices;
- iii. Agreements aiming at improving product quality, while, at the same time, certain products that are produced in a less sustainable manner are no longer sold (as long as they do not appreciably affect price and/or product diversity);
- iv. Joint development of new products through innovation (where cooperation is indispensable);
- v. Corporate Social Responsibility covenants to combat 'below legal standard competition'.

Agreements that restrict competition can still be permitted if they comply with four criteria under Article 101(3) TFEU:

- Agreements should offer efficiency gains, including sustainability benefits
- Consumers should obtain a fair share of those benefits
- The restriction of competition is necessary and proportional to reap those benefits
- Competition is not eliminated in respect of a substantial part of the products in question

The main difference between the ACM's and Commission's approaches concerns whether direct consumers in the relevant market should always be fully compensated for the harm caused by the restriction of competition or whether a 'fair share' could suffice. For this reason, ACM has introduced a distinction between environmental-damage agreements and other sustainability agreements. Environmental-damage agreements specifically concern the reduction of negative externalities. In the case of such agreements, consumers do not have to be fully compensated for the harm caused if the agreement makes an efficient contribution to compliance with an international or national standard or the achievement of a concrete policy goal. As regards other sustainability agreements, the benefits for consumers must still be fully compensated.

In its response to consultation, ACM stated that it would continue applying its own draft Guidelines on sustainability agreements until the revised Horizontal Guidelines are adopted (1 January 2023). After that, ACM will re-evaluate its own draft Guidelines in light of the final version of the Horizontal Guidelines, making a clear distinction between its interpretation of competition law and its priority-setting powers.

## The garden retail sector's sustainability initiative

ACM has recently reviewed a sustainability initiative in the garden retail sector covering approximately 70% of the Dutch retail market for the sale of ornamental flowers and plants. Launched by hundreds of garden centres (members of the Dutch Garden Retail Sector), the sustainability initiative aims to make the sector more sustainable by combating the use of illegal pesticides. The initiative proposes measures to exclude growers from supplying plants to the affiliated garden centres if the growers continue to use illegal pesticides after an initial warning. The Dutch Garden Retail Sector is responsible for keeping track of and communicating violations to retailers. ACM assessed the initiative under national competition rules and in line with its draft Guidance on sustainability agreements. ACM qualified the initiative as a sustainability agreement that aims to combat 'below legal standard competition'. It concluded that the agreement in question did not restrict competition, but pursues a legitimate objective in a proportionate way based on the following:

- illegal pesticides are still being used despite public enforcement and garden centres' individual initiatives;
- the agreement contains clear rules and involves a diligent procedure before suppliers are excluded; and
- participation in the initiative is voluntary and non-exclusive.

ACM's assessment demonstrates that sustainability agreements are permitted where they prevent unfair competition from products that fall below the legal standards.

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