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## COMPETITION & ANTITRUST

Competition Rules in the Agricultural Sector: EU's Antitrust Exemption Guidelines & HCC's Competition Guide for Agriculture

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# Competition Rules in the Agricultural Sector: EU's Antitrust Exemption Guidelines & HCC's Competition Guide for Agriculture

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The application of the competition rules in the agricultural sector has recently been in the spotlight. On 7 December 2023, the European Commission ("EC") adopted [\*Guidelines on how to design sustainability agreements in the field of agriculture\*](#) ("Guidelines"), using a novel exclusion from the EU competition rules introduced by the recently reformed Common Agricultural Policy ("CAP"). Just a few days earlier, on 1 December 2023, the Hellenic Competition Commission ("HCC") had issued a [\*Competition Guide for the Agricultural Sector\*](#) ("HCC's Guide"), providing practical advice to the agricultural community on how to avoid practices that are liable to infringe the competition rules.

These initiatives are significant in shaping the future of agricultural practices because they increase legal certainty in a sector where the application of competition law is complex and blends with derogations that specifically apply to the agricultural sector. This is all the more so, given that agriculture stands as a fundamental pillar of the Greek economy, contributing substantially to the country's GDP and providing employment to hundreds of thousands of workers.

## I. EC's Guidelines for sustainability agreements in agriculture

### Background, relevance, and importance

Agricultural products, unlike other food products, are subject to distinct treatment under EU law. Particularly, Article 42 of the Treaty on the Functioning of the European Union ("TFEU") stipulates that rules on competition shall apply to production and trade of agricultural products, **taking due account of the five objectives of the CAP**, which, pursuant to Article 39 TFEU, are: increasing productivity of agricultural production, ensuring a fair standard of living for agricultural communities, stabilising markets, assuring supplies, and ensuring reasonable prices for the consumer. On this basis, the EU legislator has decided that the EU competition rules apply to the agricultural sector subject to **a number of derogations and exemptions**.<sup>1</sup>

In the context of the CAP reform for 2023-2027 and in order to both support the transition to a sustainable food system in the EU and strengthen the position of producers in the agri-food supply chain, **a new exemption from the EU competition rules for agricultural products was adopted in 2021**. Specifically, **Article 210a was introduced into the basic act for agricultural markets, the CMO Regulation**, which excludes

<sup>1</sup> See Article 222 of Regulation 1308/2013 establishing a common organisation of the markets in agricultural products ("**Common Market Organisation (CMO) Regulation**"). See also Article 206 of

the CMO Regulation, setting out that standard competition rules apply to agricultural products, except for certain derogations set out in a number of other provisions of the Regulation.

**certain restrictive agreements in the agricultural sector from the prohibition of Article 101 TFEU**, when those agreements are **indispensable to achieve sustainability standards going beyond the mandatory EU or national rules**.

The newly adopted Guidelines on sustainability in the agriculture sector aim specifically at **clarifying how operators active in the agri-food sector can design joint sustainability initiatives** in line with Article 210a of the CMO Regulation, while, at the same time, **assisting national authorities and national courts when called upon to apply the said exemption**. In this regard, the Guidelines provide a detailed discussion of the conditions under which an agreement would be exempt pursuant to Article 210a and lay out useful practical examples, thereby **increasing legal certainty** and effectively supporting efforts in the agriculture industry to deliver sustainability objectives.

As such, the Guidelines complement the EC's work on the assessment of sustainability agreements under Article 101 TFEU, as addressed in the revised *Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements* ("[Horizontal Cooperation Guidelines](#)"). That said, EC's approach to sustainability agreements in the agri-food sector differs notably from its corresponding stance to sustainability arrangements under the Horizontal Guidelines.

