

# Sustainability agreements in agriculture – Draft guidelines on antitrust derogation

## ClientEarth’s contribution to the Commission’s consultation on the Draft Guidelines

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### 1. Introduction

ClientEarth is generally supportive of the draft guidelines on the application of the exclusion from Article 101 TFUE for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation 1308/2013 establishing a common organisation of the market in agricultural products (“**CMO**”) which has been amended by Regulation 2021/2117 (“**Draft Guidelines**”).

Our comments mainly concern the scope of the sustainability objectives and the assessment of the restriction of competition; in particular, the possibility to conclude agreements on minimum prices, the consideration of market coverage and the assessment of indispensability criteria.

Key issues we inquire the Commission to consider relate to (i) the size and position of the producers when assessing the environmental improvement brought by a sustainability agreement, and (ii) the level of legal certainty of an *a posteriori* case-by-case assessment for agreements when the market coverage exceeds certain thresholds.

## 2. General observations

Overall, ClientEarth is of the opinion that the Draft Guidelines provide, in a clear and understandable language, a useful tool to better understand both the scope and functioning of Article 210a CMO.

ClientEarth welcomes the fact that in the Draft Guidelines the Commission has provided and made use of many examples to illustrate the scope and application of Article 210a CMO. This will certainly help producers, purchasers and their associations in construing sustainability agreements which are in full compliance with this provision and hence benefit from the legal safe harbour granted by that provision.

In addition, ClientEarth would suggest the following general improvements:

- First, it would certainly be useful to recall in the introductory part of the Draft Guidelines (probably in 1.2.1) the basic rules regarding the (non-)applicability of Article 101.1 TFUE.

Indeed, the question of whether the exemption provided in Article 210bis CMO is applicable should only be verified for sustainability agreements which fall under Article 101.1 TFUE. This is not the case for sustainability agreements which do fall under the *de minimis* regime (see De minimis notice<sup>1</sup>) or which do not affect trade between Member States (see Notice on Effect on Trade<sup>2</sup>). This is also not the case for so-called “*sustainability standardisation agreements*” which satisfy the conditions of the soft safe harbour described in the draft Horizontal Guidelines (paragraph 572).

- Second, as recalled in the Draft Guidelines (paragraph 17), Article 210a CMO is only one of the many provisions in the CMO which relate to the application of competition rules to the agricultural sector. Indeed, Articles 152, 209 & 210 CMO also contain derogations and these provisions may also be invoked to avoid the application of competition rules to sustainability agreements. However, considering their technical wording, it is not always easy to identify which provisions should be invoked in what context.

There is a need for guidelines addressing all the rules and exemptions which may be used to promote the use of sustainability agreements without falling within the scope of the competition rules. This would facilitate the overall evaluation of sustainability agreements under competition rules by producers and their associations and hence improve their adoption in the agricultural sector.

- Finally, ClientEarth submits that, contrary to what is stated in the Draft Guidelines (paragraph 15), the scope of Article 210a CMO should not be interpreted strictly. Indeed, it should be recalled that pursuant to Article 42, first alinea, TFEU “[t]he provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and

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<sup>1</sup> Communication from the Commission – Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the functioning of the European Union (De Minimis Notice), OJ C 291, 30.08.2004, p.1-4.

<sup>2</sup> Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 1010, 27.04.2004, p.81-96.

*in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39*". It follows from this provision of EU primary law that competition rules are only applicable to a limited extent on agriculture and only in so far they take into account the Article 39 objectives, such as ensuring a "fair standard of living for the agricultural community". In other words, it is the application of competition rules to the agricultural sector which should be interpreted strictly, and not the reverse.

### 3. Targeted comments

#### a. Sustainability objectives

In line with ClientEarth's submissions of April 2022 to the public consultation on the draft Horizontal Guidelines and of May 2022 to the call for evidence on the new sustainability exemption, we reiterate our support, for consistency, for 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<sup>3</sup>. 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. This would be in line with Article 3(3) TEU, Article 11 TFEU, Article 37 EU Charter of Fundamental Rights, the Green Deal, the Commission's call for a "green revolution", and the Sustainable Development Goals.

In relation to paragraph 43, we therefore consider that a sustainable objective pursued by a standard in agriculture should not be regarded only from an environmental protection perspective exclusively. The reference in Article 210a CMO to "transition to a circular economy", "reduction of food waste" rather confirms that this provision envisages much broader objectives, which include social and economic aspects.

ClientEarth therefore submits that, in complement of environmental benefits (biodiversity, reduction of pollution, etc.), social and economic benefits should also be considered when assessing whether a standard meets the condition of indispensability under Article 210a CMO.

#### b. Restriction of competition

##### (i) *Price agreements*

As highlighted by ClientEarth in its May 2022 submission on the call for evidence, the sustainability exemption provided in Article 210a CMO does not make an explicit reservation with regard to the fixing of minimum prices (contrary to Article 209 CMO).

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<sup>3</sup> 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> and ClientEarth contribution to the Commission's call for evidence on sustainability agreements in agriculture, May 2022, available at <https://www.clientearth.org/media/3buf4wcy/clientearth-contribution-to-ec-call-for-evidence-on-agriculture-sustainability-agreements-may-2022.pdf>

In this context, it should be recalled that the agricultural sector is, still today, very segmented with a large number of small producers supplying 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).

ClientEarth therefore welcomes the fact that the Draft Guidelines do, to some extent, address the issue of minimum prices (see e.g. paragraphs 86, 100, 111-112).

However, in our view, the Draft Guidelines are still insufficiently clear on this issue. While some examples seem to accept that minimum prices can be agreed in order to cover the additional costs incurred by the producers as a result of the adoption of higher sustainability standards (see e.g. paragraphs 100, 111-112; Section 5.5, Example 2), other examples seem to express the view that minimum prices should only be agreed as a very last resort (see e.g. paragraph 88, Example 1).

It also appears from that last example (paragraph 88, Example 1) that the degree of improvement of the agreement would be taken into consideration in the assessment to determine whether minimum prices can or not be accepted. ClientEarth notes that such a criterion could lead to more uncertainty for producers (what is a sufficient degree of improvement to be allowed to include minimum prices in the agreement?). Furthermore, it risks excluding from the derogation certain producers who are not in a position to commit themselves to significant improvements due, in particular, to their small size. Those producers may however also need to benefit from minimum prices in order to commit themselves to improvements, which, even if they may be considered as small, are the only ones feasible at their scale.

ClientEarth believes that, in order for producers not to be deterred from entering into sustainability agreements because of a possible reduction of their profit margin (which is already very limited in many sectors), but also in view of broader objectives which should be pursued when adopting higher sustainability standards (see above), the possibility to agree on minimum prices when adopting higher standards should be further clarified in the final guidelines. In this context, the focus should be on the possibility for producers to recoup the investments required to attain the higher sustainability standard or to recoup the loss of income resulting therefrom. As a minimum, the position of the producers and their size should be taken into consideration when assessing the level of environmental improvement.

## *(ii) Aggregated market share*

In its submission of May 2022 on the call for evidence, ClientEarth has defended the view that sustainability agreements should not be *per se* prohibited if the market share of the participants exceeds a certain threshold.

Indeed, 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 of agro-chemicals, farmers who adhere to it, during the first years, will produce lower volumes and therefore also generate lower revenues compared

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

ClientEarth therefore welcomes the fact that the Draft Guidelines do provide some clarification on this issue (see Section 5.4.2.3 and paragraphs 119, 178-179 including Examples 1 & 2).

We nonetheless believe that the final guidelines should provide more comfort that high market shares at the producer level do not *per se* stand in the way of an application of Article 210a CMO.

While it is crucial that customers continue to have competitive alternatives, in order to achieve the environmental and climate objectives of the CAP (as enshrined in Articles 5 and 6 Regulation (EU) 2021/2115 on CAP Strategic Plans) as well as the wider environmental and climate objectives of the EU, the offer of non-sustainable products will progressively be reduced. This would not necessarily reduce the number of alternatives for customers, at least in the longer term, as the offers of sustainable products will be growing, leading to more choices.

We stress that paragraph 179, including Examples 1 & 2, raises uncertainty on how the market coverage of the sustainability agreement is to be addressed.

It seems to follow from these paragraphs that the lawfulness of an agreement will eventually depend on the reaction of customers and/or competitors following its implementation. If, as the result of the agreement, an increased number of consumers wish to purchase the more sustainable products covered by that agreement, leading to more producers joining the agreement (Example 1), it is unlikely to lead to an intervention from the relevant competition authority. Conversely, if, as the result of the agreement, demand for the more sustainable products covered by the agreement is not increasing and producers of non-sustainable products take advantage of this also to increase their prices (Example 2), it is likely to lead to an intervention by the relevant competition authority.

This *a posteriori* case-by-case assessment for agreements where the market coverage exceeds certain thresholds raises uncertainty for producers as they are not in a position to assess the legality of their agreement at the time they enter into it.

### *(iii) Indispensability*

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.

First, ClientEarth submits that the indispensability test should take due account of the fact that collective benefits are often very difficult to quantify and there may be many indirect benefits (better air as a result of less agricultural waste, less soil pollution as a result of better prices, etc.). Hence, the Commission should not impose too broad requirements on the obligation to quantify the benefits.

Second, ClientEarth is of the opinion that the “indispensability” condition should not be applied too strictly.

We have the following specific comments on the Draft Guidelines which illustrate our position:

- Marginal improvement of sustainability: see Example 1 on paragraph 88, due account should be taken of the fact that the profit margins of producers for most agricultural products are razor thin. A marginal increase in costs (due to sustainability improvements) can make a product unprofitable unless the increase in costs is compensated by a similar increase in price;
- Free-riding (paragraphs 97-98): cooperation may not only be indispensable to avoid free-riding but also to ensure that in concentrated markets of agricultural products, the buyer does not discriminate between producers by choosing the cheapest (unsustainable) product;
- Certification (paragraphs 101 and 103 (a)): the Draft Guidelines seem to consider certification as a least restrictive alternative by contrast with other restrictive agreements (on price, volume). This finding should be nuanced and reflect the fact that while the aim of certifications is to incentivize a change in behaviour at an individual, house-hold or farm level, the incentives might not be stronger than those that are driving the current production and consumption practices that are so environmentally harmful.<sup>4</sup> Like in other industries, there could also be some shortcomings with certification schemes in terms of their governance, transparency, certainty of applicable rules and reliability of monitoring systems.

On the one hand, there are already (too) many different certification systems on the market (with many differences in the quality and review of the certification process) and this abundance may confuse consumers. On the other hand, certification is often a costly exercise and not sufficient to compensate for the risks taken by producers which agree on higher sustainability criteria (what if the consumers are not convinced to buy the higher priced certificated product?);

- Additional costs (paragraph 112): it will often be very difficult to precisely establish “additional costs” of attaining higher sustainability standards because there can be major differences between producers of the same agricultural products (soil, water, etc.). Hence, the costs required by the individual producers to obtain a similar volume/quality may vary considerably. Setting a minimum price has the advantage of putting all producers at a same level and facilitating decision making (given this minimum price is it worth for me to invest in higher sustainability?).
- Managing food waste/excessive production (Section 5.5, Examples 3-4, pp. 36-37): to avoid excessive production, producers of most agricultural products (grain, potatoes, etc.) need to know many months ahead whether there will be demand for their crops. This requires significant cooperation (information exchange) between producers (on an aggregated basis) but also between producers and purchasers (minimum volumes to be agreed upon). Without such cooperation, each producer will be tempted to produce at the lowest costs (and hence at a low sustainability level). This should certainly also be taken into account when assessing indispensability.

Last but not least, ClientEarth submits that, while it is correct that, from a competition law perspective, efforts on sustainability should be undertaken in priority at individual level before envisaging actions at

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<sup>4</sup> See Walton, S. (2023), Linking middle-chain actors to the environmental impacts of food producers and consumers: Underlying drivers and policy implications, Centre for Food Policy, University of London, UK, available at [https://researchcentres.city.ac.uk/\\_data/assets/pdf\\_file/0005/723695/CFP\\_LinkingMiddleChain.pdf](https://researchcentres.city.ac.uk/_data/assets/pdf_file/0005/723695/CFP_LinkingMiddleChain.pdf).

collective level (paragraphs 90-91), it is clear that this will be more difficult for small producers which have less resources to follow new developments on sustainability. For these actors, efforts on sustainability will – in most cases – only be manageable at a collective level: the interpretation of indispensability should take this into account.

### c. Opinion system

ClientEarth also applauds the possibility to request an opinion of the Commission on the applicability of Article 210a CMO to sustainability agreements (chapter 7 of the Draft Guidelines) and the flexibility of its modalities and timing.

To further enhance transparency and reduce the costs for producers, purchasers and their associations when setting up sustainability agreements which fall under the exemption of article 210a CMO, we suggest that the Commission should also consider setting up a global “sustainable agreement registry”.

Such registry would provide access to (i) all opinions delivered by the Commission on this matter (if needed, through a non-confidential version), (ii) all decisions by DG Comp and NCAs regarding sustainability agreements under the exemption of Article 210a CMO, and (iii) ideally also some models of sustainability agreements which are considered to be in line with article 210a CMO.

This would contribute to the effectiveness of this provision and hence also to the fundamental objective of a more sustainable agriculture.

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