

Sustainability agreements in agriculture – guidelines on antitrust derogation

ClientEarth contribution to the Commission's call for evidence

1. Introduction

The present submission is aimed at providing, based on experience reported from agricultural actors (producers), comments and observations as well as suggestions for the guidance on the new sustainability exemption provided in Regulation 1309/2013 (Common Market Organisation Regulation or CMO), as amended by the 2023-2027 EU Common Agricultural Policy (CAP) reform.¹

In line with our submission to the public consultation on the draft horizontal guidelines, we support, for consistency, a broad definition of sustainability going beyond environmental factors, including respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, and ensuring animal welfare.² In addition, ClientEarth would emphasise that the environmental and social dimensions of sustainability must go together and be considered equally given that they are interlinked.

¹ See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R1308-20211207>.

² Simon Holmes and ClientEarth's response to the European Commission draft revised horizontal guidelines on sustainability agreements, April 2022, Section 2, page 2, available at <https://www.clientearth.org/media/hjqb42um/clientearth-and-simon-holmes-contribution-to-ec-draft-revised-horizontal-guidelines-on-sustainability-agreements-april-2022.pdf>.

2. Agreements on prices

The new sustainability exemption provided in Article 210(a) CMO does not make an explicit reservation with regard to the fixing of minimum prices (contrary to Article 209 CMO). The guidelines should therefore clarify that question and provide further details on whether, how and to what extent sustainability agreements can include provisions related to selling prices of agricultural products covered by the agreement in question.

It is ClientEarth's opinion that it is crucial for producers that the new exemption covers, to some extent, provisions related to selling prices.

The agricultural sector may indeed be very segmented with a large number of small producers facing big food distributors/processors. In those markets, producers have no negotiating power and are in fact « *price takers* ». This situation arises in particular in sectors where agricultural products need to be processed and where the transport costs are significant so that producers can only sell their products to one or a few buyers available in a limited geographic market (e.g. The beetroot sector where producers sell their products to one or two large sugar refining companies).

In those circumstances, where the selling price may even fall below the cost of production, producers are therefore compelled to use a maximum of inputs (pesticides, fertilizers, etc.) despite their environmental impact. They have indeed no incentive to move their practices to more sustainable techniques that, at least during the first years, may be more expensive and give them fewer harvests. For instance, in its Agro-Nutri Monitor 2021³, the Dutch Authority for Consumers and Markets notes that sustainability is often hindered by the high costs of sustainable production and conversion costs for farmers.

In order to achieve the transition towards sustainable agriculture in the EU and incite producers to contribute to that objective (which is a *sine qua non* condition), it is crucial to allow producers (especially smaller farmers) to enter into sustainability agreements which can include some corrective mechanisms to ensure a sufficient return on investment and guarantee a price sufficient to cover the additional costs. Those corrective mechanisms would for example ensure that the selling prices of the products concerned by the agreement in question do not fall below the average variable costs per ton.

If precluded from ensuring that their greener activities remain profitable, small producers risk being prevented from transitioning towards environmental positive agricultural practices and, thus, be excluded from that market. Indeed, only a limited number of large producers would be able to bear costs of such transition. This in turn could lead to an adverse impact on diversity and choice for consumers in the longer term.

3. Aggregated market share of the participants

Where agricultural products need to be processed (wheat, sugar beetroots, etc.) and where the downstream market is concentrated, producers will only be induced to adopt sustainable agricultural practices, and support the associated costs, if all or a large part of the producers active on the relevant market are part of the same agreement and therefore bound by the same requirements. Indeed, if a new (higher) sustainability standard provides for a gradual reduction agro-chemicals, farmers who adhere to it, during the first years, will produce lower volumes and therefore also generate lower revenues compared

³ See <https://www.acm.nl/sites/default/files/documents/agro-nutri-monitor-2021-hoofddocument.pdf>

to farmers who do not participate in that initiative. Processors will indeed not raise their purchase prices for a limited number of producers.

As a consequence, sustainability agreements should not be *per se* prohibited if the market share of the participants exceeds a certain threshold. However, that being said, specific safeguards or criteria should then be considered such as, for example, the extent of the increase of prices for consumers (so as to avoid excluding a part of the population from sustainable options) and the actual improvement provided thanks to the sustainability agreement in terms of shift to sustainable agriculture and overall benefits to consumers.

4. Consumer welfare

Agreements which benefit from an exemption do not fall within the scope of Article 101(1) TFEU and therefore would not have to be justified under the conditions of Article 101(3) TFEU, one of them being that consumers receive a fair share of the benefits resulting from the agreement in question.

ClientEarth notes that, in practice to date, the conditions provided in Article 101(3) TFEU could lead competition authorities to block sustainable agreements. By way of illustration, in the Netherlands, the national competition authority (“*Autoriteit Consument & Markt*”) considered that sustainability arrangements made between producers and retailers in view of improving animal welfare of broiler could not be allowed under the competition rules, in particular because those arrangements could not generate any “net” benefits for consumers⁴. We would like to echo in this regard our contribution to the public consultation on the draft revised horizontal guidelines on sustainability agreements in which we advocate for a broader approach encompassing collective benefits that could also arise for consumers outside the relevant market.⁵

The sustainability exemption in agriculture would therefore allow a wider range of sustainability agreements to be concluded and those agreements may in fact be presumed to benefit consumers and protect their collective interest. However, ClientEarth would like to stress that such benefits then need to be substantiated in terms of health, nutrition and clean environment for consumers as a whole, considering the fact that sustainability agreements in agriculture may in fact lead to higher costs for producers and therefore to higher prices for consumers, at least in the short run. As said in the introduction, the environmental and social dimensions of sustainability should go together and be considered equally given that they are interlinked.

⁴ See https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf. See also in Germany where the competition authority (“*Bundeskartellamt*”) pointed out that sustainability arrangements cannot be based on a price agreement to the disadvantage of consumers. https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/25_01_2022_Agrardialog.html

⁵ Simon Holmes and ClientEarth’s response to the European Commission draft revised horizontal guidelines on sustainability agreements, April 2022, Section 8, page 7, available at <https://www.clientearth.org/media/hjgb42um/clientearth-and-simon-holmes-contribution-to-ec-draft-revised-horizontal-guidelines-on-sustainability-agreements-april-2022.pdf>.

5. “Indispensability” condition

Article 210a, paragraph 1 CMO provides that agreements aiming to apply a sustainability standard higher than mandated by the Union or national law are exempted provided that those agreements impose restrictions of competition that are indispensable to the attainment of that standard.

ClientEarth is of the opinion that the “indispensability” condition should not be applied too strictly. Regard must be had to the fact that restrictions of competition may be indispensable, not as such to attain a new higher sustainability standard but to ensure that the implementation of that new standard will be profitable for producers and not lead to financial distress (see Section 2 above – Agreements on prices).

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