Guidelines on ensuring producer sustainability agreements are not anti-competitive

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EU adopts guidelines on how producers can cooperate on sustainability standards without breaching EU competition law

Commission guidelines on the exclusion from Article 101 of the Treaty on the Functioning of the European Union for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation (EU) No 1308/2013

Update

Since 2021, producers (or associations) may conclude agreements with other producers/operators on sustainability standards that go further than EU or EU Member State law to reach higher standards. Agreements between producers may have an impact on the market, and are normally not allowed under EU competition law. A 2021 derogation (exception) to competition law allows producers to conclude sustainability agreements and contribute to meeting the EU's Green Deal ambitions. The derogation also applies to sustainability agreements between non-EU suppliers and EU buyers. However, it must be strictly applied, and the European Commission has now published guidelines to help producers assess sustainability agreements and ensure they comply with competition law.

Impacted products

All agricultural products except fishery and aquaculture products

What is changing?

In the EU, agreements between actors in the market that restrict competition are not permitted. However, in 2021 the EU introduced a derogation (exception) to competition law to allow primary producers (except those from the fish and aquaculture sectors) to make agreements aiming at **higher sustainable standards** with other producers and/or with food chain operators.

The new Commission guidelines clarify how agri-food producers can cooperate in joint sustainability initiatives while respecting the derogation to competition law. In summary, sustainability agreements:

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- can only pursue the following objectives: protecting the environment; reducing pesticide use and antimicrobial resistance; or protecting animal health and welfare
- must involve at least one producer or association of producers
- must follow the guidelines (whether the parties are based either within or outside the EU) if the agreement is implemented fully or partially in the EU; or if it could have an immediate, substantial, and foreseeable effect on competition in the European internal market
- must aim for higher sustainability standards than those already mandatory in the EU or in the Member State where the agreement is implemented
- must be indispensable to achieve the sustainability standard pursued (the guidelines explain how to assess this, with examples)
- may be stopped or amended by competent authorities in the EU where there is an adverse effect, such as an unreasonable price increase
- must reflect a "concurrence of wills" between the parties, that is, an intention to jointly implement the agreement
- may relate to the sustainability of agricultural trade as well as the sustainability of production (but agreements must involve at least one producer)
- may also contain elements that are outside the scope of the derogation
- may lead to the creation of a voluntary label, logo, or brand name for products that meet the requirements of the sustainability standard
- must lead to results that are tangible and measurable (or at least that can be observed and described)
- are not necessarily written – agreements may also be practices or oral commitments.

The guidelines include flowcharts to help parties assess whether an agreement complies with the derogation, and if any resulting restriction on competition is indispensable.

Why?

Concern that producers may not cooperate to reach sustainability goals for fear of being pursued for anti-competitive behaviour led to a derogation to EU competition law. The new guidelines aim to help agri-food producers make use of that derogation. This initiative is aligned with the EU's Green Deal goals.

Timeline

Date of publication: 8 December 2023.

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What are the major implications for exporting countries?

The derogation to competition law opens up opportunities for producers, or associations of producers, including those in non-EU countries exporting to the EU. Sustainability agreements can cover production and/or trade in agricultural products. Producers involved in such agreements may gain competitive advantages through the creation of a voluntary label, logo, or brand name for products that meet the requirements of the sustainability standard.

However, the guidelines must be strictly respected to avoid any breach of EU competition law.

Recommended Actions

Any sustainability agreements involving non-EU producers concluded between 8 December 2021 (date of the derogation) and 8 December 2023 must be urgently reviewed to ensure that they are in line with the new Commission guidelines. If an agreement or practice does not comply, producers and operators may be prosecuted and fined for infringement of EU competition law.

Producers or associations in non-EU countries should explore the potential of sustainability agreements to maximise their efforts to introduce higher sustainability standards. The guidelines offer several examples, including reducing the use of pesticides.

Background

Agreements between companies that restrict competition are prohibited in the EU as they generally lead to higher prices or lower quantities (Article 101 of the Treaty on the Functioning of the European Union). Regulation 2021/2117 modified the Common Market Organisation Regulation 1308/2013, to introduce a derogation (Art. 210a) to competition law to allow primary food producers to conclude agreements with other producers, or with their partners in the food chain, to reach higher sustainability goals.

Resources

Online resources from the European Commission:

- Commission adopts antitrust Guidelines for sustainability agreements in agriculture, Press release, 7 December 2023
- Sustainability agreements in agriculture – guidelines on antitrust derogation
- Synopsis report of the public consultation - SWD(2023)398 [direct download]
- Producer and interbranch organisations

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Sources

Commission guidelines on sustainability agreements of agricultural producers [Communication - C(2023)8306 – direct download]

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