To start with, the EC's approach to sustainability agreements in the agri-food sector appears to be **more lenient** than its approach on sustainability cooperation in other areas, **making it more feasible for companies active in the agricultural sector to work on initiatives and cooperations that would deliver sustainability objectives**. For instance, unlike the exemption under Article 101(3) TFEU, the Article 210a exemption does not include the requirement that the agreement must allow "*consumers a fair share of the resulting benefit*" for it to benefit from the exemption (paras 85-89). Moreover, unlike the

Horizontal Cooperation Guidelines, the Guidelines **cover both horizontal and vertical arrangements** (paras 9-10 and 27), that is, both between competitors (e.g. between producers of competing agriculture products) and between undertakings operating at different levels of the agri-food supply chain (e.g. between a producer and a distributor or a wholesaler and a retailer).

In any event, the exemption from the general prohibition of anticompetitive practices contained in Article 101(1) TFEU that is created pursuant to Article 210a of the CMO Regulation **complements other exemptions** that may be available to sustainability agreements, including under the Horizontal Cooperation Guidelines or the Guidelines on Vertical Restraints, or (more generally) under the exemption laid down in Article 101(3) TFEU (paras 16-17).

### **Subjective and material scope of the exemption**

The Guidelines first outline **the subjective scope and the products** covered by the exemption under Article 210a (paras 21-41). An agreement, decision, or concerted practice – whether horizontal or vertical – qualify for the exemption only if it **cumulatively** meets the following criteria:

- ❖ at least one of the parties is a producer of agricultural products; and
- ❖ relates to the production of or trade in certain categories of agricultural products, as listed in Annex I to the TFEU, excluding fishery and aquaculture products.

Thus, sustainability agreements including all or any part of a food supply chain can benefit from the exclusion **if at least one producer is involved**. Conversely, agreements concluded only between operators in the agri-food supply chain without including agricultural producers cannot benefit from the exclusion, even when the agreement concerns an agricultural product.

Moreover, the scope of the exemption is **limited to agreements and behaviour relating to**

**agricultural products identified in Annex I to the TFEU**, which is a list of agricultural and food products, including, *inter alia*, live animals, meat, fish, dairy, tree, vegetables, fruits, nuts, cereals, coffee, spices, milled products, oils and oil seeds, fats, sugars, alcohol, and unmanufactured tobacco. In this regard, the EC clarifies in its Guidelines that if an agreement concerns both agricultural products (e.g. tomato certification) and non-agricultural products (e.g. tomato sauce), the provision exclusively applies to the agricultural part, and therefore the exemption covers only the portion of an agreement related to the products listed in Annex I (para 41).

Finally, according to the Guidelines, the scope of Article 210a is **not limited to parties to a sustainability agreement that are based in the EU**, provided that the agreement is at least partially implemented in the EU or provided such agreement is capable of having an immediate, substantial, and foreseeable effect on competition in the EU (para 33).

Turning to **the material scope** of application of the Article 210a exemption, **specific sustainability objectives** have been identified that justify the exemption (paras 43-48). These objectives are laid down in Article 210a of the CMO Regulation under the following **three categories**:

- ❖ **environmental protection** (including climate change mitigation and adaptation, protecting and sustainably using landscapes, water and soil, transitioning to a circular economy, pollution prevention and control, and the protection of biodiversity and ecosystems);
- ❖ **reduction of pesticide use and antimicrobial resistance**; and
- ❖ **animal health and welfare**.

Clearly, therefore, the Guidelines define sustainability objectives in a **narrower manner** as compared to the Horizontal Cooperation

Guidelines, in the sense that **agreements pursuing economic and social sustainability objectives (e.g. fair remuneration for farmers and farm workers) are not covered by the Article 210a exemption** (see e.g. para 48).

In any event, in order to benefit from the exemption, in addition to aligning with at least one of the above-mentioned categories of objectives, a sustainability agreement must also **establish a sustainability standard that:**

- ❖ **lead to tangible and measurable results, or** (if the results cannot be easily measured numerically) **observable and describable results** (paras 55-56), **and**
- ❖ **is higher than what is legally mandatory under EU or national laws** (paras 57-66).

### Indispensability

The Guidelines further clarify that sustainability agreements may, in principle, involve any kind of competition restriction (see paras 64-74), **provided that the restriction is indispensable** to achieving the legitimate sustainability objective pursued / desired sustainability standard (see paras 80-84). In this regard, the Guidelines explain how to practically assess whether a specific competition restriction is indispensable.

This assessment includes four elements:

- ❖ identifying any obstacles that would prevent the parties from attaining the sustainability standard on their own and explaining why collaboration is necessary;
- ❖ determining the scope of the agreement for the desired outcome (e.g. an agreement on price or quantity);
- ❖ identifying the indispensable restriction(s) to competition; and
- ❖ determining the appropriate level (e.g. the amount of the fixed price) and duration of the restriction(s).

The Guidelines provide detailed guidance on each aspect of the indispensability analysis, also including practical examples in this regard (see paras 85-133).

### *Ex ante review and ex post intervention*

Given that the parties' self-assessment of whether the Article 210a exemption is applicable is not likely to be a straightforward task in every case, the Guidelines **allow companies to request EC's opinion** on the compatibility of their sustainability agreements with competition law (paras 154-9). Parties may submit such a request **any time after the sustainability agreement has been concluded, including before its implementation** (para 156). Upon receipt of the request, the EC may issue information requests and, once the parties have submitted all the needed information to assess the request ("complete request"), the EC will deliver its non-binding opinion within a 4-month time limit (paras 160-74).

Additionally, **the EC and the national competition authorities may intervene *ex post* and are empowered to modify, discontinue, or prevent sustainability agreement from being implemented, if this is necessary to prevent anticompetitive foreclosure or if the agreement is not in line with the CAP's objectives** (see paras 175-97).

Even so, parties to existing sustainability agreements are invited to promptly align them with the stipulations of the Guidelines (para 135).

## **II. HCC's Competition Guide for the Agricultural Sector**

In line with its stance so far, it can legitimately be expected that the HCC will fully comply with the content of the EC's Guidelines going forward, in order to avoid inconsistent and/or contradictory outcomes. After all, pursuant to established case

law, national competition authorities must take the EC's soft law instruments into account in their decisional practice.<sup>2</sup>

Be this as it may, the HCC issued its Competition Guide for the Agricultural Sector about a week before the adoption of the EC's Guidelines, thereby missing on the opportunity to incorporate the content of the Guidelines in its Guide.

In any event, the HCC's Guide is not limited to the EU's sector-specific exemption under Article 210a of the CMO Regulation; it covers a broader spectrum of issues relating to both antitrust law and unfair commercial practices. If anything, the HCC's Guide is a "non-authoritative" or "informal" publication, aiming at educating the agricultural community on both the general competition rules and the specific conditions applicable to the sector.

In fact, the HCC's Guide sets out the general rules on antitrust law and unfair competition, covering aspects such as cartels, vertical agreements, abuse of dominance, and unfair commercial practices. In this context, the HCC explains in simple terms the content of the relevant provisions and provides **examples and practical advice** for the avoidance of risky practices in the agricultural sector. For instance, it states that a robust agricultural supplier may not restrict a trader's freedom to sell products in other EU Member States or impose price or volume limitations on cross-border trade.

### **Exceptions for agricultural sector**

The HCC further identifies certain exceptions within the competition law framework for the agricultural field, which are aligned with the CAP's objectives.

Indicatively, the HCC's Guide states that farmers may enter into agreements with traders covering

<sup>2</sup> See e.g. Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* EU:C:1989:646, paras 18-19.

the entire supply chain or **form cooperations and associations**, so as to:

- ❖ integrate their products into the market while ensuring reasonable pricing;
- ❖ increase their competitiveness;
- ❖ invest on innovative solutions and promote sustainability; and
- ❖ enhance productivity and product quality.

In this context, the HCC's Guide additionally set forth various legal texts with **specialised rules** for agriculture in its diverse areas (e.g. marketing rules to improve and stabilise the *common market for wine*, contract negotiation rules for recognized producer organisations in the *milk sector*, etc.).

### Sustainable development

Of importance is the discussion in the HCC Guide of **three instruments** that are particularly relevant for supporting the agricultural sector's efforts to deliver sustainability objectives.

The first of those instruments is the **EU's sector-specific exemption under Article 210a of the CMO Regulation**, which has already been discussed.

The second instrument concern a relatively recent amendment to L. 3959/2011 (the "**Greek Competition Act**"),<sup>3</sup> which inserted a new Article 37A empowering the President of the HCC to issue a "**no-action letter**" when issues of urgent public interest arise, **particularly when a business practice is found to contribute significantly to sustainable development objectives**. According to the HCC's Guide, such objectives may include:

- ❖ environmental protection and mitigation of climate change through the reduction of greenhouse gas emissions;

- ❖ technological innovations specifically aiming at sustainable development; and
- ❖ enhancing the green transition of small and medium enterprises.

Despite its non-binding nature, such a no-action letter may offer comfort to undertakings contemplating collaborations in the pursuit of sustainability objectives.

Finally, the HCC highlights the launch by the HCC, on 22 June 2022, of the so-called **Sandbox for Sustainable Development and Competition**.<sup>4</sup> In essence, this innovative tool creates a supervised space **to promote innovative business initiatives, and especially agreements in which market players team up to work on sustainable business projects**. Particularly, this regulatory sandbox allows businesses to digitally submit sustainability agreements to the authority to assess whether their environmental benefits outweigh any competition concerns. In this context, companies can submit business proposals through the Sandbox, which will be fully evaluated *ex ante* by the HCC, and following this, the HCC may in certain cases issue a no-action letter. Based on this letter, parties will be able to implement their proposal under the HCC's supervision within a specific time frame.

### Unfair competition practices

The HCC's Guide also discusses the provisions of L. 4792/2021 that transposed into national law Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food ("**A&F**") supply chain. The HCC's Guide further outlines the list of practices that shall be prohibited ("**black list**") and the corresponding list of practices that are in principle allowed if they are previously agreed in clear and unambiguous terms ("**grey list**").

<sup>3</sup> Effected by virtue of L. 4886/2022.

<sup>4</sup> The new platform for the Sustainability Sandbox is online at [sandbox.epant.gr/en](https://sandbox.epant.gr/en).

The **black list** include the following commercial practices: cancellations of orders for perishable A&F products at short notice; payments later than 30 days (from an agreed delivery period) for perishable A&F products and later than 60 days for other A&F products; unilateral changes in the supply agreement by the buyer; acts of commercial retaliation against the supplier; and the risk of deterioration or loss borne by the supplier.

As to the **grey list**, it covers the following commercial practices: returns of unsold A&F products; charges for stocking, displaying or listing supplier's A&F products borne by the supplier; cost for promotion, advertising and marketing of A&F products borne by the supplier; and charges for staff for fitting-out premises used for the sale of supplier's products borne by the supplier.

### III. Final thoughts

The EC's Guidelines and the HCC's Guide illustrate the importance of providing increased comfort and clearer guidance to companies committed to sustainability in the agri-food sector. This is justifiable not least because uncertainty as to what is (not) a breach of the competition rules can hinder the ability of companies active in the agricultural sector to work towards sustainability goals.

The Article 210a exemption, for instance, has been in effect since late 2021, albeit agri-food companies may have felt uncomfortable to proceed with sustainability cooperations for fear of being exposed to competition law investigations. In a similar vein, the HCC's newly adopted instruments (i.e. the no-action letter and the Sandbox) have also been dormant since their adoption in 2022.

The EC Guidelines, combined with the possibility for companies to seek comfort from the EC or the HCC, may play a key role in providing increased legal certainty and boosting green cooperation

initiatives in the sector. In this regard, companies pursuing sustainability objectives involving collaborations with other players in the market (incl. competitors) must consider the competition law risks that may arise and engage with the HCC and/or the EC, which now (more than ever) seem keen to offer advice on a case-by-case basis so as to avoid legal uncertainty that may hold companies back.

That being said, companies in the agricultural sector benefiting from the EU's exemption or a no-action letter (either based on Article 210a or Article 37A of the Greek Competition Act or via the HCC's Sandbox) should constantly monitor their arrangements to ensure that any long-term sustainability cooperation does not over time entail unlawful competition practices.

KG's dedicated team of competition lawyers is constantly monitoring the developments in this area and will be happy to advise you.



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