



English courtesy translation

Duurzaamheidsafspraken in de landbouw

Horizontale en verticale overeenkomsten in de landbouw ten behoeve van natuur, milieu, klimaat, dierenwelzijn en het verdienvermogen van de agrarisch ondernemer

Robert P. Baayen, Willy H.M. Baltussen, Alfons C.G. Beldman, Michiel van Galen, Roel Jongeneel, Katja Logatcheva, Hanna Schebesta, Raymond Schrijver



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Sustainability agreements in agriculture

Horizontal and vertical agreements in agriculture for the benefit of nature, the environment, the climate, animal welfare and the earning capacity of farmers

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This research was commissioned by the Netherlands' societies Dierenbescherming, Vereniging voor de bescherming van Natuurmonumenten and Vogelbescherming Nederland. The first author conducted the research during a three-year secondment to WENR from the Ministry of Agriculture, Nature and Food Quality.

Wageningen Environmental Research
Wageningen, March 2023

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Report 3239

ISSN 1566-7197

Enhancing the sustainability of agriculture requires a better earning capacity for farmers. Besides government (i.e. taxpayer) support for sustainable production, consumers will have to buy the more expensive sustainable products and the extra price they pay will have to be passed on to the producer through the chain. This will require sustainability agreements between farmers and chain parties, complementary to existing initiatives and labels. This study examines the scope for lawful private sustainability agreements. Under the cartel prohibition in the EU Treaty, the possibilities are limited and insufficiently workable in practice. The CMO regulation offers several derogations to the cartel prohibition, which provide opportunities for farmers and farmers' associations to make sustainability agreements. In the 2021 CAP review, that space has been extended with an article (210a) added specifically for this purpose. This offers great opportunities. The agreements must be ambitious, exceed existing legal requirements and must be made by or with farmers (mutual agreements within the retail or processing industry without participation of farmers remain under the cartel prohibition). Another condition is that the agreements are indispensable to achieve the stated sustainability objective (no greenwashing). In addition, other derogations in the CMO regulation can be used, in particular for recognised producer organisations (Art. 152) and other farmers' associations (Art. 209) in combination with value distribution clauses (Art. 172a). Better prices for farmers for sustainable products mean higher costs for consumers for their food. However, making agriculture more sustainable also leads to societal benefits and financial space to compensate citizens who cannot afford higher food prices.

Key words: sustainability, agreements, sustainability labels, competition, agriculture, CMO Regulation

This report may be downloaded for free at <https://doi.org/10.18174/590740> (for original Dutch version, see: <https://doi.org/10.18174/588388>) or www.wur.nl/environmental-research (go to 'Wageningen Environmental Research' in the grey line at the bottom). Wageningen Environmental Research does *not* provide any printed copies of reports.

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Accountability statement

Report: 3239

Project number: 5200047707

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Preface

The transition to nature-friendly and animal-friendly agriculture is one of the biggest challenges currently facing our society. The current system, which forces farmers to further intensify, is no longer sustainable. While this form of agriculture does not offer farmers sustainable economic prospects, it does result in degradation of our rural nature and in animal welfare challenges. The number of insects, birds, flowers and plants is decreasing at an alarming rate, while we cannot do without nature. In addition, not all animals in the livestock industry are given a dignified existence. This needs to change. That is why more than 24 billion in public money has been made available to halt nitrogen emissions, to realise broad nature restoration in rural areas and to make extensive and animal-friendly agriculture possible. The government also requests a significant financial contribution from chain parties for the agricultural transition. But how can farmers earn a good living with a nature-friendly and animal-friendly form of agriculture? That discussion is currently ongoing.

The Dierenbescherming, Natuurmonumenten and Vogelbescherming Nederland are also looking into this issue. Indeed, for animal welfare on livestock farms and nature restoration in rural areas and surrounding nature reserves, it is essential that farmers are better rewarded for their services. Especially around nature reserves, nature challenges are large and a new earning model is urgently required. Our national bird the godwit, for instance, depends on farmers who manage meadow birds and organise their land in such a way that this meadow bird can breed. But naturally, there must be a reward in return. The same applies to the additional costs incurred for animal-friendly livestock farming, such as the costs of free-range stall pens for sows, the use of less high-yielding breeds or integrally sustainable innovations like the VrijLevenStal. More animal- and nature-friendly measures could be mentioned. In other words: nature management and animal welfare in rural areas are inextricably linked to a good earning model for sustainable and animal-friendly agriculture.

We therefore feel responsible to contribute to solving this issue: without a sustainable earning model, there will be no nature-friendly and animal-friendly agriculture. As civil society organisations, we actually hope to offer Dutch farmers a perspective for the future. We would like to help advance the debate on agriculture, sustainability and animal welfare. What opportunities exist to reconcile the various interests? How can citizens and chain parties help farmers shape the transition to sustainability? Since the Green Deal, more scope has been created within the European Union legislation to reward farmers for sustainable and animal-friendly production. We would like to move in that direction, which is why we asked Wageningen University & Research (WUR) to investigate the opportunities of these new European possibilities.

The aim of this report is to explore the opportunities offered by European legislation to conclude agreements on sustainability, including animal welfare. Agreements that do justice to farmers and offer compensation for additional costs. The current report outlines the scope offered by Brussels. It is up to all of us to make the best possible use of it: for our nature, animals and for a sustainable future of our agriculture.



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Summary

Aim of this study

This study was undertaken to explore the possibilities offered by the European Union (EU) legislation as regards horizontal and vertical agreements between farmers and food chain actors in support of nature and biodiversity, the landscape, the environment, the climate, animal welfare and a better earning model for farmers. It concerned the options offered by Art. 210a of the CMO Regulation, as well as other possibilities in that Regulation or offered elsewhere in EU legislation.

The objective was furthermore to clarify which options offer the better prospects and should preferentially be realised to help achieve the nature, water, climate and animal welfare objectives of the Netherlands.

Methodology

The research took the form of literature studies, where relevant supplemented with interviews with relevant actors, including farmers' organisations, food chain actors, retailers and the government.

Findings

Key message

Enhanced sustainability in agriculture will require appropriate earning capacities of farmers. Additional to governmental support (i.e. from tax payers) for sustainable production, consumers will need to buy the sustainable products and the price difference paid will need to be passed along the chain from consumers to producers. This will require sustainability agreements between farmers and food chain actors, beyond and supplementary to existing initiatives and sustainability quality marks.

The cartel prohibition in the EU Treaty provides insufficient room for such agreements and the exemptions available in the EU Treaty are not very feasible. The Common Markets Organisation (CMO) Regulation offers several derogations from the cartel prohibition, however, permitting farmers' organisations to conclude sustainability agreements. In the 2021 revision of the Common Agricultural Policy (CAP), the options offered were expanded considerably with an article (210a) developed specifically for sustainability initiatives, which offers considerable opportunities. The agreements shall concern ambitious initiatives exceeding existing EU or national legislative requirements and they need to be concluded between and/or with farmers. Mutual agreements among retailers or the food industry without farmers' participation continue to be covered under the cartel prohibition. A key condition for sustainability agreements under Art. 210a of the CMO Regulation is that the agreements in question are indispensable in all respects for achieving the sustainability objectives set (i.e. no greenwashing permitted). Furthermore, other derogations in the CMO Regulation may be utilised, in particular as regards recognised producer organisations (Art. 152) and other associations of farmers (Art. 209), in combination with value sharing clauses (Art. 172a).

Better prices for farmers for sustainable products imply higher food prices for consumers. However, a higher level of sustainability in agriculture generates societal benefits and financial leeway to compensate citizens who cannot afford higher food prices.

The key findings are further presented below in more detail.

Contradictory EU legal framework hampers improved sustainability

Enhancing sustainability of agriculture is a necessity but requires significant expenses. According to a Dutch expression, a farmer 'cannot act in a green manner if his bank account colours red'. Enhancing sustainability is simultaneously enforced and obstructed by EU legislation. First, this concerns a systematic interpretation of the polluter pays principle of the EU Treaty¹, in which only voluntary sustainability activities of farmers exceeding EU or national legal requirements may be compensated through state aid, services of general

¹ Art. 191 of the Treaty on the Functioning of European Union (TFEU).

economic interest or the CAP. Second, the competition logic of the EU Treaty is based on welfare theoretical criteria, which prohibit the full inclusion of sustainability in competition policy considerations.

Furthermore, sustainability agreements are prohibited when the government imposes legal norms, under the assumption that private agreements would not be indispensable from a competition perspective in such cases. Hence, governments usually avoid imposing such norms, since these would negatively impact the competitive position of farmers on the international market. Without financial support, be it public or private, their production costs would increase and their income decrease. Such support is however prohibited, except for voluntary activities exceeding EU or national legal requirements. In cases in which support is permitted, exclusively the costs incurred and income foregone may be compensated, usually on the basis of average cost calculations, which are too high for some farmers and too low for others. Consequently, farmers stand the risk that the costs of any voluntary sustainability activities will be only partially reimbursed, while they themselves already have to bear the costs of compliance with legal sustainability requirements.

Given the gradual increase of sustainability norms over time and enforcement in court or by the European Commission (EC) of legal sustainability requirements, tensions are on the rise and the problem appears to be unsolvable within the framework of the current EU agricultural policy.

Liberalisation of the European legislation (Green Deal)

Under the Green Deal, the EU is widening the possibilities for better rewarding sustainability measures. For achieving this, the competition rules, state aid rules and the CAP have been amended.

The liberalisation of the CAP and state aid rules have been described in previous reports beschreven (Baayen en Van Doorn, 2020; Baayen et al., 2021, 2022). The present report describes the liberalisation of the competition rules as regards agriculture, which overtly permits to transmit the higher production costs of sustainable agriculture to consumers. This is essential because those additional costs will eventually need to be absorbed either by citizens (through taxation) or by consumers (through food prices).

Consumers generally are of the opinion that enhanced sustainability in agriculture is a must, however they are not always able or willing to pay higher prices themselves, in other words, consumers are not always able or willing to societal costs in their purchasing decisions, while they expect others to do so. It would be reasonable to assume that preferences of consumers concerning the behaviour of other consumers should not be solved through competition agreements, but by political decisions. For a viable solution, both approaches will be necessary. Sustainability agreements will result in higher food prices for consumers to the benefit of sustainable farming, and political decisions may compensate low-income citizens for those higher prices. Besides this, pollution norms setting and pollution pricing will remain necessary, as well as governmental support to farmers in relation to communication, consciousness raising and conversion to more sustainable forms of agriculture (Baayen et al., 2021, 2022).

Art. 210a of the CMO Regulation provides ample room for horizontal and vertical sustainability agreements

The conflicts in EU legislation as regards sustainability originate from the EU Treaty itself. Amending the EU Treaty is not an option and the jurisprudence of decades of the Court of Justice is a lasting reality. The solution should rather be sought in exceptions (derogations) to the fixed rules in the secondary legislation, i.e. the Directives and Regulations of the European Parliament (EP) and the Council which are based in the EU Treaties (the primary legislation).

In the framework of the CAP review, the CMO Regulation was amended to this end in December 2021. An article (210a) was inserted so as to better cater for sustainability initiatives in agriculture. The liberalisation in case of the competition rules is considerable. Farmers and their associations are permitted, by derogation to the cartel prohibition, to agree with food chain actors at different levels of industry, distribution and retail on sustainability objectives to be realised through sustainability norms. Those norms shall exceed existing EU and national legislative norms and the sustainability agreements need to be indispensable in all respects for achieving the sustainability objectives set. Full transparency is required as to the costs.

In January 2023, the EC opened a public consultation on draft guidelines as to the interpretation of Art. 210a of the CMO Regulation. The draft clarifies that the EC intends to provide for a truly liberal application of the

article. The interpretation of the critical term 'indispensable' has been widened beyond what is usual in relation to the cartel prohibition in Art. 101 of the EU Treaty. Furthermore, national competition authorities and the EC will have little room for prohibiting sustainability agreements. They are supposed to restrict themselves to merely a marginal test whether competition is excluded or the objectives of Art. 39 of the EU Treaty are being jeopardised.

The risks associated to the application of Art. 210a of the CMO Regulation are limited. The guidelines provide clarity and interested parties may request the EC beforehand for an opinion. There is no tension with the EU rules as regards the free movement of goods on the single market.

Alternative options in the CMO Regulation may provide an attractive alternative

Apart from Art. 210a, the CMO Regulation offers alternative options for sustainability agreements. Art. 152 and Art. 209 of the CMO Regulation permit farmers and farmers' associations to jointly negotiate prices. By combining this with the possibility offered in Art. 172a of the same Regulation on value sharing clauses more or less the same results can be achieved as under Art. 210a, but including the option to cover compliance costs with sustainability norms in legislation. In these constructions, the indispensability criterion does not apply. In certain cases, this may be attractive.

Competition needs to be maintained

When concluding sustainability agreements, the question arises whether all aspects of sustainability could be combined into a single sustainability index, simplifying choices for policy makers and consumers alike. It is however important to maintain competition for the various aspects of sustainability, and equally so between retailers. Maintaining competition is not only a legal requirement, but also to do justice to the fact that consumer preferences as regards sustainability may differ considerably in terms of preferred objectives (for some animal welfare, for other biodiversity, for still others the climate or the environmental).

Agreements between retailers, food services and the food industry without participation of farmers remains illegal

Agreements of food chain actors such as retailers, foodservices or the food industry without involvement of farmers and their associations continue to be prohibited under the EU legislation (cartel prohibition), unless four conditions for exemption given in Art. 101(3) TFEU apply. In practice, this is highly complex and far from easy to justify. Anyhow agreements on price increases or reduced choice for consumers are not permissible.

This implies that participants to the ongoing negotiations in the Netherlands on an agriculture covenant for better earning capacity for sustainable farming (the so-called "landbouwakkoord"), including the government and the national competition authority, will need to ensure that those negotiations and that covenant do not infringe upon the cartel prohibition. This can be done by restricting any such agreements to the scope of the derogations in the CMO Regulation to the cartel prohibition.

Extension of rules is not a helpful solution

Extension of sustainability agreements through Art. 164 of the CMO Regulation does not provide a helpful solution, because such a construction reintroduces of a series of conditions under the cartel prohibition of the EU Treaty and thus annihilates a substantive part of the privileges of the derogations for recognised produced organisations.

The law on sustainability initiatives proposed by the government of the Netherlands is not a helpful solution either

The government's proposal for a law on sustainability initiatives does not provide much help either, due to the fact that the national legislator is only permitted to consolidate societal initiatives in legislation that are permissible under the EU competition legislation. At most, the national legislator could impose on farmers and food chain actors to conclude sustainability agreements complying with the derogations in the CMO Regulation (e.g. application of Art. 210a).

National legislation requiring mandatory purchasing of sustainable products by retailers, foodservices and the food industry is at odds with EU legislation

The Parliament of the Netherlands has requested the government to investigate whether a national law could be envisaged obliging retailers, foodservices and the food industry to purchase sustainably produced Dutch agricultural products. Such an approach is at odds with the competition law of the EU and the free movement of goods on the internal EU market.

The vice-chair of the highest court in the Netherlands for administrative law, the Raad van State, on request of the Minister of Agriculture, Nature and Food Quality advised the government in 2022 that EU Member States are not permitted to introduce national legislation that would be prohibited for private actors under competition law. The situation differs from that for biofuel, for which EU legislation provides for a legal obligation on Member States. Moreover, it is questionable whether such a legal obligation can be effective without infringing on the EU internal market rules.

Stimulate constructive developments that are already ongoing

Independently from competition legislation, food chain actors have already developed models for supporting sustainable production and purchasing. Retailers may use their so-called margins mix (i.e. price adjustment of certain products to promote these over other products) to lower the prices of sustainable products at the expense of regular products. This results in more affordable sustainable food and stimulates demand for such products. This perspective is promising and should be encouraged. It is not clear however in how far such an approach suffices to address the problems currently faced by agriculture in the Netherlands.

Government may help

The government would do well to encourage and facilitate the use of the derogations in the CMO Regulation for sustainability agreements. To this end, the government could provide for a catalogue of reliable quality marks together with tables concerning compensation costs for each type of sustainable activity. The existing catalogue under the CAP for blue-green sustainability services in the framework of the agro-environment-climate measures (AECM) could be extended for this purpose to also cover for example animal health and welfare. The government could provide for an annual update of the catalogue and cost tables by an independent party and finance those updates.

Art. 210a of the CMO Regulation is the best way forward

The Netherlands have a tradition of societal covenants, in which the concerned parties express commitment to certain compromise solutions. The problems concerning the earning capacity of farmers however can only be solved through agreements concerning who will pay for what. Such agreements in principle fall under the cartel prohibition unless they coincide with the derogations in the CMO Regulation. The best way forward is to utilise the instruments offered by the EU for enhancing sustainability of agriculture, namely the possibility to conclude sustainability agreements under Art. 210a of the CMO Regulation. Such agreements are legally permissible.

The opportunity now provided is to compensate farmers for sustainability costs through a price premium. In order to do so, the rules of the game will need to be respected. The initiative may only come from farmers and farmers' associations, and cannot be restricted to retailers, foodservices or the food industry. Each group of farmers will themselves need to agree with its own chain partners and in many cases the sustainability objectives agreed upon will colour differently than with other groups of farmers and chain actors. What will need to be demonstrated is that the sustainability agreements concluded are truly indispensable. This will require a lot of work, but this is feasible. The fact that farmers conclude agreements with purchasers and other chain actors implies that the EU legislation concerning the internal market is not being jeopardised.

Conditions

Employment of the derogations in the CMO Regulation will result in higher food costs for consumers, as long as the consumers' diet remains unchanged. At short term, however, this is inevitable to resolve the current sustainability problems in agriculture, at least in the Netherlands. It should be borne in mind that enhanced sustainability in agriculture also generates benefits for society and liberates resources to compensate citizens that are unable to cope with price increases. Moreover, society is in urgent need of a solution for the tensions in this politically sensitive file.

Summary of findings

The table below provides an overview of the scenarios for sustainability agreements and arrangements, each with its pros and cons.

| | Scenario A Incremental increase of sustainability via existing initiatives | Scenario B Agreements under CMO Regulation, Art. 210a | Scenario C Agreements under CMO Regulation, Art. 152, 172bis and 209 | Scenario D Legislation imposing sustainable products purchasing percentage |
|---|--|---|--|--|
| Elements | | | | |
| <i>Who</i> | Producers and buyers | Producers and chain actors | Producers and chain actors | Chain actors |
| <i>Duration</i> | Multiannual contracts | Multiannual agreements | Multiannual agreements | Permanent |
| <i>Ambition level</i> | Limited to substantive | High (legally required) | Free choice | Government decides |
| <i>Formula</i> | Quality mark (existing or new) or company logo | Quality mark (existing or new) or company logo | Quality mark (existing or new) or company logo | Government decides |
| <i>Cost calculation</i> | Negotiable | Full transparency required | Negotiable | Government decides |
| <i>Price premium for sustainable production</i> | Yes | Yes | Yes | Possible |
| <i>Who pays</i> | Buyers and consumers (indirect) | Chain actors and consumers (indirect) | Chain actors and consumers (indirect) | Chain actors, rather than consumers |
| <i>Mechanism</i> | Gradual shift of price margins in favour of sustainable products | Agreements in food chain | Agreements in food chain | Legal obligation to purchase sustainable products |
| <i>Internal market</i> | Compatible, virtually no leakage effects | Compatible, virtually no leakage effects | Compatible, virtually no leakage effects | Incompatible and/or large leakage effects |
| <i>Phasing in</i> | Nudging of consumers to sustainable products | Stepwise introduction of sustainability norms | Stepwise introduction of sustainability norms | Increasing obligation level as regards purchasing of sustainable products |
| Pros and cons | | | | |
| <i>Voluntary or mandatory</i> | Voluntary | Voluntary | Voluntary | Legal obligation |
| <i>Scope</i> | Mandatory requirements as well as higher norms | Only norms exceeding mandatory requirements | Mandatory requirements as well as higher norms | Government decides |
| <i>Feasibility</i> | Good | Complex but feasible | Relatively simple | Resistance and enforcement problems |
| <i>Legality</i> | Certain | Certain | Probable (combination with Art. 172a) | Improbable |
| <i>Conditions</i> | None | Agreements must be strictly indispensable | Common selling required under Art. 152 | Equal treatment for Dutch and foreign products |
| Effectiveness | | | | |
| <i>Sustainability objectives</i> | Limited to medium (depending on ambition of buyer and consumer) | High (legally required) | Medium (intermediate solution) | Medium (leakage effects, escape behaviour) |
| <i>Earning capacity</i> | Limited to medium (problems of scale) | High (compensation of all additional costs) | Medium to high | Medium (leakage effects, escape behaviour) |
| Feasibility | Excellent | Excellent | Probably good | Probably poor |

Recommendations

The following recommendations can be made:

- i. Acknowledge and encourage existing efforts of retailers and food industry to promote the sustainability transition in agriculture through multi-annual contracts with Dutch farmers and compensation of the higher cost level of sustainable production. This should be part of a broad mix of instruments for improved sustainability, including regulatory norms setting, environmental emissions pricing and governmental support for farmers as regards communication, consciousness raising and conversion from regular to sustainable mode of production.
- ii. Focus on implementation of Art. 210a of the CMO Regulation in all sectors for ensuring compensation for voluntary sustainability norms exceeding EU and national legislation by means of a price premium. Respect the condition that sustainability agreements need to be concluded by farmers and farmers' organisations in coordination with their respective chain actors, and that agreements between retailers, foodservices or the food industry without participation of farmers is not permitted.
- iii. As a government, facilitate the conclusion of sustainability agreements, in particular by making available and expanding the existing compensation system under the CAP for sustainability services to also include animal health and welfare, reduction of the use of pesticides and antibiotics, etc. (elements that are missing in the existing cost compensation tables of the CAP). Provide for cost figures which also cover the costs of marginal service offers (as for the blue-green services catalogue under the CAP), i.e. do not use cost averages which will be insufficient for part of the farmers. Specify the costs where appropriate per sector and geographic area. The government should on its own expenses provide for an annual update of the cost tables by an independent body.
- iv. Furthermore, utilise the possibilities in Art. 152 and Art. 209 of the CMO Regulation to cover the costs of mandatory sustainability norms for agricultural production through a price premium. Take profit from the fact that agreements under these two articles do not need to be indispensable and will be relatively simple to justify.
- v. The government should refrain from imposing legal requirements for retailers and the food industry to purchase sustainable agricultural products, given the negative advise of the Netherlands' supreme court for administrative law (the so-called Raad van State) concerning legislation outside of the derogations in the CMO Regulation that would undermine the *effet utile* of the EU competition rules. Endeavour if so desired to create a legal basis for such rules at EU level in the future Sustainable Food Systems Regulation.
- vi. Encourage farmers to better organise themselves in recognised or not producer organisations and associations for sustainable production. This will reinforce their negotiation power and enable them to utilise the derogations in the CMO Regulation to the cartel prohibition.
- vii. Structure the excessive diversity in quality marks and norms for sustainability in the Netherlands by defining and implementing minimum requirements and benchmarking, while respecting the need to maintain diversity in sustainability objectives, both from a competition perspective and for sake of the freedom of choice of consumers.

Samenvatting

Doel

Het onderzoek waarover in dit rapport verslag wordt gedaan, had ten doel om in kaart te brengen welke mogelijkheden de EU-regelgeving biedt om horizontale en verticale ketenafspraken te maken tussen landbouwers respectievelijk ketenpartijen ten gunste van natuur en landschap, milieu, klimaat, dierenwelzijn en een versterkt verdienvermogen van de boer. Het ging daarbij zowel om de nieuwe ruimte van Art. 210bis van de GMO-verordening als om de ruimte die er al langer was binnen die verordening of op grond van andere EU-regelgeving.

De opdracht was tevens om in beeld te brengen welke van die mogelijkheden kansrijk zijn en bij voorrang zouden kunnen worden gerealiseerd om de natuur-, water-, klimaat- en dierenwelzijnsdoelen van Nederland te helpen halen.

Werkwijze

Het onderzoek werd uitgevoerd door literatuuronderzoek, waar nodig aangevuld met gesprekken met relevante actoren, waaronder organisaties van landbouwers, ketenpartijen, retailers en overheden.

Bevindingen

Kernboodschap

Voor verduurzaming van de landbouw is een goed verdienvermogen voor de landbouwers nodig. Naast steun van de overheid (dus de belastingbetaler) voor duurzame productie, zullen consumenten de duurdere duurzame producten ook moeten afnemen en zal de meerprijs die zij betalen via de keten moeten worden doorgegeven aan de producent. Daarvoor zijn duurzaamheidsafspraken nodig tussen landbouwers en ketenpartijen.

Onder het kartelverbod in het EU-verdrag is de ruimte voor zulke afspraken beperkt en onvoldoende werkbaar in de praktijk. De GMO-verordening biedt verschillende derogaties op het kartelverbod, die mogelijkheden bieden aan landbouwers en verenigingen van landbouwers om duurzaamheidsafspraken te maken. In de GLB-herziening van 2021 is die ruimte uitgebreid met een artikel (210bis) dat speciaal voor dit doel is toegevoegd. Dit biedt grote kansen. Het moet gaan om ambitieuze bovenwettelijke initiatieven en de afspraken moeten worden gemaakt vanuit of met de landbouwers (onderlinge afspraken binnen de retail of de verwerkende industrie zonder de landbouwers blijven vallen onder het kartelverbod). Voorwaarde is ook dat de afspraken in hun uitwerking onontbeerlijk zijn om het gestelde duurzaamheidsdoel te realiseren (geen greenwashing). Daarnaast kunnen andere derogaties in de GMO-verordening worden benut, met name voor erkende producentenorganisaties (Art. 152) en andere verenigingen van landbouwers (Art. 209) in combinatie met waardeverdelingclausules (Art. 172bis).

Betere prijzen voor landbouwers voor duurzame producten betekenen hogere kosten voor de consument voor diens voedsel. Verduurzaming van de landbouw leidt echter ook tot maatschappelijke voordelen en financiële ruimte om burgers te compenseren die door de hogere voedselprijzen in de knel komen.

Hieronder worden de belangrijkste bevindingen samengevat.

Tegenstrijdige juridische kaders belemmeren verduurzaming

Verduurzaming van de landbouw is noodzakelijk, maar brengt aanzienlijke kosten met zich mee. Een boer "kan niet groen doen als hij rood staat". De verduurzaming van de landbouw wordt echter zowel afgedwongen als belemmerd door het EU-recht. Het gaat met name om een systematische, belemmerende uitwerking in de regelgeving van het "de vervuiler betaalt"- principe uit het Verdrag², waarbij uitsluitend bovenwettelijke activiteiten door de staat vergoed mogen worden (met staatssteun, via diensten van

² Art. 191 VWEU.

algemeen economisch belang (DAEB) of via het Gemeenschappelijk landbouwbeleid (GLB)), samen met een mededingingslogica op basis van welvaartstheoretische criteria, die het niet toelaat om duurzaamheid volwaardig mee te nemen in de afwegingen.

Duurzaamheidsafspraken zijn niet toegestaan wanneer de overheid wettelijke eisen stelt (normering), omdat private afspraken mededingingsrechtelijk dan niet onontbeerlijk zouden zijn. De overheid stelt die normen niet graag, omdat die ertoe leiden dat de landbouwers geschaad worden in hun concurrentiepositie. Hun kosten nemen immers toe en het inkomen neemt af, tenzij de overheid of private partijen steun bieden. Dat is echter verboden, tenzij voor bovenwettelijke activiteiten. In dat geval mogen ook nog eens uitsluitend de gemaakte kosten en gederfde inkomsten worden vergoed, vaak op basis van hooguit gemiddelde kosten. De landbouwers lopen zo ook het risico bij de bovenwettelijke duurzaamheidsactiviteiten niet uit de kosten te komen, terwijl zij de kosten van naleving van de wettelijke eisen toch al zelf moeten dragen.

Omdat de duurzaamheidsnormen geleidelijk wel steeds hoger worden en naleving via de rechter dan wel door de EC zelf wordt afgedwongen, loopt de spanning op en lijkt het probleem binnen de context van het huidige landbouwbeleid van de EU onoplosbaar.

Verruiming van Europese regels (Green Deal)

In het kader van de Green Deal verruimt de EU de mogelijkheden om duurzaamheid beter te belonen en te vergoeden. Daarvoor zijn de mededingingsregels, het GLB en de staatssteunregels aangepast.

De verruiming van het GLB en de staatssteunregels is in voorgaande rapporten beschreven (Baayen en Van Doorn, 2020; Baayen et al., 2021, 2022). Dit rapport beschrijft de verruiming van de mededingingsregels voor de landbouw. Die verruiming maakt het mogelijk om de meerkosten van een duurzame bedrijfsvoering beter door te rekenen naar de consument. Dat is nodig, omdat die kosten uiteindelijk ofwel door de burger (via de belastingen) ofwel door de consument (via voedselprijzen) zullen moeten worden betaald.

Consumenten vinden meestal wel dat verduurzaming nodig is, maar zijn niet altijd in staat of bereid daarvoor zelf een hogere prijs te betalen; met andere woorden, de consument kan of wil de maatschappelijke kosten niet ten volle meenemen in de aankoopbeslissing. Het ligt in de rede dat de voorkeuren van consumenten over het gedrag van anderen niet via mededingingsafspraken dienen te worden opgelost, maar via de politiek. Om tot een werkbare oplossing te komen, zijn beide routes nodig. Langs de weg van duurzaamheidsafspraken, waarbij consumenten een hogere prijs gaan betalen voor hun voedsel, en langs de weg van de politiek, waarbij burgers met een laag inkomen kunnen worden gecompenseerd voor de hogere prijzen. Dit laat onverlet dat normering en beprijzing van milieu-emissies nodig blijven, naast steun van de overheid voor landbouwers op het gebied van communicatie, bewustwording en omschakeling (Baayen et al., 2021, 2022).

Art. 210bis van de GMO-verordening over horizontale en verticale duurzaamheidsinitiatieven geeft veel ruimte

Het hierboven geschetste probleem in de EU-regelgeving ten aanzien van duurzaamheid vindt zijn oorsprong in het EU-Verdrag zelf. Aanpassing van het Verdrag is geen optie en de jurisprudentie van decennia van het Europese Hof van Justitie (HVJ) is een blijvend gegeven. De oplossing moet dan ook worden gevonden in een derogatie (uitzondering) op de vaste regels in de richtlijnen en verordeningen van de Raad en het EP (de secundaire regelgeving) die op de EU-Verdragen (de primaire regelgeving) zijn gebaseerd.

In het kader van de herziening van het GLB is in december 2021 daartoe de GMO-verordening aangepast. Daarbij is een artikel (210bis) toegevoegd om private duurzaamheidsinitiatieven in de landbouw beter mogelijk te maken. Het gaat om een aanmerkelijke verruiming van de mededingingsregels. Landbouwers en hun organisaties mogen, bij derogatie van het kartelverbod, duurzaamheidsdoelen afspreken en realiseren langs de weg van bovenwettelijke duurzaamheidsnormen, samen met ketenpartijen op verschillende niveaus van de productie, verwerking en handel binnen de voedseltoeleveringsketen, waaronder de distributie. Daarvoor geldt wel de eis dat die afspraken bovenwettelijke normen betreffen en onontbeerlijk zijn om het gestelde doel te bereiken. Ook is volledige transparantie nodig ten aanzien van de kosten.

In januari 2023 heeft de EC een concept ter inzage gelegd van de richtsnoeren voor de toepassing van Art. 210bis van de GMO-verordening. Belanghebbenden kunnen in deze consultatie hun reactie geven. Uit het concept blijkt dat de EC een ruimhartige toepassing van het artikel voorstaat. De interpretatie van het begrip "onontbeerlijk" is verruimd ten opzichte van de duiding daarvan bij het kartelverbod van Art. 101 VWEU. De EC beperkt daarnaast de ruimte voor nationale mededingingsautoriteiten om duurzaamheidsovereenkomsten te verbieden. Zij mogen alleen een marginale toets doen op de vragen "wordt de mededinging uitgesloten?" en "worden de doelstellingen van het landbouwartikel van het EU-verdrag (Art. 39 VWEU) in gevaar gebracht?"

De risico's van duurzaamheidsafspraken onder Art. 210bis zijn gering. De richtsnoeren bieden duidelijkheid en partijen kunnen voorgenomen afspraken vooraf laten toetsen door de EC. Er is geen spanning met het vrije verkeer op de interne markt.

Alternatieve opties onder de GMO-verordening kunnen een aantrekkelijk alternatief zijn

Buiten Art. 210bis GMO-verordening om kunnen ook duurzaamheidsafspraken worden gemaakt. Art. 152 en Art. 209 GMO-verordening staan landbouwers en hun organisaties toe om samen op te trekken bij onderhandelingen over prijzen. Door die ruimte te combineren met de mogelijkheid die zij onder Art. 172bis GMO-verordening hebben om waardeverdelingclausules af te spreken, kan ongeveer hetzelfde worden bereikt als met Art. 210bis GMO-verordening, maar dan met ruimte om ook de kosten van naleving van wettelijke duurzaamheidseisen te vergoeden. De eis van onontbeerlijkheid is daarbij niet van toepassing. In sommige gevallen kan dat aantrekkelijk zijn.

Behoud van concurrentie nodig

Het maken van duurzaamheidsafspraken roept vragen op of alle duurzaamheidsaspecten in één index kunnen worden samengenomen, zodat de keuze voor consumenten en beleidsmakers eenvoudig is. Het is echter belangrijk om concurrentie op de verschillende vormen van duurzaamheid in stand te houden, ook tussen supermarkten. Dit is juridisch nodig, maar ook omdat consumenten verschillen in het belang dat zij hechten aan bijvoorbeeld dierenwelzijn, biodiversiteit, milieu of klimaat.

Afspraken tussen supermarkten, foodservice en verwerkers zonder deelname van landbouwers blijven verboden

Onderlinge afspraken van de retail, foodservice of de verwerkende industrie zonder betrokkenheid van landbouwers en hun organisaties zijn onder de EU-regelgeving nog steeds niet toegestaan (kartelverbod), tenzij zij voldoen aan vier voorwaarden in Art. 101, lid 3 VWEU. In de praktijk is dat buitengewoon complex en moeilijk te onderbouwen.

In dit licht zullen de deelnemers aan de lopende gesprekken over het beoogde Landbouwakkoord, inclusief de overheid en de ACM, moeten bewaken dat die gesprekken en de te maken afspraken geen inbreuk maken op het kartelverbod. Dit kan worden bereikt door die afspraken vorm te geven vanuit de derogaties in de GMO-verordening op het kartelverbod.

Algemeenverbindendverklaringen bieden geen soelaas

Een algemeenverbindendverklaring van duurzaamheidsafspraken biedt geen soelaas, omdat deze constructie gepaard gaat met herinstructie van allerlei eisen en voorwaarden uit Art. 101 VWEU (kartelverbod). De ruimte die de GMO-verordening biedt aan erkende producentenorganisaties middels derogaties op het kartelverbod gaat bij een algemeenverbindendverklaring goeddeels weer verloren.

Wetsvoorstel ruimte voor duurzaamheidsinitiatieven biedt geen soelaas

Het Wetsvoorstel ruimte voor duurzaamheidsinitiatieven biedt geen soelaas, omdat de wetgever alleen initiatieven mag consolideren via wetgeving die binnen de EU-mededingingsregels toegestaan zijn. Hooguit kan de wetgever landbouwers en ketenpartijen eventueel verplichten om de mogelijkheden die de GMO-verordening biedt te benutten (bijvoorbeeld de uitrol van Art. 210bis).

Verplicht "bijmengen" van duurzame producten wringt met de Europese regels

De Tweede Kamer heeft bij motie gevraagd om te onderzoeken of een wettelijke verplichting kan worden ingevoerd voor de retail en verwerkende industrie om duurzame Nederlandse producten in te kopen. Een

dergelijke aanpak staat op gespannen voet met het mededingingsrecht van de EU en met het vrije verkeer op de interne markt. De vicepresident van de Raad van State heeft in 2022 in een zwaarwegend advies (een "Voorlichting") op verzoek van de minister van LNV erop gewezen dat lidstaten geen regels mogen invoeren die onder de mededingingsregels voor private partijen verboden zijn. De situatie is anders dan bij biobrandstoffen, waar sprake is van een Europeesrechtelijke verplichting om bij te mengen. Afgezien daarvan is twijfelachtig of verplicht "bijmengen" effectief kan zijn zonder inbreuk te maken op de regels voor het vrije verkeer in de EU.

Bekrachtig goede ontwikkelingen die al gaande zijn

Buiten de mededingingsregelgeving hebben ketenpartijen al modellen ontwikkeld om duurzame productie en inkoop te steunen. Zo kunnen supermarkten met hun margemix de prijs van duurzame producten relatief laag houden en die van gangbare producten hoger. Daarmee wordt duurzaam voedsel voor de consument betaalbaarder en kan de marktvraag naar duurzaam voedsel groeien. Deze benadering biedt perspectief en zou kunnen worden aangemoedigd. Wel is de vraag in hoeverre dit volstaat om de problemen waar de Nederlandse landbouw voor staat in voldoende mate op te lossen.

De overheid kan helpen

De overheid doet er goed aan om het gebruik van de ruimte in de GMO-verordening voor het maken van duurzaamheidsafspraken te stimuleren en te faciliteren. Hiertoe kan de overheid zorgen voor een catalogus aan betrouwbare keurmerken, met bijbehorende tabellen met vergoedingen per duurzame activiteit. De bestaande catalogus voor groenblauwe diensten onder het Agrarisch natuur- en landschapsbeheer (ANLb) kan voor dit doel door de overheid worden uitgebreid voor bijvoorbeeld dierenwelzijn, diergezondheid en niet-grondgebonden veehouderij. Ook kan de overheid op zich nemen om de catalogus en vergoedingen jaarlijks te laten actualiseren door een onafhankelijke instantie.

Koninklijke weg loopt via Art. 210bis GMO-verordening

De Nederlandse traditie van polderen brengt convenanten met zich mee, waarin partijen hun commitment uitspreken aan compromissen. Het probleem van het verdienvermogen van landbouwers laat zich echter alleen oplossen als er afspraken worden gemaakt over wie wat gaat betalen. Zulke afspraken vallen al snel onder het kartelverbod, tenzij de afspraken samenvallen met de openingen die de GMO-verordening biedt. De koninklijke weg is om gebruik te maken van het instrumentarium dat de EU aanreikt voor het verduurzamen van de landbouw, namelijk de mogelijkheid om duurzaamheidsinitiatieven te nemen onder Art. 210bis GMO-verordening. Afspraken daarover zijn wel toegestaan.

De kans die nu geboden wordt, is om duurzaamheidskosten van landbouwers te vergoeden via prijsopslagen. Daarvoor zullen de regels van het spel moeten worden gerespecteerd. Het initiatief mag alleen uitgaan van (verenigingen van) landbouwers, niet van retail, foodservice of industrie. Elke groep landbouwers zal zelf afspraken moeten maken met zijn ketenpartijen en veelal met duurzaamheidsdoelstellingen die anders worden ingekleurd dan bij andere groepen landbouwers. Onderbouwd moet worden dat de afspraken onontbeerlijk zijn. Het is veel werk, maar het is haalbaar en uitvoerbaar. Omdat de afspraken vanuit landbouwers worden gemaakt met hun afnemers, zijn er geen spanningen met het vrije verkeer op de interne markt van de EU.

Randvoorwaarden

Toepassing van die mogelijkheden zal bij een ongewijzigde samenstelling van het voedselpakket³ leiden tot hogere kosten voor voedsel voor de consument. Dit is – in ieder geval op korte termijn – onvermijdelijk om het duurzaamheidsprobleem in de landbouw, zeker in Nederland, op te lossen. Verduurzaming van de landbouw leidt echter ook tot maatschappelijke voordelen en financiële ruimte om burgers te compenseren die door de hogere voedselprijzen in de knel komen. De maatschappij heeft ook dringend behoefte aan een oplossing van de spanningen rond dit dossier.

³ Consumenten zouden in reactie op prijsstijgingen van hun voedsel kunnen kiezen voor aanpassing van hun dieet. Sommige consumenten zullen een voorkeur hebben voor minder duurzame maar goedkopere producten, andere consumenten zullen hun consumptie van (dure) dierlijke producten terugbrengen. Ook kan ten gevolge van prijsstijgingen disruptieve innovatie optreden, zoals vervanging van dierlijke door plantaardige zuivel. In dit rapport wordt uitgegaan van een ongewijzigd dieet.

Samenvatting van de bevindingen

Onderstaande tabel geeft een overzicht van de scenario's voor duurzaamheidsovereenkomsten en hun voor- en nadelen.

| | Scenario A Incrementele verduurzaming vanuit bestaande initiatieven | Scenario B Afspraken onder Art. 210bis GMO- verordening | Scenario C Afspraken onder Art. 152, 172bis en 209 GMO-verordening | Scenario D Wettelijke verplichting tot aankoop van zeker aandeel duurzaam |
|---|---|---|--|---|
| Bouwstenen | | | | |
| <i>Wie</i> | Producenten en afnemers | Producenten en ketenpartijen | Producenten en ketenpartijen | Ketenpartijen |
| <i>Duur</i> | Langjarige contracten | Langjarige afspraken | Langjarige afspraken | Permanent |
| <i>Ambitieniveau</i> | Bescheiden tot substantieel | Hoog (juridisch vereist) | Naar keuze (vrij) | Overheid beslist |
| <i>Formule</i> | Keurmerk (bestaand of nieuw) of bedrijfsformule | Keurmerk (bestaand of nieuw) of bedrijfsformule | Keurmerk (bestaand of nieuw) of bedrijfsformule | Overheid beslist |
| <i>Kostenberekening</i> | Onderhandelbaar tussen partijen | Volledige transparantie vereist | Onderhandelbaar tussen partijen | Overheid beslist |
| <i>Prijsopslag duurzame productie</i> | Ja | Ja | Ja | Eventueel |
| <i>Wie betaalt</i> | Afnemer en consument (indirect) | Ketenpartijen en consument (indirect) | Ketenpartijen en consument (indirect) | Ketenpartijen, meer dan de consument |
| <i>Mechanisme</i> | Verschuivende margemix | Ketenafspraken | Ketenafspraken | Inkoopverplichting |
| <i>Interne markt</i> | Compatibel, nauwelijks weglekeffecten | Compatibel, nauwelijks weglekeffecten | Compatibel, nauwelijks weglekeffecten | Niet compatibel en/of grote weglekeffecten |
| <i>Infasering</i> | Nudging van consument naar duurzame producten | Stapsgewijze invoering duurzaamheidsnormen | Stapsgewijze invoering duurzaamheidsnormen | Oplopende inkoopplicht t.a.v. aandeel duurzaam |
| Voor- en nadelen | | | | |
| <i>Vrijwilligheid</i> | Vrijwillig | Vrijwillig | Vrijwillig | Wettelijke verplichting |
| <i>Reikwijdte</i> | Wettelijk en bovenwettelijk | Alleen bovenwettelijk | Wettelijk en bovenwettelijk | Overheid beslist |
| <i>Uitvoerbaarheid</i> | Goed | Complex maar werkbaar | Relatief eenvoudig | Weerstand en problemen met handhaving |
| <i>Rechtmatigheid</i> | Zeker | Zeker | Waarschijnlijk (combinatie met Art. 172bis) | Onwaarschijnlijk |
| <i>Randvoorwaarden</i> | Geen | Afspraken moeten strikt onontbeerlijk zijn | Bij Art. 152 gezamenlijke afzet vereist | Gelijke behandeling Nederlands en buitenlands product |
| Effectiviteit | | | | |
| <i>Duurzaamheidsdoelen</i> | Beperkt tot middelmatig (afhankelijk van ambitie afnemer en consument) | Hoog (juridisch verplicht) | Middelmatig (tussenweg) | Middelmatig (weglekeffecten, ontsnappingsgedrag) |
| <i>Verdienvermogen</i> | Beperkt tot middelmatig (schaalprobleem) | Hoog (volledige vergoeding meerkosten) | Middelmatig tot hoog | Middelmatig (weglekeffecten, ontsnappingsgedrag) |
| Haalbaarheid | Uitstekend | Uitstekend | Waarschijnlijk goed | Waarschijnlijk slecht |

Aanbevelingen

Het onderzoek geeft aanleiding tot de volgende aanbevelingen:

- i. Erken en bevorder als overheid de bestaande inspanningen van supermarkten en industriële verwerkers om de landbouw te helpen verduurzamen door middel van langjarige contracten met Nederlandse landbouwers en vergoeding van hun meerkosten voor duurzame productie. Dit als deel van een bredere mix van instrumenten voor verduurzaming, waaronder normering en beprijzing van milieu-emissies en steun van de overheid voor landbouwers op het gebied van communicatie, bewustwording en omschakeling.
- ii. Zet in op landelijke uitrol van Art. 210bis GMO-verordening om de meerkosten van bovenwettelijke duurzame productie te kunnen vergoeden door middel van een prijsopslag. Respecteer daarbij dat de duurzaamheidsafspraken moeten uitgaan van (verenigingen van) landbouwers, in overleg met voor hen relevante ketenpartijen, maar niet mogen worden gemaakt door de retail, foodservice of verwerkende industrie zonder deelname van landbouwers.
- iii. Faciliteer als overheid de duurzaamheidsafspraken, met name door de bestaande vergoedingensystematiek die de overheid voor het GLB onderhoudt, beschikbaar te stellen voor duurzaamheidsafspraken en daartoe te verbreden met dierenwelzijn, diergezondheid, reductie van pesticiden- en antibioticumgebruik etc. (elementen die ontbreken in de bestaande vergoedingentabellen van het GLB). Ga uit van bedragen waarbij de marginale Nederlandse aanbieder uit de kosten komt (zoals bij de catalogus groenblauwe diensten van het ANLb) en dus niet van gemiddelden waar een deel van de landbouwers tekort aan zal hebben. Zorg dat de kostentabellen waar nodig per sector en gebied worden gespecificeerd en laat die tabellen jaarlijks op kosten van de overheid bijwerken door een onafhankelijke instantie.
- iv. Benut aanvullend daaraan de ruimte in Art. 152 en Art. 209 GMO-verordening om de meerkosten van wettelijk vereiste duurzame productie te vergoeden door middel van een prijsopslag. Benut daarbij ook het feit dat zulke afspraken niet onontbeerlijk hoeven te zijn en relatief makkelijk te onderbouwen.
- v. Zie af van een wettelijk verplichte "bijmenging" van duurzame producten, gezien het negatieve advies van de Raad van State over regelgeving buiten de kaders van de derogaties in de GMO-verordening die het nuttige effect van de mededingingsregels ondermijnt. Zet desgewenst in op reparatie door een Europeesrechtelijke grondslag voor zo'n verplichting op te laten nemen in de komende Verordening Duurzame voedselsystemen.
- vi. Stimuleer landbouwers om zich te verenigen in al dan niet erkende producentenorganisaties en coöperaties voor duurzaamheid. Dit versterkt hun onderhandelingspositie en maakt het hen mogelijk om de derogaties in de GMO-verordening op het kartelverbod te benutten.
- vii. Breng met behulp van minimumeisen aan keurmerken en benchmarking orde aan in het woud van duurzaamheidskeurmerken, maar respecteer dat diversiteit qua doelstellingen nodig is, zowel uit oogpunt van mededinging als uit oogpunt van keuzevrijheid van de consument.

Lexicon

Agricultural nature and landscape management - Part of the system by which provinces implement the CAP's agri-environment measures, subsidise conservation and development of (agricultural) natural areas and landscapes, targeting habitats of species of international importance, co-financed from the second pillar of the CAP and implemented through a collective, area-based approach.

Common Agricultural Policy – System of EU rules and subsidies regarding agriculture, set out in the Common Market Organisation Regulation (1308/2013), the Strategic Plans Regulation (2021/2115) and the Horizontal Regulation on the financing, management and monitoring of the CAP (2021/2116).

Conditionality - System under the Strategic Plans Regulation in which beneficiaries receive the full CAP basic income support only if they meet basic environmental, climate, public health, animal and plant health and animal welfare standards and consisting of statutory management requirements (SMRs) and good agricultural and environmental condition (GAEC) standards.

Council – Council of the European Union which is the decision-making body for the Member States of European Union, presided over by the various Member States in turn for a period of six months and which exercises legislative power, usually with codecision of the European Parliament.

European Commission - Politically independent institution that promotes the interests of the EU, proposes new legislation, supervises the implementation of the tasks set out in the treaties and decisions of the European Parliament and the Council and is the executive body of the Community.

European Parliament - Elected representative body of the EU that can approve, amend or block legislative proposals and other plans of the European Commission.

European Union - An association of states consisting of 27 European countries that operates through a system of independent supranational institutions and decisions concluded intergovernmentally by Member States.

Key Performance Indicator – Indicator for a factor over which a farmer has direct influence and which is crucial to achieve set goals and targets

National Strategic Plan – Overarching plan of the Member State for the elaboration and implementation by the Member State of the CAP, based on its specific national and regional objectives and needs, in the form of targets for the achievement of CAP objectives, interventions enabling the achievement of the targets and allocated financial resources.

Third countries - Countries outside the European Union.

Abbreviations

| | |
|----------------|--|
| ACM | Authority for Consumers and Market (the national competition authority) |
| AoA | Agreement on Agriculture |
| ANLb | Agricultural nature and landscape management programme (a CAP programme) |
| CAP | Common agricultural policy of the EU |
| CBD | Convention on Biological Diversity |
| CBL | Centraal Bureau Levensmiddelenhandel (an umbrella organisation of retailers) |
| CMO | Common market organisation, a part of the CAP |
| CODEX | Codex Alimentarius |
| EC | European Commission |
| ECJ | European Court of Justice |
| EOR | Extension of rules |
| EP | European Parliament |
| EU | European Union |
| FAO | Food and Agriculture Organisation |
| IBO | Interbranch organisation |
| IPPC | International Plant Protection Convention |
| I&W | Ministry of Infrastructure and Water |
| KPI | Key performance indicator |
| LNV | Ministry of Agriculture, Nature and Food Quality |
| NSP | National Strategic Plan |
| OIE | World Organisation for Animal Health |
| PBL | Planbureau voor de leefomgeving (a governmental policy research organisation) |
| PO | Producer Organisation |
| RDA | Raad voor Dierenaangelegenheden (the national council for animal issues) |
| RLI | Raad voor de leefomgeving en infrastructuur (the national council for the environment) |
| SGEI | Services of general economic interest |
| SPS | Sanitary and Phytosanitary Agreement |
| TEU | Treaty concerning the European Union |
| TFEU | Treaty concerning the functioning of European Union |
| WECR | Wageningen Economic Research |
| WENR | Wageningen Environmental Research |
| WFD | Water Framework Directive |
| WTO | World Trade Organisation |
| WUR | Wageningen University & Research |

1 Introduction

1.1 Problem analysis

1.1.1 Societal and political developments as regards sustainable agriculture

Conflicting interests

The agriculture in the Netherlands is characterised by innovation, intensification and economies of scale, leading for the EU and even the world in many areas. At the same time, Dutch agriculture has major sustainability problems in relation to climate, environment, nature, biodiversity, landscape, animal welfare and human health.⁴ The cause is the tension between production optimisation and the negative external effects of that production on the living environment, the welfare of farmed animals and the health of people in the vicinity of farms. In a small country like the Netherlands with high population density but also high livestock density, intensive agriculture and horticulture, high land prices and important nature areas, the different interests quickly come into conflict. Many times there is also seemingly no way back from choices once made, which is called path dependency (Vink & Boezeman, 2018). Agricultural practice increasingly clashes with requirements from broader regulations on sustainability, and compliance with those regulations is increasingly being enforced in court (nitrogen emission issues, Urgenda ruling).

However, more sustainable farming comes at the expense of economic returns, while competitors in other countries often do not have to meet these requirements⁵ and margins are narrow. This has created a lock-in situation for which - within current systems - solutions can hardly be found anymore, unless significant additional resources are released to cover the costs of sustainable operations (Baayen et al., 2022). This will require all parties in the chain to contribute, i.e. in addition to farmers themselves, suppliers, traders, industry, retail, consumers (through their purchases), citizens (through taxes) and banks.

Globalisation and multilateralism as drivers

A major driver of the problems is globalisation. Whereas Dutch agriculture was once more or less circular and land-bound, it is currently part of a global production network, in which raw materials, starting materials, plants, animals and products zigzag across the planet as and when economically advantageous. The external effects of Dutch agriculture thus affect not only the Netherlands itself, but also other countries. In addition, nutrient cycles are disrupted on a global scale, with nutrients accumulating in our country in the form of applied manure, for example, due to the supply of animal feed raw materials (soy) from other continents. The government has therefore been committed to circular agriculture for several years now (Ministry of Agriculture, Nature and Food Quality, 2018).

Added to this, the EU has committed to globalisation of trade and multilateralism as a primary source of prosperity. This was obvious as the EU is, at its core, a multilateral treaty between European countries. The EU is committed to a well-functioning WTO and conformity to multilateral agreements.⁶

In line with this, the EU has placed great emphasis on countering distortions of competition between Member States as they would hamper the proper functioning of the single market. The TFEU contains strict rules on

⁴ For example particulate matter issues and animal diseases that can spread to humans (zoonoses).

⁵ Lighter environmental requirements often apply to agriculture outside Europe, and these requirements are often easier to meet or the cost of compliance is lower there than in the Netherlands. Within the EU, Member States also apply different requirements, due to different interpretations of the space offered by EU agriculture regulations. Enforcement often leaves much to be desired, also in the Netherlands. The perception is thus that there is no level playing field, whereby for the Netherlands some argue that our country is too lax with its environmental legislation and others that our country is too far ahead.

⁶ Examples include the WTO agreements on agriculture (AoA) and sanitary and phytosanitary matters (SPS), as well as the standard-setting conventions IPPC, OIE and CODEX.

state aid and competition, and European agricultural policy (CAP) has been shaped along those same lines.⁷ Those rules are based on an economic logic in which the interests of consumers and free competition are central and problems with negative externalities must either be solved by public authorities through regulation (standard-setting) or by increasing consumers' willingness to pay more for goods for the sake of sustainability and fair trade. Providing financial support is bound by strict and, in practice, quite prohibitive frameworks.

Tensions within the EU legal framework

As a result, it is extremely difficult to promote sustainable agriculture. According to economic theory, if governments set stricter sustainability standards, while this will promote innovation so that sustainability is achieved increasingly efficiently in competition, national agriculture does risk losing the competitive battle with other countries. For this reason, countries, as well as the EU itself, prefer to achieve sustainability goals through subsidies. The downside is that the TFEU assumes that the polluter pays for negative externalities, so subsidies to pollute less are problematic. The EC has tried to solve this with a system where subsidies may be provided to pollute less, but not for meeting standards in national or EU regulations (Baayen et al., 2022). Moreover, such subsidies should only cover either the costs incurred in carrying out more sustainable activities or the income foregone as a result of failing to pollute. Only in highly exceptional cases may aid be given for meeting legal obligations, especially in relation to Natura 2000 areas and the WFD (Baayen & Van Doorn, 2020; Baayen et al., 2021, 2022) and, as far as the EC is concerned, also on a transitional basis, such as for halving the use and risk of pesticides (EC, 2022c). As a result, sustainability is not very attractive for farmers because the desired activities are remunerated, but without a margin for income⁸, while it requires a different business operation that usually involves more risk. By assuming standard amounts that cover costs for each farm and not averages, this can be addressed to some extent (Baayen & Van Doorn, 2020; Baayen et al., 2021), but the scope is limited.

Role of consumers and competition rules

On top of this, consumers are reluctant to pay higher prices for agricultural products (meat, vegetables, fruit, flowers and compound food industry products) (Van Galen et al., 2020, 2021a, 2021b, 2022a, 2022b). However, without sufficient consumer demand for sustainable products, the farmer receives too low a price to produce sustainably (Taskforce Verdienvermogen Kringlooptlandbouw, 2019).⁹ Education and other forms of communication about the importance of sustainable production are not sufficiently effective to solve this problem (ACM, 2022e; Logatcheva, 2020, 2022; Van Galen et al., 2020, 2021a, 2021b, 2022a, 2022b). However, it is virtually impossible to force consumers or industry to buy (more expensive) sustainable products. Competition rules, in particular Art 101 TFEU, prohibit making sustainability agreements between farmers or between chain parties unless strict conditions are met. In relation to the cartel prohibition of Art. 101 TFEU, one of the conditions is that the agreements must result in consumers receiving a fair share of the benefit of the agreement. Since 2004, the EC has interpreted this in the sense that sustainability agreements require consumers to be willing to pay the extra cost for the stated goal and result (Candel, 2021). As a rule, consumers are not willing to do this and sustainability agreements are therefore not easy to achieve. Moreover, non-economic factors are difficult to qualify in terms of benefits (Malinauskaite & Buğra Erdem, 2023). Recently, the EC has been pushing for space to include collective benefits (EC, 2022g, 2023).

Incidentally, there is a case for the EC's strict line on economic grounds. Schinkel & Treuren (2020) argue that companies in competition alone tend to be more sustainable than together, and that with such

⁷ Services of general economic interest (SGEI) are an exception to this to some extent. The term covers both economic activities and non-economic services; there is no specific EU legislation for the latter; as a starting point, they are also not covered by the Treaty rules on the internal market and competition. The basis for SGEIs lies in Art. 14 and Art. 106(2) TFEU and in Protocol No 26 to the TFEU. Within certain limits, Member States are allowed to entrust services to companies outside the state aid rules, e.g. for sustainability objectives, provided they are sharply defined, transparent in terms of costs, based on cost compensation with room for a reasonable profit margin and based on averages for healthy companies (Altmark judgment) (EC, 2013; Ministry of the Interior and Kingdom Relations, 2014). However, competition rules sometimes remain applicable. In the Netherlands, this has been used by the government in the context of nature management, for example.

⁸ For services of general economic interest in relation to sustainability, a reasonable profit can incidentally be part of the compensation, even though it is in principle capped to the actual costs (EC, 2013). In agricultural nature and landscape management within the CAP, this space also exists (Baayen et al., 2021). In practice, however, provincial governments reimburse only 84% of the standard amounts, which is obviously undesirable to promote sustainability.

⁹ In this context, see also organic farmers' criticism of supermarkets' supposedly disproportionate margins on processed organic products, <https://www.rtlnieuws.nl/nieuws/nederland/artikel/5364732/biologisch-eten-uit-potje-onnodig-duur-door-hogere-marge>.

restrictions on competition there is a risk of 'cartel greenwashing', i.e. minimal sustainability for maximum price premium. They point out that while companies like to be perceived as sustainable, initiatives to do so tend to be minimal, just enough for self-promotion, when consumers cannot properly identify the nature of their products. This makes it necessary for the competition authority to be on top of ensuring that the initiative leads to sufficient sustainability and, in the process, does not increase prices more than strictly necessary. The competition authority has to take political decisions, which is fundamentally undesirable.¹⁰

Also Inderst (2022), in a study for the EC on sustainability agreements, argues that European competition law does not stay away from the issue of unresolved harm to the living environment without reason. This is inextricably linked to citizens' preferences about the importance of the environment versus prosperity, where those citizens themselves often do not act according to their moral views, but think others should: "Antitrust law and its enforcement are typically not concerned with the problem of non-internalised externalities and thereby with consumer preferences over the choices of other consumers." Decision-making on what may be asked of others in terms of sustainability belongs in the political process and should not be regulated through sustainability agreements as an exception to competition law (Inderst, 2022).¹¹ According to this author, an exception is conceivable for damage to the environment¹², but not for other types of negative externalities such as in the areas of animal welfare, social justice and fair trade (Inderst, 2022, p. 40).

As for animal welfare, on the other hand, Art. 13 TFEU grants animal welfare a right of its own that must be taken fully into account:

"In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage."

Its nature is thus different from social justice and sustainability in relation to the environment.¹³ In policy-making, animal welfare should be weighed from general societal views and perceptions, not from individual consumer perceptions such as willingness to pay (Visser & Woltjer, 2022).

¹⁰ In addition, Schinkel & Treuren point out that environmental pollution and inadequate production of public goods is not so much market failure as government failure (failure to implement solutions that have been known for decades, in particular standard setting and enforcement). According to them, being able to point to self-regulatory initiatives is an ideal excuse for central government to further escape from its responsibilities and shift its public duty to competition authorities. The authors see allowing sustainability agreements as a mandate to private cartels, with a cartel price premium, to tax the private good in order to then compensatingly finance a public good - a cleaner environment (Baayen et al., 2022).

¹¹ Inderst (2022), p. 42: "[...] should a group of consumers be given the right to 'vote' on issues, such as animal welfare or fair trade, not only with their willingness-to-pay regarding their own consumption but also with their expressed preferences over the consumption of others? This discussion highlights a tension between the maximization of consumer welfare, including preferences over the choice of other consumers, and individual rights and the freedom to choose. Such tension is at the heart of many societal decisions. Through the political process, in particular, citizens express their preferences for collective choices that constrain individual liberties or that impose certain costs (e.g., in the form of taxes) on individual choices while still other choices are subsidized. [...] When an agreement that restricts choices is cleared based on the expression of preferences over the choices of others, such a 'vote' necessarily takes place outside of the political process, as already noted. Prima facie it may thus risk not conforming to the balance that society has already struck between welfarism and individual liberties."

¹² Inderst (2022), p. 5: "Assessing an agreement under [...] a collective consumer welfare analysis, which includes preferences over the choices of others, may lead to particularly large distributional implications. It also risks interfering in the market and reducing individual consumer sovereignty based on an expression of preferences over the choice of others that is typically legitimized by a political process and decision-making but that is not typical of market interactions. Such reservations are of less relevance with respect to environmental externalities, for which I therefore discuss additional tools as the benefits from a reduction of such externalities typically cannot be measured by consumers' choices within the market."

¹³ In relation to the living environment, Art. 191 TFEU requires EU policies to contribute to preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; and promoting at international level measures to deal with regional or worldwide environmental problems, and in particular combating climate change (paragraph 1). In its environmental policy, the Union shall aim at a high level of protection, taking into account the diversity of situations in the various regions of the Union. Its policy is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay (paragraph 2). In preparing its policy on the environment, the Union shall take into account [...] the potential benefits and costs of action or lack of action (paragraph 3). The wording 'taking full account' of animal welfare goes beyond 'taking into account benefits and burdens' of policy options. That space is not provided for animal welfare, which is reflected in the Netherlands in the Animals Act and is currently the subject of political debate due to its economic consequences (see section 4.1.1).

Shifting views and rules

The emphasis in EU legislation on consumer interest over the public interest in weighing sustainability in relation to competition is not a law of nature, but a choice. Australia's constitution, for instance, actually prioritises general societal views over individual consumer preferences and their willingness to pay for sustainability (Inderst, 2022). The EC itself also once used this logic, but replaced it in 2004 with a narrower interpretation of consumer interest when the assessment of concrete cases passed from the EC to individual Member States with the introduction of Regulation 1/2003 (Candel, 2021; Amttenbrink & Vedder, 2022). Since then, national competition authorities have taken the lead in stretching competition rules in relation to sustainability, more so than the EC itself, from a pragmatic legal perspective. In doing so, however, there have been wide differences in approach, ranging from national guidance documents to, among other things, room for experimentation and statutory regulations. The Dutch ACM had a pioneering role (Malinauskaite & Buğra Erdem, 2023). With the European Green Deal, the EU position started to shift (EC, 2019, 2020c; Badea et al., 2021). State aid rules have been broadened¹⁴ and competition rules are also being broadened, notably through the guidelines on horizontal cooperation agreements (EC, 2022g, paragraphs 588-609) and those on sustainability agreements in agriculture (EC, 2023). Regarding the CAP, additional space was created in the Strategic Planning Regulation (2021/2115) in the form of the eco-schemes. An Article 210a was inserted in the CMO Regulation (1308/2013), which allows for horizontal and vertical sustainability agreements. This significantly expanded the range of exceptions (derogations) to the cartel prohibition of Art 101 TFEU for agriculture. The pre-existing derogations did provide room for certain types of horizontal and vertical agreements, but to what extent sustainability agreements would also be allowed under them remained uncertain (Agricultural Markets Task Force, 2016). Furthermore, the EC intends to introduce a new Regulations for sustainable food systems, for which a proposal will be released in 2023 (EC, 2021b, 2021c, 2022d).

For a detailed analysis of the tension between classical and modern "green" interpretations of EU competition law, see Inderst (2022) and Malinauskaite & Buğra Erdem (2023).

Fundamental political shifts

The search for more space for sustainability in agriculture is part of a global political shift. Multilateralism is on the wane. The WTO is lamed by the US blocking the appointment of panellists for years. The world is disintegrating into power blocs that do not hesitate to use economic, political and sometimes military means to favour their own position and business. Strategic support for national interests hardly allows itself to be curbed by agreements and treaties under the WTO or the United Nations. It is notable here that the regained space in the area of state aid and competition is also being used for sustainability. US President Biden's Inflation Reduction Act embodies his commitment to climate action, in the form of large-scale support to national industry. The European Green Deal aims to make the EU's economy more sustainable and is also accompanied by widening state aid for European companies and wider competition rules. In doing so, Europe and the US criticise each other (as well as the People's Republic of China) for distorting competition.

Netherlands

The Rutte 4 government's support in the Netherlands of almost €25 billion for making agriculture more sustainable because of the nitrogen problem fits this pattern. So does the search for space to make sustainability agreements in the chain in order to offer farmers guarantees that products from sustainable farming will be purchased at a fair price (an agricultural agreement is being sought for this purpose), in which, as far as the government is concerned, chain parties and banks should also make a significant contribution. The former (an extra EUR 25 billion) is potentially at odds with state aid rules, the latter (agreements on improving farmers' earning capacity) with competition rules.

This report

The scope for helping Dutch agriculture become more sustainable through CAP and state aid has been addressed in previous reports (Baayen & Van Doorn, 2020; Baayen et al., 2021, 2022). This report describes

¹⁴ The Agricultural Exemptions Regulation (2022/2472) includes from 1 January 2023 aid for animal welfare commitments, for mitigating disadvantages related to Natura 2000 areas, for agri-environmental commitments (up to a certain threshold) and for organic farming. The Guidelines for state aid in the agriculture, forestry and rural areas sector (EC, 2022f) now also allow aid for agri-environmental commitments going beyond what is required by law from 1 January 2023, subject to mandatory notification of the aid. Support may also be granted for a transitional period of 24 months for new national rules in relation to fertilisers and plant protection products that go beyond the minimum requirements of Union law.

the scope for private parties to make agreements for sustainability and fair remuneration of farmers¹⁵ and what is needed for such agreements to work well.

Table 1 The position of national competition authorities in EU Member States as regards sustainability (copied from Malinauskaite & Buğra Erdem, 2023).

| Positive action approach | Cautious approach | Reserved approach | Undecided approach |
|--------------------------|-------------------|-------------------|--------------------|
| Austria | Belgium | Czechia | Croatia |
| France | Bulgaria | Germany | Cyprus |
| Greece | Finland | | Denmark |
| Hungary | Ireland | | Estonia |
| Spain | Poland | | Italy |
| The Netherlands | Portugal | | Latvia |
| | Romania | | Lithuania |
| | Sweden | | Luxembourg |
| | | | Malta |
| | | | Slovakia |
| | | | Slovenia |

1.1.2 Questions addressed and aim of the research carried out

The aim of this study was to explore the possibilities offered by EU regulations to conclude horizontal and vertical chain agreements (between farmers and chain parties respectively) for the benefit of nature and landscape, the environment, climate, animal welfare and enhanced earning capacity of the farmer. This concerns the new space provided by Art. 210a of the CMO Regulation, as well as the space that was already available within that Regulation or under other EU legislation. The assignment was also to identify which of these opportunities are promising and could be realised as a priority to achieve the Dutch nature, water, climate and animal welfare goals.

The questions to be addressed were the following:

1. How do horizontal and vertical sustainability agreements differ in essence from other chain agreements, such as sustainability labels, agreements within cooperatives and between cooperatives and suppliers or buyers, agreements within producer organisations and (inter)sectoral organisations and extension of such rules (EORs)?
2. What are the main agricultural chains in the Netherlands, what are their actors, what form could sustainability agreements within these chains take, how and to what extent would these agreements lead to enhanced earning capacity of the farmer and who would bear the costs?
3. How could sustainability agreements be monetarised with e.g. shadow prices, what additional instruments would be needed (e.g. for landscape and animal welfare) and how does this work practically under Art. 101 TFEU and Art. 210a of the CMO Regulation?
4. How can a system of sustainability agreements based on Art. 172a and Art. 210a of the CMO Regulation function within the EU internal market?
5. What possibilities does the government have to facilitate or impose private sustainability agreements, national or area-specific, within the framework of the National Rural Area Programme, and to what extent is additional commitment required? How does a voluntary system differ from a government-imposed contribution (sensu Rutte 4 coalition agreement) or a contribution imposed at the request of private parties (EOR or any regulations sensu the government's legal proposal for a Sustainability Initiatives Act)?
6. What knowledge gaps arise, how can they be filled and what is a priority in this respect?

¹⁵ Questions about fundamental changes in the food system and the long-term prospects of sectors and chains are not addressed in this report. From a system transition perspective, the loss of unsustainable activities may be partly necessary. The approach of this report is to consider how solutions can be found within the current agricultural system.

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7. Based on the above: which horizontal and vertical chain agreements are most promising and/or need priority action and by whom (which parties)?

1.2 Methods

For the study, relevant EU legislation and literature were reviewed and recent developments in European competition law were identified. Additionally, interviews were held with relevant actors, including farmer organisations, chain parties, retailers and public authorities where necessary to validate findings. The results were discussed, supplemented and validated within the project team. Sources are accounted for in the bibliography at the end of the report.

The research was conducted by the first author, with input from and in interaction with the other authors who each contributed their specialisms.

1.3 Structure of this report

Chapter 1 of this report provides an introduction, taking account of societal and political developments, of which the changing EU competition law in relation to sustainable agriculture and sustainability agreements is an expression. The research questions and objectives of the study are then given.

Chapter 2 discusses the goals pursued by sustainability agreements. These include climate, environment, nature and biodiversity, but also animal health and welfare and good earning capacity for farmers.

Chapter 3 describes EU legislation and practice regarding sustainability agreements. EU terminology is covered, the types of sustainability agreements with their opportunities and limitations, and the role of the EC and the European Court of Justice. Standing practice is also portrayed, with recognised and non-recognised producer and interbranch organisations and existing forms of chain agreements.

Chapter 4 deals with legislation and practice in the Netherlands. In addition to the existing national regulations, it discusses the proposal of the Netherlands' government for a legal act on Sustainability Initiatives and the role of the national competition authority (ACM). The main chains are described and an overview of common sustainability labels is given. The functioning of retail with regard to pricing for sustainability and sustainability labels is discussed. Existing forms of chain agreements are outlined and the Agricultural Agreement on which the government is working is also discussed.

Chapter 5 outlines the responsibilities of the various chain actors, in particular consumers, producers, chain parties and banks, but also governments.

Chapter 6 describes possible solutions for rendering Dutch agriculture more sustainable with the help of sustainability agreements within the European legal frameworks. The scenarios discussed are (i) incremental sustainability from existing initiatives, (ii) mandatory procurement of sustainable products by industry and retail, and (iii) agreements on systematic compensation of the extra costs of sustainable production between farmers and chain parties.

Chapter 7 outlines the preconditions for a well-functioning system of sustainability agreements, namely a healthy earning capacity of farmers and purchasing power maintenance for consumers.

Chapter 8 presents the conclusions from the study, together with recommendations on how to proceed in realising sustainability agreements.

The report includes a literature list and annexes with key articles from European legislation (Annex 1), key points from the EC's draft guidelines for horizontal sustainability agreements (Annex 2) and examples of permitted and prohibited sustainability agreements (Annex 3).

2 Objectives as regards sustainability and earning capacity

2.1 Climate, environment, nature and biodiversity

Sustainability in agriculture comprises a large number of objectives that differ considerably from each other, but are mostly interrelated. This section discusses the objectives with respect to climate, environment, nature and biodiversity. An exhaustive description of these can be found in Baayen et al. (2021), from whom the outline below is taken. Goals regarding animal health and welfare are discussed in the next section.

2.1.1 Climate

Mitigation and adaptation

Climate-related goals concern, on the one hand, mitigation of climate change (how do we prevent further global warming) and, on the other, adaptation to that change (how do we adapt to that change in a timely manner). Sustainability agreements will basically involve measures to mitigate (slow down) climate change.

Reduction of greenhouse gas emissions

First of all, measures are needed to reduce greenhouse gas emissions. For livestock farming, this mainly concerns methane and nitrous oxide emissions. The Netherlands' Climate Agreement (2019) sets a reduction target for livestock farming of 1.2 megaton to 2.7 megaton CO₂-eq, of which at least 1.0 megaton reduction for methane. For this, a variety of measures are conceivable, such as precision fertilisation, low-emission stalls, life extension of dairy cattle, integrated approach to methane and ammonia emissions, research into nitrification inhibitors, sustainable stall systems in pig farming, fertiliser replacement and knowledge and development, in addition to a clean-up of pig farming (Baayen et al., 2021). It also involves measures to reduce greenhouse gas emissions from the peatland area. Dewatering oxidises the peat, releasing the stored carbon to the air as CO₂. Here, reductions in these emissions can be achieved relatively quickly by raising groundwater levels (Baayen et al., 2021) and this is also necessary given the disproportionate contribution of peat oxidation to greenhouse gas emissions (Andrés et al., 2022). For this reason, the government decided in 2022 to structurally raise the groundwater level in the peatland area to a depth of up to 20 cm to 40 cm below ground level (Ministerie van I&W, 2022).

Carbon fixing

Mitigation of global warming can also be achieved by sequestering CO₂ in agricultural soils and in above-ground parts of plants (wood and other biomass). The potential for carbon sequestration in soil is similar to the potential above ground. Several studies have shown that as much carbon can be stored in soil under grassland as under forest (D'Hose & Ruyschaert, 2017; Andrés et al., 2022). Importantly, once sequestered carbon is not released as it is, which in terms of soil happens when ploughing, and in terms of above-ground biomass when harvesting (food) and burning (wood).

The Netherlands' Climate Agreement (2019) commits to increasing soil organic matter content, reduced formation of nitrous oxide in these soils during fertilisation, more sustainable cropping plans with less intensive tillage, more catch crops and green manures, more protein and rest crops, use of organic soil improvers, and promotion of organic and circular fertilisers (Baayen et al., 2021). Regarding carbon sequestration in wood, the Forestry Strategy (LNV and joint provinces, 2020) commits to reducing deforestation in Natura 2000 areas, climate-smart management, design of national lands and construction and conservation of landscape elements (Baayen et al., 2021).

Besides measures aimed at business operations in livestock and arable farming, energy conservation is an important goal, along with renewable energy generation. This is where greenhouse horticulture has a special task.

Key performance indicators

Reijs et al. (2022) reduce the climate-related targets for the key performance indicator system to be developed for circular agriculture to a KPI for greenhouse gas emissions, expressed in CO₂ equivalents per animal or per hectare. Other aspects such as carbon sequestration and reduced tillage come back under the KPIs of soil organic matter and soil quality.

2.1.2 Environment

Types of problems

Environmental sustainability goals are diverse. Important goals include the reduction of substances that lead to fertilisation of nature, such as ammonia and nitrous oxides, restoring the nutrient balance in agriculture, ensuring the quality of ground and surface water, reducing the use of plant protection products and other pollutants, and restoring soil quality. For an overview, see Baayen et al. (2021), for translation into critical performance indicators see Reijs et al. (2022).

Ammonia and nitrous oxides

Restoration of deteriorated nature areas in the Netherlands requires, in many cases, a significant reduction of the nutrient surplus, caused mainly by emissions of ammonia and nitrous oxides from livestock farming, traffic and industry. Reducing these emissions is high on the political agenda and legally unavoidable as a result of the Habitats Directive, the Nature Protection Act and a series of rulings by the European Court of Justice, the Netherlands' supreme court (the Raad van State) and lower courts. It also concerns air pollutants sulphur dioxide, particulate matter and NMVOCs. Of these, particulate matter from livestock farming is harmful to public health.

Nitrate and phosphate

Use of fertilisers, both organic manure and artificial fertiliser, can lead to leaching of nutrients to ground and surface water. This can lead to algal growth (eutrophication) and pollution of drinking water. Agriculture is the main source of pollution of ground and surface water with nitrogen (nitrate) and phosphorus (phosphate), even though the environmental load has decreased over the years. Because of the WFD, the quality of all ground and surface water must meet high standards by 2027. This is a big task that cannot be met easily.

Pesticides

Another source of groundwater and surface water pollution is pesticides (also known as plant protection products). The European Green Deal has high ambitions regarding the reduction of the use and risk of plant protection products (EC, 2022c). The task is also considerable for the Netherlands. The government is committed to a sharp reduction of the number of violations of the environmental quality standards for crop protection products in surface water and drinking water and virtually no emissions from open cultivation by 2030. Closed crops should already be free of emissions now.

Soil quality

Soil quality involves physical, chemical as well as biological aspects. There is a close connection with climate (carbon sequestration resp. emissions), but also disease resistance (without a biome, resistance to diseases and pests is lower).

Key performance indicators

Reijs et al. (2022) reduce the environmental targets for the key performance indicator system to be developed for circular agriculture to KPIs for nitrogen balance, ammonia emissions, phosphate balance, environmental impact with plant protection products, soil organic matter and soil quality. The focus of the KPI system is thus mainly on environmental factors.

2.1.3 Nature and biodiversity

Worldwide decreases

The state of biodiversity is alarming worldwide, with sharp declines in insect and mammal numbers and habitat loss (EC, 2020b). To reverse the decline, efforts are needed to protect special animal and plant

species and habitat types. In the EU, such protection is realised through the Birds and Habitats Directives, implemented in the Netherlands in the Nature Conservation Act. Globally, it has been agreed that 30% of the world's land, oceans, coastal areas and inland waters should be protected by 2030 (CBD, 2022), which is in line with the EU's commitment with the European Biodiversity Strategy (EC, 2020b). The Netherlands has relatively few protected nature areas and even those areas are largely in poor condition, with agriculture being the main pressure factor, more so than urban development or climate change (Baayen et al., 2021; Van Hinsberg et al., 2020).

Problem complexity

What is difficult about the issues of nature and biodiversity is that they involve an extremely broad spectrum of habitats and species, with their state influenced by a large number of pressures. This means that it is often unclear which species and habitats should be protected and how. Moreover, there are trade-offs: what is good for one species may be bad for others, as each species has its own habitat and preferences. Species live together in ecosystems, in which they depend on each other and on the characteristic abiotic conditions in their habitat. With the loss of one species, other species may also be at risk; conversely, recovery of one species may provide opportunities for other species. Biodiversity policy is thus much more complex than environmental policy and also more vulnerable in the sense that biodiversity protection is less engineerable than would be desirable in policy terms.

Relationship between the cultural landscape and biodiversity

In the Netherlands, biodiversity is in many cases linked to culturally and historically shaped landscapes. As a result of human intervention, a small-scale and diverse entity has emerged with all kinds of different niches and gradients. Traditionally, many of these niches have been nutrient-poor and species-rich (a lack of nutrients leads to all kinds of evolutionary adaptations for survival). With the scaling-up and intensification of agriculture, many such nutrient-poor niches have been lost. The nitrogen blanket over the Netherlands due to ammonia from agriculture is largely to blame for this, in addition to habitat loss due to building and infrastructure construction.

Contradictory objectives

Biodiversity restoration thus requires an amalgam of measures in many areas. Everything is connected to everything else, but taking action on a single component will not solve the problem. For instance, although global warming leads to a decrease in remaining biodiversity, climate measures alone are absolutely insufficient to guarantee nature restoration. Conversely, measures aimed at improving animal welfare can lead to reductions in livestock density and thus lower environmental pressure and thus less pressure on biodiversity, but with this, biodiversity measures do not yet have an effect on animal welfare.

Key performance indicators

In biodiversity policy, this leads to commitment to achievable goals, such as climate and environment, even if they offer little certainty that biodiversity will benefit. For example, Reijs et al. (2022) provide only one KPI for biodiversity itself, namely the share of nature and landscape (green-blue veining).¹⁶ The biodiversity monitors for dairy farming¹⁷ and for arable land farming (Doorn et al., 2021b, 2022) also pay little attention to biodiversity itself, other than the commitment to agricultural nature and landscape management.

2.2 Animal health and welfare

European policy

Animal health is a part of animal welfare. Animal health is about protecting animals from diseases. At EU level, veterinary policy on infectious animal diseases is regulated by the Animal Health Regulation (2016/429). Globally, animal health policy, as well as animal welfare policy, is coordinated under the OIE. Veterinary policy under OIE, phytosanitary policy under IPPC and food safety policy under CODEX are explicitly recognised as standard-setting frameworks in the SPS agreement under the WTO Treaty ("the three sisters").

¹⁶ Reportedly, however, this KPI may be further developed and split into quantitative and qualitative aspects.

¹⁷ http://biodiversiteitsmonitormelkveehouderij.nl/docs/Biodiversiteitsmonitor_nederlands.pdf

In European legislation, animal welfare regulation in relation to farm animals has formed its own domain for over 40 years. Leading the way is Council Directive 98/58/EC on the protection of animals kept for farming purposes.¹⁸ The rules are based on the European Convention for the Protection of Animals Kept for Farming Purposes. The starting point is the "five freedoms" of the Brambell Committee (1965), namely:

- Freedom from hunger and thirst
- Freedom from discomfort
- Freedom from pain, injury and disease
- Freedom from normal behaviour
- Freedom from fear and disruption

In addition, EU legislation exists on, for example, animal welfare during transport and during slaughter. All this fulfils the mandate in Art 13 TFEU to take full account in policy of what is required for the welfare of animals as sentient beings.

National policy

The government is committed to an animal-worthy livestock industry (Ministry of Agriculture, Nature and Food Quality, 2022a), drawing on an elaboration by the RDA (2021) of the five freedoms in the form of six principles:

- Recognition of the intrinsic value and integrity of the animal
- Good nutrition
- Good environment
- Good health
- Natural behaviour
- Positive emotional state

With this shift, which the government wants to enshrine in law, more emphasis is placed on the importance of animals experiencing positive welfare, and not just having their basic needs met.

The government's aim is to bring about a turnaround to a situation where only animal-oriented designed husbandry systems (may) be used. To this end, it is pushing for a Covenant on Animal Friendly Livestock Farming. Within this framework, the government also wants to make agreements on reducing common disorders and diseases in animals and on stopping breeding animal breeds with characteristics that are detrimental to their welfare or health. The move towards animal husbandry should be part of the transition to circular agriculture. The animal welfare and animal health objectives are a precondition for this, and are, as far as the government is concerned, an integral part of making agriculture sustainable.

The starting point is that all stables should become integrally sustainable, with animal orientation being part of integral sustainability. To achieve this, a balance will have to be found between different criteria, for instance between nitrogen emissions and animal welfare. Different criteria also have to be weighed within the theme of animal worthiness. For instance, free-range farming may be desirable from an animal welfare point of view, but lead to new animal health risks because of closer contact with wild animals, as is the case with highly pathogenic avian flu. With regard to animal dignity, the government believes that, as with other sustainability aspects, two main issues must be promoted: there must be sufficient demand for products that meet high animal welfare standards and livestock farmers must receive a good price for the products they supply.

In this context, efforts are focused on labels, such as the Better Life label, On the way to Planet Proof and organic. Efforts are also being made to be able to compare foreign and Dutch quality marks and to look at initiatives in the market to raise animal welfare standards, such as Zonvarken, Kipster and Livar.

Key performance indicators

In the development of critical performance indicators for circular agriculture, targets and parameters for animal health and welfare have not yet been concretised (Reijs et al., 2022).

¹⁸ https://food.ec.europa.eu/system/files/2016-10/aw_european_convention_protection_animals_en.pdf

2.3 Earning capacity

General objectives

A general description of the economic position of Dutch farmers can be found in Baayen et al. (2021), from which the summary below is taken. Core challenges are:

- Securing a livable income for agricultural households;
- Strengthening agricultural risk management;
- Strengthening the resilience of agricultural enterprises;
- Broadening investment financing opportunities for sustainability and innovation;
- Strengthening competitiveness and sustainable entrepreneurship;
- Financially supporting sustainable production and conversion to sustainable production;
- Increasing transparency regarding sustainable products and increasing demand for high-quality and sustainable products;
- Strengthening horizontal and vertical cooperation in the chain;
- Promoting short chains.

Being able to earn a fair income is an important objective of agricultural policy, given the mandate to do so in Art. 39 TFEU. Without income support, a significant proportion of farms would realise an income below the minimum wage or low income threshold. The average income in agriculture and horticulture is about 20% lower than in other sectors, even though this is incidentally more favourable than the EU average, which is about 40% lower than in other sectors (EC, 2020d, 2021a).¹⁹ At least 20% of agricultural households in the Netherlands live on an income below the low-income threshold. However, income figures can fluctuate considerably from year to year, with particularly good and bad years and with large differences between sectors.²⁰

A weak income and liquidity position makes farmers vulnerable to events that partially or completely wipe out their income. In agriculture, however, such events are part of the reality, more so than in other sectors (weather impacts, diseases and pests, consumer demand loss in crises, geopolitical or trade policy border closures). Due to its strong export orientation, Dutch agriculture is more susceptible to such risks than the EU average. Strengthening agricultural risk management is therefore an important goal within the CAP.

Increasing the resilience of farms requires broadening and improved earning capacity, for instance by increasing the market inside and outside the Netherlands for Dutch products produced in a sustainable way beyond the legislation. In addition, better opportunities are needed for financing sustainability and innovation. It must be ensured that farmers are equipped for entrepreneurship that is "state of the art", both technologically and in terms of sustainability, in order to maintain their competitiveness. Support is needed for transition to more sustainable forms of production such as organic farming.

A transition to sustainable agriculture is only possible if consumers are willing to pay more for sustainably produced food.²¹ This requires, among other things, greater transparency on which products are sustainably produced. Transparency is a necessary step in preparation for "true pricing". In addition, transparency contributes to consumer awareness of quality and sustainability.

In all this, it is desirable to strengthen horizontal and vertical cooperation in the chain (Bijman et al., 2012). Most primary producers perceive their position in relation to other chain parties as relatively weak. This is especially true for dairy farmers and pig farmers, and to a slightly lesser extent for fruit and vegetable growers. There is a large number of producers versus a small number of suppliers and buyers/processors. Farmers produce predominantly homogeneous products and often structurally too much of them, which depresses prices. There is fierce competition with countries with lower labour costs and/or lower sustainability requirements. The increasing demand for processed food works to the disadvantage of primary

¹⁹ It should be noted here that the average income in agriculture in the Netherlands in 2021 was €81,900 per entrepreneur (unpaid annual work units). The average personal income of the self-employed, including business owners, in that year was € 46,100 (<https://opendata.cbs.nl/statline/#/CBS/nl/dataset/83740NED/table?dl=63E38>). Insofar as the EC's figures refer to workers' wages, it should be remembered that most hired labour in agriculture and horticulture is not highly skilled labour.

²⁰ <https://www.wur.nl/nl/show/inkomensraming-2022.htm>; <https://www.cbs.nl/nl-nl/nieuws/2022/51/inkomsten-landbouwsector-iets-hoger-in-2022>

²¹ Without prejudice to the need to additionally provide government support for sustainability.

producers. Unfair commercial practices sometimes occur, which is why the Directive (EU) 2019/633 on unfair commercial practices in relations between enterprises in the agricultural and food supply chain²² was adopted in 2017. Primary producers do not exploit all legal opportunities for cooperation, partly due to unfamiliarity with them, thus missing opportunities to jointly counterbalance other chain players.

Alternatively, some farmers focus on short chains, increasing their margin, and on business expansion with non-agricultural activities.

Recommendations of the Agricultural Markets Task Force

In many of the areas mentioned, the Agricultural Markets Task Force (2016) issued advice to improve farmers' earning power. They included greater market transparency, strengthening risk management tools (including futures), promoting contractualisation (including in favour of sustainability), curtailing unfair trading practices, expanding opportunities for value-sharing arrangements along the chain, clarifying rules on competition and improving farmers' access to finance.

Some of the advice has been incorporated into the adjustments to the CAP for the period 2021-2027 (in practice: 2023-2027). The insertion of Art. 210a into the CMO regulation (1308/2013) and the elaboration of guidelines thereto are one example.

Recommendations of the national competition authority (ACM)

More specifically in relation to sustainability, the ACM commissioned research by WECR into price formation in the Dutch food chain, the position of farmers and market gardeners and possible obstacles to sustainability (ACM, 2022a, 2022e, 2022f, 2022g, 2022h, 2022i; Van Galen et al., 2020, 2021a, 2021b, 2022a, 2022b). This shows that for most of the products studied, farmers and market gardeners are reimbursed for the additional costs of organic production²³ and that the conversion costs from conventional to organic, although substantial, are not insurmountable. For other labels, whether producers receive a premium varies from product to product. The limited willingness to pay of Dutch and foreign consumers is a major obstacle to further sustainability. Export opportunities at a premium price for products with a non-organic Dutch sustainability label are limited.

The ACM recommends taking measures to reduce the price difference between mainstream and more sustainable products, either by making more sustainable products cheaper (subsidies, VAT reductions) or by making mainstream products more expensive (pricing of negative externalities, VAT increases). Production-limiting measures are also advised, such as increasing the legal minimum sustainability requirements for mainstream products and reducing production, for example through stricter licensing requirements or through buyouts. Furthermore, the ACM recommends taking measures to increase consumer confidence in the sustainable nature of more sustainable products and using similar labels in the catering sector as in retail. Supermarkets, specialty shops and catering companies should more explicitly encourage their customers to make a more sustainable choice, especially organic. More attention is desirable for international benchmarking of labels for better export opportunities for products with a non-organic Dutch sustainability label.

The ACM notes that many producers perceive problems in the transparency of pricing. For instance, they find it unclear what selling prices their customers realise and they find prices not predictable. Furthermore, producers perceive the distribution of risks (such as those of weather damage and crop failure) as unfair. Producers could make more use of cooperation opportunities to make investments in more sustainable production profitable and to strengthen their bargaining position vis-à-vis customers.

Skewed balance of power: perception or reality?

The economic literature indicates that skewed power relations in negotiating prices usually lead to unbalanced outcomes. Monopoly situations, where customers can only turn to one or a few suppliers, are a well-known example. The mirror image of this is the situation where suppliers can only go to one or a few customers (monopsony) (Jongeneel, 2022). This plays out in agriculture, where large numbers of farmers face a relatively small number of buyers.²⁴ Based on the literature, it makes sense that this leads to farmers finding too little

²² <https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:32019L0633>

²³ This observation applies to primary products, but not to canned products, for example. This leads to criticism from organic farmers of what they see as disproportionate margins maintained by supermarkets for processed products. See <https://www.rtlnieuws.nl/nieuws/nederland/artikel/5364732/biologisch-eten-uit-potje-onnodig-duur-door-hogere-marge>

²⁴ https://agriculture.ec.europa.eu/common-agricultural-policy/agri-food-supply-chain/producer-and-interbranch-organisations_en

room to be reimbursed for their costs, e.g. for sustainability. National competition authorities investigate this and also impose fines (Schrijvershof & Heystee, 2022). The Agro-Nutri Monitor indicates that this is not so much an issue for organic products (with the exception of milk), but the situation for other sustainability labels is variable²⁵ (Van Galen et al., 2022a, 2022b). Supermarkets and trade tend to pay a higher price, the question is whether the fee outweighs the costs incurred. Incidentally, the Agro-Nutri Monitor finds that in sectors where the concentration of farmers and horticulturists relative to the concentration of buyers is higher, margins were also higher in the period under study, in line with earlier findings by Bijman et al. (2012) for the EU as a whole. Moreover, in a recent study, the OECD could not confirm that there would actually be market failure due to concentration of market power further down the chain, relative to farmers (Deconinck, 2021).²⁶ Perceived unfair pricing could also be the result of structural problems, where smaller farms cannot get by on the market price for their products (Deconinck, 2021, p. 34) or steadily declining prices of agricultural products on the world market or other types of competition problems.

Conclusion

Strengthening the earning capacity of farmers with a greater commitment to sustainability requires a range of measures. Consumers, retail, the catering industry, chain parties and the government will all have to commit to this, each within their own possibilities. Farmers themselves also have unused opportunities to strengthen their position, for instance by focusing more on mutual cooperation in the form of cooperatives and producer organisations. This strengthens their negotiating position with buyers, which is an important condition for actually getting compensation for the extra costs of sustainability.

²⁵ Van Galen et al. (2022a), p. 8: "Whether products with a sustainability label are paid a premium price by Dutch buyers varies by product. Common dairy farmers usually receive a premium for production under non-organic sustainability labels. In most cases, dairy farmers and stakeholders indicate that the additional price at least largely covers the costs. The same applies to pig farmers with the 1-star Beter Leven label. In the vegetable sectors studied, it is much less common to pay an explicit premium for products with a sustainability label. The study shows that this does happen in some cases, for example with table potatoes. That extra price is paid by the potato trade. Supermarkets indicate that they do pay a bit more for potatoes with the On the way to Planet Proof label, but that extra price is not made explicit and is included in the negotiated price. For onions, pears, tomatoes and mushrooms, there was usually no stipulated extra price. For mushroom growers who sell under Albert Heijn's Beter Voor label, there is a small compensation for costs incurred." The additional price thus is not yet transparent.

²⁶ Quote: "Concerns about market power and competition in the agri-food sector are widespread, with commentators regularly suggesting that farmers are in a structurally weaker position than other actors, who therefore benefit at their expense. The evidence reviewed in this paper indicates that downstream segments of agrifood chains are indeed typically more concentrated than farm-level production. Nevertheless, while competition problems were found in some instances, the current evidence does not support the claim that stronger actors in the chain systematically abuse their stronger position at the expense of farmers."

3 Legislation and practice in the European Union

3.1 Legislation

3.1.1 Concepts and definitions

Sustainability engagements and sustainability agreements

This report deals with sustainability engagements (in Dutch 'afspraken') and agreements (in Dutch 'overeenkomsten') in agriculture. However, EU regulations mostly refer to sustainability agreements, not sustainability engagements. Formally, this term refers to "agreements, decisions and concerted practices",²⁷ a system of overlapping terms indicating the joint will of parties involved to do or refrain from doing something. Several guidelines, through which the EC provides regulatory clarification, do use the term agreements in an informal sense (like the Dutch 'afspraken'). In competition law, the term 'agreements' is commonly used as the broadest category, which includes all of the above concepts. Thus, there is no difference in principle between sustainability 'afspraken' and sustainability 'overeenkomsten'.

Sustainability agreements - by definition in competition law, by the way, between private parties, not between companies and government - do not thereby constitute a separate category of cooperation agreements, but is one of the forms that cooperation agreements can take.

Contractual relationships between producers and buyers, even if they deal with sustainability issues, are not sustainability agreements as long as other producers and buyers are not involved.

Horizontal and vertical agreements

Horizontal agreements broadly involve agreements between competitors regarding R&D, production, purchasing, commercialisation, information exchange, standardisation and standard terms.

Vertical agreements broadly involve situations where one or more producers and one or more market participants are parties at different levels of production, processing and trade within the food supply chain, including distribution.

Both terms have narrowly defined meanings in EU competition law and are the subject of a variety of ECJ jurisprudence, which has ruled, for example, that both fall under the cartel prohibition (Art. 101 TFEU). The EC has published several guidelines on them. This report does not elaborate on these.²⁸

Sustainability standards

A special case of sustainability agreements are "sustainability standards agreements", aimed at rules, guidelines or characteristics for products and production methods with regard to sustainability measures. The agreements may focus on both setting and observing them. Another word for this is "sustainability schemes".

Quality marks or labels are an example of sustainability standards. These are often private initiatives that can range from unilateral codes of conduct drawn up by companies, to standards advocated by civil society and multi-stakeholder initiatives involving companies along the value chain.

²⁷ Art. 101(1) TFEU.

²⁸ The definitions given are based on EC (2022g). In the CMO regulation (1308/2013), the terms appear only in Art. 210a. For further clarification, see EC (2023).

3.1.2 Cartel prohibition (Art. 101, paragraph 1 TFEU)

Core article of competition law

Art 101 TFEU constitutes the basis of EU competition law and is sometimes referred to as the cartel ban. Due to its great importance, the full text follows below:

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
 - a. directly or indirectly fix purchase or selling prices or any other trading conditions;
 - b. limit or control production, markets, technical development, or investment;
 - c. share markets or sources of supply;
 - d. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - e. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
 - any agreement or category of agreements between undertakings,
 - any decision or category of decisions by associations of undertakings,
 - any concerted practice or category of concerted practices,which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - a. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - b. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Basic rule, exemptions and exceptions

The basic rule is thus that all agreements that may affect trade between Member States and have the object or effect of preventing, restricting or distorting competition within the internal market are prohibited. Also in agriculture. However, exemptions and exceptions to this are possible:

- Paragraph 3 of Art. 101 TFEU allows for individual exemptions, under certain conditions;
- Art. 42 and Art. 43 TFEU provide scope for establishing the applicability of Art. 101 TFEU to agriculture, including generic exemptions or exceptions;²⁹
- Art. 103 TFEU provides a basis to elaborate in European Parliament and Council regulations the provisions of Art. 101 TFEU, including any exemptions and exceptions.³⁰

Inherent restrictions and rule of reason

While the cartel prohibition is central to European competition law, it is at odds with societal interests other than market forces that are embedded elsewhere in the TFEU. Provisions thereon are ancillary to the cartel prohibition in the TFEU. To resolve such conflicts, the doctrine of inherent restrictions or the rule of reason can be invoked in certain cases.

The doctrine of inherent restrictions means that agreements are exempted from the effect of Art 101 TFEU when they are inherent to the pursuit of certain societal objectives, such as the protection of recipients of social services or other societal and/or political objectives. A prerequisite for this is that the arrangement is

²⁹ Art. 42 TFEU reads: "The 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 in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39". For its elaboration, see section 3.1.4.

³⁰ Art. 103 TFEU reads: "1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.
2. The regulations or directives referred to in paragraph 1 shall be designed in particular: [...] c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102; [...]"

necessary and proportionate. This follows from a ECJ judgment in the Wouters case³¹ and is therefore also known as the Wouters doctrine. The doctrine was initially mainly concerned with restrictions on competition imposed by professional organisations such as lawyers and notaries on their members in the context of legal services and where public values are at stake, such as the proper administration of justice (Ruigewaard, 2020). Analogously, it is defensible that sustainability and animal welfare are seen as legitimate public interests on the basis of which a restriction on competition can be considered acceptable (Maverick Lawyers, 2015).³² In that case, that restriction falls outside the scope of Art 101 TFEU and therefore there is no exemption or exception. The assessment on inherent restriction precedes the assessment under Art. 101 TFEU and the related exemptions and exceptions.

The ACM (2014b) also points out that the ECJ has on a few occasions assumed that a restriction of competition was acceptable because of the legitimate public interest served by it, was thereby 'inherent' in that public interest and that as a result the cartel prohibition did not apply. In 2014, the ACM did not rule out on principle that the doctrine of inherent restrictions could be applied to sustainability initiatives. At that time, however, it considered this doctrine insufficiently crystallised in case law to make statements on its application.

Closely related is the concept of "rule of reason", which involves weighing the economic interests protected by the cartel ban and other societal interests (Houdijk, 2008).³³ The "rule of reason" developed in European free movement law and contains a number of criteria that, in cases with a societal dimension, are suitable for weighing up clashing economic and non-economic interests. The background to this development was that the exception instruments in the TFEU were inadequate and an alternative method was required. The "rule of reason", or "exception based on overriding requirements of public interest", has, according to this author, roughly five conditions:

- i. a relevant Community rule does not exist;
- ii. the national rule is not applied for purely economic reasons;
- iii. the interest which the national measure seeks to protect is of sufficient weight;
- iv. the national measure must not be discriminatory;
- v. the national measure must be proportionate.

The terms "rule of reason" and "overriding requirements of public interest" come from the case law on free movement and are not used in the Wouters judgment mentioned above. Nevertheless, the core of the "rule of reason" test (the standard of proportionality *sensu lato*) is also found in Wouters, in the form of a necessity and proportionality test (Houdijk, 2008). The dividing line between competition rules and free movement rules is fluid at this point.³⁴

The rule of reason ensures that competition law does not simply cast aside all non-economic interests. It provides a tool to balance interests by laying down a number of specific conditions. For those who like to see competition law at work with full force from the goals of efficiency and maximising consumer welfare, these criteria provide an excellent opportunity to argue that the competition interest should prevail and that less anti-competitive alternatives to the measure at hand are excellent. For opponents of overly far-reaching market forces, the rule offers points of leverage to engage precisely the opposite proposition (Houdijk, 2008).

³¹ <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=46722&pageIndex=0&doclang=NL&mode=lst&dir=&occ=first&part=1&cid=693104>

³² <https://www.maverick-law.com/nl/blogs/kip-ook-juridisch-een-veelzijdig-stukje-vlees.html>

³³ Houdijk (2008) argues that instead of the figure of the "rule of reason", the term "doctrine of inherent restrictions" could also be used. After all, a rule labelled as inherent to the exercise of an activity is considered so necessary for that activity that one cannot do without it. The focus on the (absolute) necessity of a measure is often a real representation of the thorny issue in the assessment process. Nevertheless, his preference is for the term "rule of reason", as this reasonableness rule has theoretically the best elaborated review scheme and thus provides the most guidance to the reviewing entity.

³⁴ The classic distinction is between *imperium* (political power) and *dominium* (economic power) as the focus of free trade and competition law respectively (Houdijk, 2008).

In essence, therefore, the doctrine of inherent limitation and the rule of reason offer solutions to the tensions between the cartel ban and other provisions in the TFEU. According to, inter alia, the Wouters judgment, the ECJ considers those solutions to be valid. In practice, their application is uncertain.³⁵

3.1.3 Individual exemptions (Art. 101, paragraph 3 TFEU)

Conditions

Paragraph 3 of Art. 101 TFEU nevertheless allows agreements to be concluded, provided four conditions are met (cumulatively):

- i. The agreements must contribute to improving the production or distribution of goods or to promoting technical or economic progress;
- ii. A fair share of the resulting benefits must benefit consumers;
- iii. The agreements must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- iv. The agreements must not afford the possibility of eliminating competition in respect of a substantial part of the products in question.

The formulation of the four conditions listens closely and has been interpreted in great detail by the EC (EC, 2004, 2010, 2014, 2018b, 2022f, 2022g) and by national competition authorities such as the ACM (ACM, 2014a, 2014b, 2019a, 2019b, 2020, 2021, 2022c, 2022d). The European Court of Justice has the final say in this, sometimes overruling the EC's interpretation, as in the so-called Endives judgment.³⁶

Practical problems

In practice, meeting all four conditions is not easy. The requirements of efficiencies (condition 1) and no elimination of competition (condition 4) are usually not the problem, but rather the conditions that a fair share of the benefits must accrue to consumers (condition 2) and that the agreements may only impose restrictions that are indispensable to achieve the objective (the necessity principle, condition 3).

This problem arises in particular with regard to sustainability. For example, the Supreme Court (Raad van State) (2022, p. 6) states:

"An example is an agreement between farmers and supermarkets to sell only sustainably produced (and often more expensive) food. (see note 29) Such an agreement may violate Article 101(1) TFEU." The relevant footnote reads, "Such an agreement would exclude suppliers of non-sustainable food products from the market. In this regard, see for example the sustainability agreements on 'The Chicken of Tomorrow', which the ACM has ruled to be in breach of competition law (reference: ACM/DM/2014/206028)."

In "The Chicken of Tomorrow", retailers agreed to maintain a basic level of animal welfare when buying and selling (ACM, 2014a; Bos et al., 2018). The ACM's negative opinion led to public commotion and the Rutte 3 coalition agreement's mandate to the ACM in this area led the ACM to seek space on how sustainability could then be legitimately pursued in agreements between private parties. This led to a series of guidance documents (ACM, 2019a, 2019b, 2020, 2021, 2022c, 2022d) and also to a different vision of how to apply competition law (Candel, 2021). In addition, the commotion led to a bill Room for Sustainability Initiatives (see section 4.1.2).

Green Deal and sustainability

In light of the Green Deal and the need to make agriculture more sustainable, the EC itself has now proposed significant adjustments to competition rules, both in terms of the regulations based on Art. 42 TFEU and Art. 103 TFEU and in terms of guidelines³⁷ on how to apply those rules (EC, 2021b, 2021c). Many of these

³⁵ It is on this point that Art. 210bis CMO Regulation (see section 3.1.5) offers important gains by removing this uncertainty and providing room for cartel agreements in favour of sustainability and animal welfare not alongside, but within the framework of the cartel prohibition with its exemptions and exceptions.

³⁶ ECJ 14 November 2017, ECLI:EU:C:2017:860, C-671/15.

³⁷ Guidelines are policy rules that bind the EC, but not the person using them. They have no basis in an empowerment in EU law and no legally binding status (Art. 288 TFEU). However, deviation from the guidelines poses risks because the EC can take decisions on the permissibility of agreements that may violate competition rules. This is ultimately decided by the ECJ (see

adjustments were made in 2022. A draft guidance document on horizontal agreements and sustainability in general was submitted for consultation in 2022 (EC, 2022g), but has not been adopted at this stage.³⁸

While the provisions under Art. 42 and Art. 43 TFEU on the applicability of Art. 101 TFEU to agriculture and the generic exemptions under Art. 103 TFEU can be used to enhance the sustainability of agriculture, Art. 101 TFEU remains relevant indirectly. This is because the wording of exemptions and exceptions (derogations) in many cases harks back to Art 101 TFEU, and the EC's interpretation in the guidelines in relation to Art 101 TFEU has a bearing on this. This is particularly relevant for concepts such as "not indispensable to the attainment of the objectives" and "elimination of competition". For details on this and concrete examples using case histories, see the Guidelines on the application of Art 101(1) TFEU (EC, 2004) and the Draft Guidelines on horizontal agreements (EC, 2022g), in particular the section on sustainability (Chapter 9, points 541 to 621).

Agreements pursuing sustainability objectives do not constitute a separate category of cooperation agreements under Art. 101 TFEU (point 547). Agreements that restrict competition cannot escape the prohibition of Art 101(1) TFEU merely because they are necessary for the pursuit of the sustainability objective (point 548). For the assessment of sustainability agreements under Art 101(1) TFEU, see points 555 to 575.³⁹ For the assessment of sustainability agreements under Art. 101(3) TFEU, see points 576 to 614. On indispensability, see points 580 to 587.⁴⁰ With regard to no elimination of competition, see points 610 to 614.⁴¹

3.1.4 Generic applicability provision and exceptions for agriculture (Art. 42 and Art. 43 TFEU)

CMO Regulation

Art. 42 TFEU provides that the competition rules of Art. 101 to Art. 106 TFEU apply to the production of and trade in agricultural products only to the extent determined by the European Parliament and the Council, namely in the CMO Regulation (1308/2013) adopted pursuant to Art. 43 TFEU. This regulation does not provide a generic exemption from Art. 101 TFEU, which is therefore in principle fully applicable to agreements between farmers, whether cooperative or not, with each other or with suppliers and buyers. In

paragraph 54 of the Guidelines on horizontal cooperation agreements, Annex 2), but in case of an unfavourable ruling, high fines can be imposed. In practice, this makes it little attractive to deviate from the guidelines (Agricultural Markets Task Force, 2016, point 148). This puts the EC in a special position of power, as guidelines are developed and adopted unilaterally by it after stakeholder consultation (i.e. without co-decision or voting).³⁷

³⁸ This report does not address the content of this, otherwise important, document. For agriculture, the derogations in the CMO regulation offer significantly more scope. However, its contents may be useful for arrangements outside farmers and their organisations, such as between retailers and processors. An extract can be found in Annex 2.

³⁹ Among others: The fact that an agreement actually pursues a sustainability objective may be taken into account in determining whether the restriction in question is a restriction of competition by object (and thus not permitted) or by effect within the meaning of Article 101(1) (point 559). In this context, where parties claim that an agreement, which appears to pursue price fixing, market or customer sharing, limitation of output or innovation, actually pursues a sustainability objective, they must provide all facts and evidence showing that the agreement actually pursues such an objective and is not used to disguise a restriction of competition by object. If the evidence shows that the agreement does indeed pursue a sustainability objective, the restrictive effects on competition will have to be assessed (point 560). Sustainability standards that do indeed pursue a sustainability objective but disguise price fixing, market or customer sharing, restrictions on output or limitations on quality or innovation are restrictive of competition by object (point 570). In particular, an agreement between competitors as to how increased costs resulting from the adoption of a sustainability standard should be passed on in higher selling prices to their consumers has a restrictive effect on competition. Similarly, an agreement between the parties to the sustainability standard to pressure third parties not to market products that do not comply with the sustainability standard has a restrictive effect on competition (point 571).

⁴⁰ Among others: The agreement may not impose restrictions that are not indispensable to the attainment of the benefits generated by the agreement. Parties must demonstrate that their agreement as such - and any restriction of competition resulting from it - is reasonably necessary to achieve the claimed sustainability benefits and that there are no other practically feasible and less restrictive means, from an economic point of view, to achieve them (point 581). Where EU or national law requires companies to comply with concrete sustainability goals, cooperation agreements and any resulting restrictions cannot be considered indispensable for the purpose to be achieved. This is because each company is already required by law to achieve the goal (point 583). As a rule of thumb, obligations imposed by sustainability agreements should not go beyond what is necessary to achieve the purpose of the agreement (point 587).

⁴¹ Among others: According to the fourth condition of Article 101(3), the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. In essence, this condition ensures that a certain degree of residual competition is always maintained in the market covered by the agreement, regardless of the level of benefits (point 610). The latter condition can be fulfilled even if the restrictive agreement covers the whole industry, as long as the parties to the agreement continue to compete vigorously on at least one important aspect of competition (point 611).

certain cases, however, the CMO regulation provides for a derogation (exception) from Art. 101 TFEU. These are discussed below in numerical order.

Derogation for recognised producer organisations (Art. 152, paragraph 1a CMO Regulation)

Art. 152(1a) of the CMO regulation contains a conditional derogation from Art. 101(1) TFEU for recognised producer organisations (POs). They must pursue certain objectives, carry out joint activities⁴² and, upon recognition, may act jointly and apply for an extension of rules (EOR) if desired.

Derogation in relation to Art. 39 TFEU (Art. 209, paragraph 1, first subparagraph CMO Regulation)

Art. 209(1), first subparagraph of the CMO Regulation contains a conditional derogation from Art. 101(1) TFEU which does not apply to agreements, decisions and practices required to achieve the objectives set out in Art. 39 TFEU. These are the objectives of the so-called agriculture article. The case-law of the ECJ shows that this derogation can only be used if the agreements or conduct contribute to all the objectives of Art. 39 TFEU at the same time. Those objectives are partly contradictory. For instance, both a good income for farmers and reasonable prices for consumers must be achieved. As a result, the derogation is effectively unusable (an empty shell) (ACM, 2022d, point 41).

Derogation for farmers and their associations (Art. 209, paragraph 1, second subparagraph CMO Regulation)

Art. 209(1), second subparagraph of the CMO Regulation contains a second derogation from Art. 101(1) TFEU for individual farmers, associations of farmers (e.g. cooperatives) and unions of these associations, POs recognised under Art. 152 CMO Regulation or Art. 162 CMO Regulation or unions of POs recognised under Art. 156 CMO Regulation. The condition is that the agreements and conduct relate to the production or sale of agricultural products or the use of common facilities for their storage, treatment or processing. The agreements and conduct must not jeopardise the objectives of Art. 39 TFEU.

The scope under Art. 209(1), second subparagraph CMO Regulation is similar to that for recognised POs under Art. 152(1a) CMO Regulation, while far fewer conditions need to be met. In essence, the derogation under Art. 209(1), second subparagraph CMO Regulation allows farmers to act together as one party in production and trade, in line with the legislator's aim with this derogation (Agricultural Markets Task Force, 2016). On the other hand, only recognised POs, some of which run their farms jointly, may apply for an extension of rules under Art. 164 to Art. 165 CMO Regulation.

In practice, the derogation of Art. 209(1), second subparagraph CMO Regulation is a dormant derogation ground due to confusion about the scope of the derogation and its relation to Art. 152(1a) CMO Regulation (Agricultural Markets Task Force, 2016). The EC advises farmers who want to use it to contact it.⁴³ Those wishing to invoke this provision can ask the EC for advice on the compatibility of an agreement with the objectives of Art. 39 TFEU. However, the relevant wording in Art. 209(1), second subparagraph CMO Regulation of the conditions for applicability⁴⁴ is identical to that in Art. 210a CMO Regulation, where, according to the EC, it does not prevent application in the case of sustainability agreements (see the EC's explanation of this in points 162-169 and, in particular, points 167-168 of the draft guidelines for application of Art. 210a CMO Regulation; EC, 2023).⁴⁵

⁴² The condition includes that the recognised PO concentrates supply and markets the products of its members, irrespective of whether ownership is transferred to the PO by the producers and irrespective of whether the negotiated price applies to the combined production of all, or some, of its members.

⁴³ https://agriculture.ec.europa.eu/common-agricultural-policy/agri-food-supply-chain/producer-and-interbranch-organisations_nl

⁴⁴ The text regarding the conditions of applicability reads: 'unless the objectives of Article 39 TFEU are jeopardised'; 'This paragraph shall not apply to agreements, decisions and concerted practices [...] excluding competition'. This is identical to paragraph 7, first subparagraph of Art. 210a CMO Regulation: 'The national competition authority [...] may decide in individual cases that [...] one or more of the agreements, decisions or concerted practices should be amended, discontinued or should not take place at all, if it considers that such a decision is necessary to prevent the exclusion of competition or if it considers that the objectives of Article 39 TFEU are jeopardised'.

⁴⁵ Point 167 reads: '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.' In point 168, the EC also points out that reasonable prices for consumers are something other than the lowest possible price: 'The 'reasonable prices' objective should not be understood as referring to the lowest price possible'. This is in line with earlier comments to this effect by the European Parliament's Committee on Economic and Monetary Affairs (Schrijvershof & Heystee, 2022, footnote 30).

Compatibility with the objectives of Art. 39 TFEU can therefore not be a fundamental obstacle to using the derogation of Art. 209(1), second subparagraph CMO Regulation.

Derogation for recognised interbranch organisations (Art. 210, paragraph 1 CMO Regulation)

Art. 210(1) CMO Regulation provides a derogation for agreements and behaviours of recognised interbranch organisations (POs) necessary for the achievement of certain of their aims and/or objectives in respect of olive oil, table olives and tobacco. Such BOs must pursue certain objectives and may carry out certain activities aimed at the chain as a whole. The conditions are that such agreements and behaviour cannot lead to market partitioning, cannot jeopardise the proper functioning of the market organisation, cannot create distortions of competition that are not absolutely necessary to achieve the objectives pursued by the CAP, do not involve the fixing of prices or quotas and cannot cause discrimination or eliminate competition for a substantial part of the products concerned. These conditions return much of Art. 101(3) TFEU.

The scope for recognised POs to enter into agreements, sustainable or otherwise, is thus limited. However, recognised POs may apply for an extension of rules under Art. 164 to Art. 165 CMO Regulation.

Derogation for sustainability initiatives (Art. 210a CMO Regulation)

Art. 210a CMO Regulation contains a derogation from Art. 101 TFEU for vertical and horizontal sustainability initiatives. These are agreements aimed at applying a sustainability standard that goes beyond what is required by Union or national law. The condition is that these agreements impose only those restrictions on competition that are indispensable for achieving the standard. These are agreements of producers of agricultural products to which several producers are parties or to which one or more producers and one or more operators are parties at different levels of production, processing and trade within the food supply chain, including distribution. The agreements can cover almost all aspects of sustainability (climate, environment, biodiversity, circularity, animal health and welfare).

The EC and the ACM can prohibit the sustainability agreements made to prevent the exclusion of competition or if they consider that the objectives of Art. 39 TFEU are jeopardised. In both cases, this is a marginal test with a high threshold (EC, 2023, points 167-168), intended to apply only exceptionally.

A draft of guidelines on the application of Art. 210a CMO regulation was submitted for consultation on 10 January 2023 (EC, 2023). The guidelines will be adopted by 8 December 2023. The draft offers a generous and workable interpretation of the article:

- Sustainability agreements are defined as all agreements, decisions and actual behaviour between producers among themselves or with chain parties in relation to production or trade of agricultural products that aim to apply a higher standard of sustainability than legally required, regardless of the form of cooperation (point 11).
- At least one farmer must be involved in the agreement (point 27). In addition, suppliers, service providers, processors, traders, retailers and transporters may be involved (point 28). POs and IBOs, whether recognised or not, can also be involved in the agreements (point 29).
- All Annex I TFEU products can be the subject of a sustainability agreement, including non-food (e.g. flowers). Processed products can be so only insofar as they are raw materials listed in Annex I TFEU (points 34-36).
- Application of sustainability standards must lead to the realisation of sustainability objectives mentioned in Art. 210bis CMO Regulation (point 44). They can be existing labels (point 46) and new standards (point 48).
- Results of sustainability standards should be concrete and measurable (point 52) and go beyond what is already mandatory at EU or national level (point 57).
- The condition that sustainability agreements must be indispensable to achieve the stated sustainability goal should be read differently from Art. 101 TFEU, where the third condition of paragraph 3 uses the same wording (point 81). The test on this point for Art. 210a CMO Regulation therefore differs from that for Art. 101(3) TFEU, as the EU co-legislators explicitly wanted sustainability agreements in agriculture to become possible. The condition in Art. 101(3) TFEU that a fair share of the benefit of the agreements must accrue to consumers does not apply to Art. 210a CMO Regulation and price agreements and production-limiting agreements are therefore permissible, insofar as they are indispensable (point 83).

- To assess whether sustainability agreements are indispensable, all aspects of agreements should be assessed individually (point 86), in addition to an integral judgment (point 87).
- The more marginal the sustainability outcome of the agreement, the less likely the agreement is indispensable. Conversely, the more difficult a sustainability objective is to achieve socially, the more plausible the restriction of competition is indispensable (point 88).
- The risk that companies run if they are the first to take sustainability steps may in principle legitimise sustainability agreements (countering "free riders") (point 98).
- Government subsidy for sustainability does not prevent sustainability agreements, but only for the part of the costs not covered by the government subsidy (point 99).⁴⁶
- Provisions that restrict the free movement of goods and services within the EU are in principle not indispensable (point 106; see also example 2 on p. 62 regarding border regions).
- Restrictions on prices can take the form of fixed prices, minimum prices and price supplements. A premium for sustainable operations may be appropriate, but based on actual additional costs (point 111, point 116).
- Restrictions are more likely to be indispensable as the sustainability goal demands higher ambition (point 115).
- Sustainability agreements do not require research into the relevant market (points 118 and 119). Review takes place ex-post.
- Once concluded, sustainability agreements should be reviewed regularly, as the indispensability of the agreement may lapse and adjustment or termination may be required (points 130-136).
- The ex-post assessment of whether sustainability agreements are indispensable concerns jeopardising the objective of Art. 39 TFEU and excluding competition (point 161). This requires careful balancing, whereby advantages on one of the five objectives of Art. 39 TFEU may outweigh disadvantages for other objectives (point 163).
- Agreements should be prevented from covering such a large part of the market as to inhibit innovation or reduce the standard of living of farmers in general (points 164 and 165). However, the threshold for reaching that conclusion should be high, given the spirit of Art. 210a CMO Regulation, and small effects on the five objectives should not lead to a negative assessment of the agreements (point 167).
- Art. 39 TFEU does not aim at self-sufficiency or at the lowest possible prices for consumers (point 168). Nor does Art. 39 TFEU require that any restriction of competition is prohibited (point 169). It may be indispensable to achieve sustainability goals, but those goals must then outweigh the restrictions (point 171).
- However, it must be considered whether substitution of non-durable products by sustainable ones is in line with increasing demand for sustainable products or imposed on them (point 176).
- The market share of sustainability agreements should be taken into account when assessing whether they are permissible, with a share of up to 15% (horizontal agreements) or 30% (vertical agreements) not considered anti-competitive (point 178). Above that, the restrictions may still be indispensable, but will have to be assessed on a case-by-case basis (point 179).

All in all, Art. 210bis CMO Regulation, together with the guidelines for its application, offers a lot of room to make agriculture more sustainable, provided the initiative comes from farmers and does not exclusively involve chain parties (processors, industry, retail). The article offers a solution similar to that of the doctrine of inherent limitations and the rule of reason, but with certainty that the construction is lawful (see section 3.2.1).

Derogations for periods of serious market disruption (Art. 222 CMO Regulation)

Art. 222 CMO regulation allows recognised POs to derogate from certain competition rules during periods of serious market disruption. To this end, the EC may adopt implementing acts to ensure that Art. 101(1) TFEU does not apply to agreements and decisions of farmers, associations of farmers or associations of such associations, or recognised producer organisations, associations of recognised producer organisations and recognised interbranch organisations, to the extent that these agreements and decisions do not undermine the proper functioning of the internal market, have as their sole object the stabilisation of the sectors

⁴⁶ To the extent that the remuneration comes from the government (CAP, state aid, de minimis or services of general economic interest), that part is subject to the applicable requirements, while sustainability agreements between private parties are subject to the competition rules.

concerned and fall within certain categories of activities. The duration of the derogation is limited to a maximum of 6 months, renewable once for a further 6 months.

Other derogations in the CMO Regulation

Beyond these articles, the CMO regulation allows for sector-specific exceptions in Art. 149, Art. 167, Art. 167a, Art. 172a and Art. 172b, but - apart from Art. 172b - without reference to Art. 101 TFEU.

Particularly interesting is the possibility offered by Art. 172a for farmers, including farmers' organisations, to agree value-sharing clauses (including market-generated profits and losses) with parties further down the chain, determining how developments in the relevant market prices of the products concerned or other commodity markets should be allocated between them.

Extension of rules (EOR)

Art. 164 and Art. 165 CMO Regulation provide that recognised producer and interbranch organisations can have their agreements declared universally binding if they meet certain requirements. The consequence of an EOR is that non-member parties are still bound by the agreements (Art. 164 CMO Regulation) and may also have to co-pay (Art. 165 CMO Regulation). The government regulates the EOR, but the agreements remain private in nature. An EOR may only be granted for a limited period, for which the CMO regulation does not, incidentally, set a maximum period.

With an EOR, recognised (U)POs and IBOs can have sustainability regulations declared generally valid in the fields of climate, environment, nature, landscape, animal and plant health, less use of plant protection and veterinary medicines, soil quality and organic farming (Art. 164 CMO Regulation).

Declaring agreements generally binding results in those agreements becoming subject to a set of conditions of competition (Art. 164(4), second paragraph CMO Regulation). This concerns the conditions applicable to recognised POs. The greater scope of recognised POs in terms of competition under the derogation of Art. 152(1a) CMO Regulation thus falls back to a much stricter regime under an AVV, little different from the scope under Art. 101(3) TFEU. The Supreme Court (Raad van State) (2022, p. 11) is of the opinion that in the case of an EOR, even Art. 101 TFEU, paragraph 1 applies in full:

"Unlike Article 209 or 210 of the CMO, Article 164 of the CMO does not contain a provision which excludes generally binding rules from the scope of the competition rules. The fourth paragraph of Article 164 CMO sets the condition that the rules to be declared generally binding may not have any of the anti-competitive effects listed in Article 210(4) CMO. This does not seem to mean that a rule that does not have any of the effects listed in Article 210(4) of the CMO is automatically exempted from the scope of the competition rules. Firstly, not because it does not follow from the text Article 164 CMO itself. Indeed, the same article stipulates as a condition that the rules are also "not otherwise" incompatible with Union law. This obviously includes the prohibition on cartels⁴⁷ in Article 101(1) TFEU. [...] Article 164 CMO, read in conjunction with Article 210 CMO, therefore entails that regulations submitted for declaration of universal applicability must in principle be tested for compatibility with competition rules."

However, an EOR combined with one of the derogations to Art. 101 TFEU in the CMO regulation does not fall under the conditions of Art. 101 TFEU (Raad van State, 2022, page 11):

"The question is what this means for regulations that - viewed in isolation - meet the requirements of Articles 209 and 210 CMO (or any other agricultural exception). Article 164 CMO does not, to its letter, prevent the application of an agricultural exception. The effect of the declaration of universal applicability is that such a rule will be applied more widely than just by the farmers, producer organisations or interbranch organisations mentioned in Articles 209 and 210 of the CMO. As a result, such an arrangement or agreement has a greater (anti-competitive) effect on the market, which may result in the conditions of Articles 209 or 210 of

⁴⁷ The contention that with the terms of Art. 210(4), the cartel prohibition is back in force seems debatable. Then the same would apply to Art. 210 CMO Regulation itself, which would effectively empty the derogation for recognised POs. Since the legislator explicitly intended recognised POs to enjoy a derogation on Art. 101(1) TFEU, that interpretation cannot be correct.

the CMO not (or no longer) being met. This means that the parties applying for an AVV decision for a regulation that allegedly benefits from an agricultural exception must demonstrate that the regulation meets the conditions of the exception even after being declared generally binding."

An EOR should be sharply assessed for infringement of EU competition rules precisely because it involves possible infringement imposed or favoured by the Member State (p. 12):

"When the Minister declares a restrictive agreement to be generally binding, it is eminently a case of 'imposing or favouring' or 'strengthening the effect' of cartel agreements. After all, an arrangement or agreement is submitted to the Minister, the scope of which is extended to companies that were not involved in the arrangement or agreement. When assessing whether a regulation lends itself to being declared generally binding, it is therefore up to the Minister to ensure that the competition rules have been observed. [...]"

The above means that when assessing whether an arrangement or agreement can be declared universally binding, the Minister must also assess in the light of competition law. More concretely, it must be assessed whether the arrangement or agreement restricts (or may restrict) competition and thus violates Article 101(1) TFEU. If that is the case, then it is up to the parties seeking a declaration of universal applicability to show that the (declared universally applicable) agreement can be justified under Article 101(3) TFEU or (still) falls under one of the agricultural exceptions of the CMO Regulation."

So all in all, the extension of rules instrument is poorly suited to broadly applying sustainability agreements, unless the formal derogations in the CMO regulation are employed.

3.1.5 General exemptions from the cartel prohibition (Art. 103 TFEU)

The exemptions that Art. 103 TFEU allows from the cartel prohibition of Art. 101 TFEU have taken shape in block exemptions for certain agreements, such as the Vertical Block Exemption Regulation 2022/720 (EC, 2022b). There are also exemptions for specialisation agreements and R&D agreements⁴⁸, for example. These exemptions apply to agriculture unless the regulations explicitly exclude agriculture from their operation.

For the purposes of this report, these exemption regulations and related guidelines are of secondary importance.

3.1.6 Opportunities and limitations for farmers, associations of farmers and recognised producer organisations

Art. 152 CMO Regulation and Art. 209, paragraph 1, second subparagraph CMO Regulation

Under Art. 152 CMO Regulation, recognised POs may focus on joint activities related to sustainability services, including contributing to sustainable use of natural resources and climate change mitigation, as well as promoting the use of production standards and developing products with a national label. They may organise quality control for this purpose. Cooperation is only allowed between members of one and the same PO. By organising themselves in a recognised PO, farmers can negotiate better prices for products from sustainable operations. Coordination of quantities and prices between different POs is not allowed. Sector organisations or parties in other links of the chain may also not be involved in the cooperation. However, recognised POs can unite in a recognised union of POs (UPO). The UPO decides on the activities assigned to it by the participating POs. These can be the same activities that the recognised PO carries out.

Under Art. 152 and Art. 209(1)(2) CMO Regulation, farmers, cooperatives and POs have great scope to make agreements under derogation of Art. 101(1) TFEU. The advantage of applying these articles is that the agreements can also be made with a view to realising statutory standards, something that EU regulations reject in almost all other cases (CAP, state aid, Art. 101 TFEU, Art. 210a CMO Regulation) in view of the

⁴⁸ https://eur-lex.europa.eu/content/summaries/summary-08-expanded-content.html#arrow_0805

"polluter pays" principle (Art. 191 TFEU). Here lies an opportunity to agree on reimbursement of sustainability costs in areas where farmers have hitherto borne the costs themselves.⁴⁹

What these two articles lack, however, is the unambiguous mandate to make horizontal and vertical sustainability agreements, which Art. 210a CMO Regulation does provide. This makes application of Art. 152 and Art. 209(1), second paragraph CMO Regulation for sustainability agreements somewhat vulnerable, as the legislator added Art. 210a for that purpose. This does not alter the fact that it seems legally possible, if desired in combination with Art. 172a CMO Regulation on value distribution clauses that farmers may agree with chain parties. In combination, these articles offer similar scope to Art. 210a CMO Regulation, but under different conditions. It should be considered on a case-by-case basis which arrangement is more favourable.

Art. 210a CMO Regulation

Under Art. 210bis CMO Regulation, farmers have great scope to make sustainability agreements, both among themselves and with chain parties. A condition is that the agreements are about sustainability standards that are above the statutory standard and are indispensable to achieve the standard. This indispensability concerns the form, content and costs of the agreements. It should always be weighed up whether the sustainability goal can also be achieved with fewer restrictions on competition. For example, the national competition authority ACM (2022d) states that price agreements may not be indispensable if a price mark-up can achieve the same goal with less restriction of competition, and that voluntary labels without agreements on prices may also suffice.

Ultimately, however, it is not for the ACM (or EC) to determine whether stated goals are useful or necessary. That would require a political judgement that could turn out unequally in different member states (for example, different in the Netherlands with its nitrogen problem than in Member States with lower environmental pressures) and the legislator has chosen here to leave room for the private parties involved.⁵⁰ Both scientific professional literature and the Supreme Court (Raad van State) point out that the ACM should not be burdened with political choices.⁵¹

Regarding the content of the agreements, however, it will have to be considered whether they contain aspects that, while attractive to participants, are not necessary to achieve the standard (e.g. obligations on behaviour or communication).

Regarding the costs of the agreements, transparency will have to be ensured regarding the cost structure and calculation methodology, with validated substantiation. In its guidelines, the EC (2022g) highlights the need to avoid greenwashing in sustainability agreements. In Germany, Bioland argues on similar grounds for full transparency in terms of costs and fees under Art 210a CMO Regulation. The ACM states in its draft Guide to Sustainability Agreements (2021, point 67): "However, in the opinion of the ACM, it may be required specifically with regard to environmental damage agreements that the costs involved are not significantly higher than the costs of the measures the government would take to achieve the same sustainability benefit." This could be met by using the cost tables from the blue-green cost catalogue for the

⁴⁹ In addition, Art. 152 CMO Regulation and Art. 209 CMO Regulation do not require indispensability of the agreements to achieve the standard. This also gives room, but given the lenient interpretation of this concept in the draft EC guidelines for Art. 210a CMO Regulation (EC, 2023), that gain is limited.

⁵⁰ In the areas of food safety, animal and plant health and animal welfare, the legislator has placed the judgement in concrete situations on the necessity of standards with EFSA and, for invasive exotic species, with a scientific committee. Both apply criteria laid down in European regulations. Political decisions are then taken by the EC by delegated or implementing act. A substantive judgment on the desirability of standards therefore does not fit the role of the national competition authority and even the EC does not take such decisions without political scrutiny.

⁵¹ Interst (2022) in his study for the EC on sustainability agreements and competition notes that the judgment concerning indispensability ought to include why problems with externalities in a Member State have not been resolved through political processes: "When (environmental) externalities on other consumers are recognized as sustainability benefits, the applicable standard of indispensability may need to be reconsidered. In this case, it may not always be sufficient to point to a potential market failure since production and consumption without the agreement already satisfy the norms set by society. Such norms, for instance, may already impose limits or taxes on emissions as an expression of a trade-off of diverse preferences and principles, including individual liberties. I acknowledge that this raises difficult issues regarding the general scope of competition law and the mandate and role of competition authorities, as well as regarding the effectiveness and efficiency of the overall political process. Still, in terms of an extended indispensability test, it should be analyzed why the issues addressed by an agreement are not sufficiently solved through (existing) policies."

ANLb⁵², supplementing them where necessary. For example, for animal welfare, an elegant costing system has been developed by Vissers & Woltjer (2022). An approach based on CAP amounts has the added advantage that compensation on top of the costs incurred and income foregone has a modest plus for contribution to the farmer's income. This plus is created by assuming the costs of the marginal, not the average provider (Baayen et al., 2021) and is necessary to make participation attractive.⁵³ This logic was developed by the Ministry of LNV together with the EC and approved by the EC in an audit.

Table 2 Opportunities and restrictions for sustainability agreements of individual farmers, farmers' associations, cooperatives and non-recognised producer organisations and associations of producer organisations when applying Art. 101 TFEU, Art. 209 CMO Regulation and Art. 210a CMO Regulation. Red: unfavourable conditions; green: favourable conditions.

| Farmers, cooperatives and non-recognised POs | Art. 101 TFEU, paragraph 3 | Art. 209 CMO Regulation | Art. 210a CMO Regulation |
|--|--|---|---|
| Limit of charging on of sustainability costs | Only for costs of activities exceeding legal requirements ⁵⁴ | No restriction to exceeding of legal requirements | Only for costs of activities exceeding legal requirements |
| Mandatory collectivity | N.A. | N.A. | N.A. |
| Competition | Progress is mandatory | Progress is not mandatory | Progress is not mandatory |
| | Fair share of benefit to consumers required | Fair share of benefit to consumers not required | Fair share of benefit to consumers not required |
| | Agreements must be indispensable to achieve the objective | Agreements need not be indispensable to achieve the objective | Agreements need not be indispensable to achieve the objective |
| | Price agreements concerning charging on of sustainability costs to consumers not permitted according to EC guidelines ⁵⁵ , however value sharing clauses (Art. 172a CMO Regulation) permitted: legal conflict | Price agreements concerning charging on of sustainability costs to consumers likely permitted, certainly through value sharing clauses (Art. 172a CMO Regulation), however no obligation for identical prices permitted | Price agreements concerning charging on of sustainability costs to consumers explicitly permitted, with or without value sharing clauses (Art. 172a CMO Regulation) |
| | No possibility permitted for eliminating competition for a significant part of products concerned | Exclusion of competition is prohibited | Exclusion of competition is prohibited |
| | N.A. | Objectives of Art. 39 TFEU not to be jeopardised | Objectives of Art. 39 TFEU not to be jeopardised |

⁵² These cost tables are based on amounts at which the marginal Dutch provider receives a full cost compensation, rather than averages that will be insufficient for part of the farmers (Baayen et al., 2021).

⁵³ In this respect, there is a parallel with compensation for services of general economic interest, for which the compensation should be based on actual costs but may include a reasonable profit (EC, 2013).

⁵⁴ Agreements are not necessary when there is a legal obligation.

⁵⁵ In the Guidelines on horizontal cooperation agreements, the EC states that that an agreement between competitors on how, as a result of the adoption of a sustainability standard, increased costs should be passed on in higher selling prices to their consumers, has an anticompetitive object (and is therefore prohibited under Art. 101 TFEU).

Table 3 Possibilities and limitations for sustainability agreements of recognised producer organisations and associations thereof, when applying Art. 152 separately or together with Art. 209, Art. 210a or Art. 164 CMO Regulation (GTC). Red: unfavourable conditions; green: favourable conditions.

| Recognised (U)PO | Art. 152 | Jointly with Art. 209 | Jointly with Art. 210a | Jointly with Art. 164 (Extension of rules) |
|--|---|---|---|--|
| Limit of charging on of sustainability costs | Statutory and non-statutory requirements | Statutory and non-statutory requirements | Only for costs of activities exceeding legal requirements | Statutory and non-statutory requirements |
| Mandatory collectivity | Concentration of (part of) supply | Concentration of (part of) supply | Concentration of (part of) supply | Concentration of (part of) supply |
| Competition | Progress is not mandatory | Progress is not mandatory | Progress is not mandatory | