CENTRAL EUROPEAN LAWYERS

INITIATIVE

Public consultation on Article 210a of Regulation 1308/2013
Contribution by the Central European Lawyers Initiative

We welcome the public consultation launched in connection with the Draft Guidelines of the European Commission on Article 210a of Regulation 1308/2013. The Central European Lawyers Initiative would like to submit the following proposals for consideration. In general, we find the inclusion of sustainability in competition law forward-looking, however, we are of the opinion that certain provisions may require a more thorough assessment. These are the following:

I. Personal scope

Only one agricultural producer party is enough to have an agreement exempted pursuant to Article 210a.[1] It cannot be considered a standard too excessive for a rule whose legal foundation lies in the Common Agricultural Policy seeking, among other things, to raise the living standard of producers. Obviously, the exception rule is primarily about contributing to a higher level of sustainability rather than the increase of individual earnings of agricultural producers. However, the method and legal foundation chosen (Article 42 TFEU) appear contradictory. Not because sustainability would not be an important pillar of a well-functioning EU agricultural policy, but due to the extended scope *rationae personae* that covers not only agricultural but also industrial and trading market players (for example, processors and retailers).

If the personal scope of the provision has been so broadened to include non-farming undertakings, why have businesses in the HoReCa sector not been included? Do they not constitute an important part of the food supply chain? Food waste, whose reduction is explicitly mentioned among the sustainability obejctives, is generated in 12% by hotels, restaurants and cafés in the EU, being the third „greatest" contributor to the overall quantity, only outrun by households (53%) and the processing industry (19%).[2]

II. Animal welfare as a sustainability objective

The contribution of animal welfare[3] to sustainability is far from settled, however, agreements aiming to achieve higher animal welfare can be exempted from Article 101(1) TFEU. Although the issue has appeared lately in academic and public policy discussions, the demonstration of its true benefits for sustainability has not yet occurred. The direct causal link between animal welfare and sustainability is missing. This finding does not mean that animal welfare does not matter, but aims to shed light its underdevelopment from a sustainability perspective. Reduced pesticides use, soil or water protection clearly have added value to sustainability, underpinned by an incalculable number of scholarly publications, contrary to animal welfare. This distinction should be reflected in competition policy.

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[1] Draft Guidelines, Recital (27).
[2] Åsa Stenmarck and others, *Estimates of European food waste levels* (2016).
[3] It is one of the many possible sustainability objectives. See: Regulation 1308/2013, Article 210a(3)(c).

„Claims based on indirect effects are as a general rule too uncertain and too remote to be taken into account"[4] within the assessment of individual exemption from the prohibition of anti-competitive agreements. The „efficiency" that agreement should bring about is the higher level of sustainability. However, the claimed efficiencies must be substantiated, and it is still unclear how much animal welfare (such as using larger cages) actually contributes to sustainability. Increasing animal welfare is welcome, but the use of competition law exemptions to achieve a goal (sustainability) that cannot be met even with permitted competition restrictions because there is no direct causal connection between the means and the efficiencies to be realized is not. This eliminates the main purpose of exemptions, which is to enable an efficiency-improving restriction. Only after the justification for the derogation has been proven should the Pandora's box of competition law be unlocked.

III. Indispensability

According to the Draft Guidelines, the indispensability test in connection with the sustainability agreements of the agricultural sector is different from the assessment of indispensability carried out in Article 101(3) cases. The Guidelines on the application of Article 101(3) TFEU is considered „a useful starting point" by the Draft Guidelines, but „there are certain key differences between the two articles, as a result of which the standard for indispensability necessarily differs between them".[5] Among others, say the Draft Guidelines, „the exclusion under Article 210a does not require that parties to an agreement ensure that consumers receive a fair share of the benefits resulting from the sustainability agreement in question as is the case in Article 101(3) TFEU."[6]

We consider it mistaken to establish two different indispensability tests. They should be identical. Objectives to be realised may be different, but the test in all cases is based on two consecutive steps: first the indispensability of the agreement, second that of the competition restrictions are put under scrutiny. However, different goals may require various forms of competition restrictions of various intensity, and this is the reason that the test, at first sight, may seem divergent, but it is not. From the viewpoint of the indispensability test, the only difference lies in the objectives to be achieved. For a goal to be realised, one type of competition restriction may seem indispensable; for another one, the same restriction is not. That there is no requirement pursuant to Article 210a to provide at least a fair share of benefits to consumers is a completely other issue lacking relevance to the indispensability test of Article 210a.

IV. Assessment of agricultural policy objectives

The competent competition authority may intervene *ex post*, if it considers that the agreement, among others, jeopardises the objectives of the Common Agricultural Policy. Within this, it can decide that the agreement shall be modified, discontinued or prevented from being implemented. It seems once again unrealistic that a competition agency could assess whether a sustainability agreement runs counter to agricultural policy objectives, such as the increasing of farmers' living standard or the ensuring of supplies to consumers at reasonable (not the lowest) prices.[7]

The Draft Guidelines stipulate that the threshold to rule that the CAP objectives have been jeopardised is high,[8] but – despite the rare occassions these problems may appear – the

[4] Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, Recital (54).
[5] Draft Guidelines, Recital (81).
[6] Draft Guidelines, Recital (83).
[7] Draft Guidelines, Recital (168).
[8] Draft Guidelines, Recital (167).

issue is still to be solved. Do competition authorities have the expertise and mandate to decide whether *agricultural policy objectives* are endangered by a *sustainability* agreement? Here it seems the most obvious that competition law enforcement is ill-suited to balance public policy interests that are so far away from the agencies' original mandate: to protect competition as such and consumers. They are unlikely to make credible decisions about these questions, simply because they are not established for this and, thus, have no appropriate information in this regard.