



Public consultation on the draft Guidelines on the application of Article 210a of regulation 1308/2013

Response from the Netherlands Authority for
Consumers & Markets

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1 Outline

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2 Intro and summary

In the Netherlands, circular agriculture is an important policy issue for the government, as well as an important issue for society as a whole. To increase the sustainability of the food chain in the Netherlands, the government relies heavily on supplementary self-regulatory initiatives by the agricultural sector and their buyers. The government called upon the business community to take its responsibility and come forward with sustainability initiatives. In the past, competition law stood in the way of collective initiatives or was at least perceived as a barrier for such initiatives. The new Article 210a of Regulation 1308/2013 (“CMO”), further elaborated on in the Commission’s draft Guidelines on the application of the derogation from Article 101 TFEU for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation 1308/2013 (“the Guidelines”) offers opportunities for far-reaching cooperation for this purpose.

The Netherlands Authority for Consumers & Markets (“ACM”) welcomes these Guidelines as well as this opportunity to comment on them as part of the ongoing public consultation. In general, ACM agrees with the proposed Guidelines. ACM understands that the European Commission intends to create a different, more lenient framework for the application of Article 210a CMO than in the context of Article 101 (3) TFEU in the light of the importance of attaining certain sustainability standards in the realm of agriculture by 2030. In particular, the opportunity of farmers to agree with each other *and* with their buyers on a compensation for the additional costs of more sustainable practices should be helpful in this respect. Such compensation is an important element for farmers to make the transition towards sustainable production. In Chapter 3, ACM will provide detailed comments and suggestions with regard to different parts of the Guidelines. Our main concerns can be summarized as follows:

- First, the concept of indispensability, an important condition of Article 210a CMO, is not clear. ACM appreciates the clarification of the term ‘indispensable’ in the Guidelines. Due to the similar wording of Article 210a CMO and Article 101 (3) TFEU, this could easily cause confusion. The European Commission clearly states that there are key differences between the articles, as a result of which the standard for indispensability inevitably differs between them. In some places of the guidelines however, it could be questioned if the European Commission in fact maintains a similar interpretation as in Article 101 (3) TFEU. In Chapter 3.4, we mention what parts of the guidelines could be clarified for this purpose.
- Second, with regard to the ex-post opportunity for authorities to intervene if competition is excluded from the market or where the objectives of the CAP are jeopardized. The European Commission clearly states that the thresholds for both interventions should be high, that it would otherwise be against the spirit of Article 210a CMO. In its explanation of this ex-post opportunity of intervention, it is however not that clear. ACM would like to ask the European Commission to make clear in its explanation that this is a truly final procedure for exceptional cases only. ACM fears that this will otherwise unnecessarily restrict the development of sustainability agreements. In Chapter 3.6, we mention what parts of the Guidelines could be clarified for this purpose.

ACM trusts the Commission will give due weight to these suggestions in light of the overall response to the consultation, and looks forward to the final text.

3 Submission

3.1 Legal context of the exclusion

Paragraph 18

Paragraph 18 refers to the Horizontal Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01 (“Horizontal

Guidelines”). Perhaps a specific reference could be made to the new sustainability chapter of the Horizontal Guidelines.

3.2 Personal scope of Article 210a CMO

Producers and associations of producers

Section 2.2 of the Guidelines describes the personal scope of Article 210a CMO. Paragraph 27 states that at least one producer of agricultural products needs to be party to the agreement:

‘Article 210a applies to sustainability agreements to which at least one producer of agricultural products is 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 at the distribution level and including with wholesalers and retailers.’

This is repeated in paragraph 28:

‘Parties to sustainability agreements must include one or more producers of agricultural products.’

As well as in paragraph 33:

‘To be covered by Article 210a(2), a sustainability agreement must have at least one producer as a party. Producers are thus essential parties to sustainability agreements.’

However, paragraph 29 describes that at least one of the parties to the agreement needs to be a producer or an association of producers:

‘Parties to sustainability agreements may be individual operators and associations or other collective entities involving producers or other undertakings described above – regardless of their legal nature or whether they are formally recognized under EU or national law – if at least one of the parties to the sustainability agreement is a producer or an association of producers. Such collective entities can be, for example, producer organizations (‘POs’), associations of POs or interbranch organizations (‘IBOs’).’

This is repeated in Annex A – Flowchart of the assessment under Article 210a CMO, which mentions the following question with regards to the application of Article 210a CMO:

‘Is there at least one producer or producer organisation party to the sustainability agreement?’

This could cause confusion. ACM would like to suggest making clear whether at least one producer needs to be party to the agreement or whether this might also be an association of producers/producer organization.

Paragraph 33

Paragraph 33 describes that producers that are parties to the agreement must be involved in the negotiation, adoption and implementation of the standard:

‘To be covered by Article 210a(2), a sustainability agreement must have at least one producer as a party. Producers are thus essential parties to sustainability agreements. Producers that are party to an agreement at the time it is set up must be involved in the negotiation, adoption and implementation of the standard. This does not prevent producers from becoming parties to the agreement at a later stage without having taken part in the negotiation or adoption of the agreement, if there is a concurrence of wills that they be bound by the sustainability agreement.’

ACM wonders at what point (in time) producers need to be involved in the process of negotiation, adoption and implementation of the standard. For example, ACM wonders whether it is possible for other market participants than the producers to come up with an idea for a sustainability standard and negotiate about this before involving producers. In practice, this could help producers enter into sustainability agreements with their buyers. But this might also lead to fewer bargaining powers for the producers if the agreement is almost set in stone.

3.3 Material scope of Article 210a CMO

Example paragraph 37

The example under paragraph 37 is written down as follows:

'A sustainability objective could be to reduce the use of pesticides or the prevention of soil erosion. The sustainability standard that the sustainability agreement aims to apply could include setting measurable targets in form of quantitative or qualitative criteria going beyond a mandatory standard (e.g. reducing pesticides by 60% or using a cover crop in winter to avoid soil erosion). The agreement could include specific implementation measures, such as obligations to implement precision farming practices and pest monitoring, to use certain machinery or equipment, to implement risk management tools, or to support the dissemination of technical knowledge (including training, advice, cooperation and knowledge exchange), digital technologies or practices for sustainable management of nutrients.'

ACM wonders whether, in this example but also in general, it should be assessed to what extent the measures relate to the percentage that prevents soil erosion (60%) of only the percentage above the legal standard. The European Commission only allows cooperation that exceeds the legal standard. It could be helpful to show how parties to a sustainability agreement could prove this.

3.4 Indispensability under article 210a CMO

General remark

The European Commission states that there are key differences between articles 210a CMO and 101 (3) TFEU, as a result of which the standard for indispensability inevitably differs between them. In the explanation of the application, it is not always clear what the differences are. ACM especially wonders what the differences are between the first step of the indispensability test under Article 101 (3) TFEU and under Article 210a CMO.

Paragraph 78

Paragraph 78 is written down as follows:

'Finally, the indispensability of restrictions of competition under Article 210a must be assessed in relation to the attainment of the standard specified in the sustainability agreement. Attaining the sustainability standard could mean either producing or trading agricultural products in compliance with the standard.'

ACM notes that, in the Dutch translation of paragraph 78, it appears that the assessment should consider the extent to which the standard set in the agreement has been achieved.¹ ACM wonders whether this is

¹ The Dutch translation: 'Ten slotte moet bij de beoordeling van de onontbeerlijkheid van de mededingingsbeperkingen in de zin van artikel 210 bis worden gezien in hoeverre de in de duurzaamheidsovereenkomst vastgestelde norm is bereikt'

correct, since this can only be observed after the agreement has been effectuated. It could be helpful to specify how this condition should be met.

Paragraph 83

In paragraph 82, both steps of the indispensability test under Article 101 (3) TFEU are written down. Paragraph 83 describes that Article 210a CMO also consists of a two-step indispensability test. ACM suggests to describe both steps of the indispensability test of Article 210a CMO already in paragraph 83. In addition, perhaps it could be clarified in paragraph 83 how both indispensability tests differ from each other.

Paragraph 89

Paragraph 89 is written down as follows:

'Finally, the indispensability of the restriction needs to be assessed in the actual context in which the sustainability agreement operates, taking into account the structure of the market, the economic risks related to the sustainability agreement and the incentives facing the parties. The more uncertain the attainment of the sustainability standard covered by the agreement, the more likely it is that a restriction of competition may be indispensable to ensure that the standard will be attained.'

ACM notes that the wording of the last sentence of paragraph 89 could cause confusion. If it is uncertain that the agreed sustainability standard will be attained without the agreement, concluding the agreement and subsequently restricting competition will indeed be more likely to be indispensable. However, if it is uncertain that the agreement will lead to the attainment of the sustainability standard, ACM is of the opinion that a restriction of competition is less likely to be indispensable. Perhaps the last sentence can be clarified to avoid misinterpretation.

Paragraph 100

Paragraph 100 describes that if there is *willingness to pay* on the part of consumers, agreements may be unnecessary because the result can also be achieved individually:

'In some situations, consumers may place greater value on products that are of a more sustainable nature and may be willing to pay a higher price for those products than for less-sustainable alternatives. In such cases, cooperation among operators to attain the sustainability standard may be unnecessary because operators may be able to finance the necessary investments in producing or trading in the more sustainable products by charging higher prices to consumers.'

ACM understands the idea but is against the reintroduction of the *willingness to pay* criterion, which belongs to the criteria of Article 101 (3) TFEU. The reintroduction of this criterion presumes that parties to a sustainability initiative first have to consider the *willingness to pay* of consumers for a sustainable standard. The problem in the agricultural sector is that consumers often have *no willingness to pay*, which makes agreements more likely to be necessary than when there actually *is* a *willingness to pay*. That is also the reason, as we understood it correctly, why Article 210a CMO contains a derogation from Article 101 (3) TFEU.

3.5 Opinion system under Article 210a CMO

Paragraph 146

Paragraph 146 describes that the Commission may share information with national competition authorities:

'The Commission may share the information submitted to it with national competition and agricultural authorities or ministries, as appropriate, provided that these authorities and ministries are subject to the obligation to use that information only for the purpose for which it was acquired by the Commission. The Commission may also invite and receive input from those authorities and ministries.'

ACM wonders if the Commission could explain in what situations the Commission intends to share information with national competition authorities, as well as for what purpose and what information that might entail.

3.6 Ex-post intervention by the Commission and national competition authorities under Article 210a (7) CMO

General remarks

ACM fears that the ex-post intervention mechanism laid down in Article 210a (7) CMO may create insecurities for market participants. Although the European Commission states that this option should only be used with restraint, the explanation of the ex-post intervention gives ample room for the use of this ex-post intervention option.

Furthermore, ACM interprets the rationale of Article 210a CMO as stimulating sustainability in the agricultural sector. The transition to a sustainable EU food system implies that phasing out non-sustainable or less-sustainable products is inevitable to the process. ACM wonders whether the texts of paragraphs 167 and 173 in particular are in line with the aforementioned rationale.

Paragraph 163

Paragraph 163 describes that competition authorities will have the power to intervene with a concluded or implemented agreement:

'Based on this, Article 210a(7) gives competition authorities the power to intervene where a sustainability agreement, which has been entered into or implemented, jeopardises the five objectives set out in Article 39 TFEU. When doing so, the relevant competition authority must consider the effect of the sustainability agreement on all five objectives. In some cases, it will be sufficient for one of the five objectives to be jeopardised for the objectives set out in Article 39 TFEU to be jeopardised within the meaning of Article 210a(7). However, in cases where some objectives may be negatively impacted but other objectives are positively impacted, it will be necessary to reconcile those five objectives.'

Are authorities obliged to investigate the consequences of an agreement if it possibly jeopardizes Article 39 TFEU? This is a very difficult investigation for an authority to execute.

Paragraph 166

The example in paragraph 166 is written down as follows:

'Several grain producers, making up 80% of the grain produced in the relevant geographic area, agree to stop selling seeds treated with a certain type of chemical pesticide during the time necessary to modify their production process and to sell off their existing stock of grain. Because the producers account for a large share of seed production, this creates a shortage of inputs for processors that use the grains, and this instability leads to an increase in the price of bread. This would be likely to jeopardise the objectives of ensuring the availability of supplies and reasonable prices for consumers.'

ACM would like to suggest changing this example as it could be read as that every price increase will jeopardize the objective of reasonable prices for consumers. This is against the idea of the European Commission that the threshold under Article 210a (7) CMO for jeopardizing the objectives set out in Article 39 TFEU should be high. Could the European Commission make clear at what level a price increase jeopardizes the objective of reasonable prices for consumers within the light of the other objectives of Article 39 TFEU?

Paragraph 167

Paragraph 167 describes that the threshold for jeopardizing the objectives laid down in Article 39 TFEU should be high.

'The threshold under Article 210a(7) for jeopardising the objectives set out in Article 39 TFEU should be high. It would be against the spirit of Article 210a and the case law of the Court of Justice of the European Union on the need to reconcile the five CAP objectives if those objectives would be jeopardised any time a sustainability agreement has even a slight impact on one of those objectives.'

Perhaps some clarification could be provided in general on what this 'high threshold' entails.

Paragraph 169

Paragraph 169 is written down as follows:

'Jeopardising the objectives set out in Article 39 TFEU is also distinct from the exclusion of competition. An exclusion of competition in some situations may occur without jeopardising the objectives set out in Article 39 TFEU. Moreover, those objectives may be jeopardised even if competition is not excluded.'

ACM wonders to what extent national competition authorities ought to assess whether the objectives set out in Article 39 TFEU are jeopardized. These objectives touch upon policy issues on which competition authorities are not (or not always) authorized or able to take a position. Furthermore, it would be costly to use competition capacity to assess the five objectives out of Article 39 TFEU, also taking into account that these objectives can also contradict each other.

Paragraph 176

Paragraph 176 describes the role of *willingness to pay* within Article 210a (7) CMO:

'However, the fact that products that comply with lower sustainability standards are withdrawn from the market does not imply an exclusion of competition within the meaning of Article 210a(7) if the products were withdrawn because consumers increasingly demand more sustainable products. It is therefore necessary to assess whether the exclusion of competition is due to consumer preferences for sustainable products or whether instead the sustainability agreement has forced the withdrawal of a product for which there is substantial unfulfilled consumer demand.'

This text implies that, in the situation of phasing out less-sustainable options, when there is no *willingness to pay*, there might be an exclusion of competition within the meaning of Article 210a (7) CMO. ACM wonders how this relates to the rationale behind Article 210a CMO that transitioning to more sustainable products cannot be achieved individually if there is no *willingness to pay* and therefore may be concluded in agreement.

Paragraph 178

Paragraph 178 describes a market share indication for the likeliness to exclude competition:

'The market coverage of the sustainability agreement is likely to be a factor in deciding whether to intervene under Article 210a(7). Where the combined market shares of the parties to the sustainability agreement do not exceed 15% in the case of horizontal agreements and 30% in the case of vertical agreements, the agreement is unlikely to exclude competition.'

Does this mean that, above these percentages, an investigation has to be conducted? ACM wonders whether these percentages are not too low, considering the rationale behind Article 210a CMO and the fact that this article provides for an exemption for Article 101(3) TFEU. This system of (low) percentages is more akin to Article 101 (3) TFEU. ACM believes that, in cases where competition continues to exist on other characteristics, for example product quality, there is no exclusion of competition even when market shares are high.

Paragraph 179

Paragraph 179 describes that the assessment of whether sustainability agreements exclude competition should be undertaken on a case-by-case basis:

'Where the combined market shares of the parties to the sustainability agreement exceed the above-mentioned thresholds, the assessment of whether a sustainability agreement excludes competition should be undertaken on a case-by-case basis, depending on the extent to which consumer demand is unfulfilled. The mere fact that a sustainability agreement covers the entirety of the market will not in and of itself necessarily lead to an exclusion of competition.'

ACM would like to suggest the Commission to clarify that this assessment should be executed by competition authorities and not by market participants.

Example 2 paragraph 179

Example 2 in paragraph 179 is written down as follows:

'Turkey breeders, making up 60% of the market, decide to improve their turkey's living conditions, by establishing a new animal welfare standard that go beyond what is prescribed by mandatory law. This requires increasing the turkeys' living space, and installing air renewal and water treatment systems. The new sustainability standard also includes feeding turkeys premium-quality products only. The producers agree to apply a price premium to cover their costs.'

The price premium is 150% higher than the price of the less sustainable reared turkeys. This increase is indispensable given the extensive extra costs of the new standard. The higher price of sustainable turkeys has the effect of leading producers of non-sustainable turkeys (amounting to 40% of the market) also to increase their price by 60%.

Market studies show that as a result of the agreement, a range from 15 to 20% of the consumers of turkeys declare that they are no longer able to afford non-sustainable turkeys, and are hence prevented from buying any turkey.

As a result, consumers that were only willing to pay for the cheaper – and less sustainable alternative – will no longer access turkeys, as they cannot afford the 150% price increase. Such a situation is likely to lead to an intervention by the relevant competition authority.'

ACM wonders whether the behavior of non-participating parties should be included in the assessment of whether the sustainability agreement, concluded by other market parties, excludes competition. In other words, ACM wonders whether parties to the sustainability agreement should be held accountable for the behavior of non-participating market participants.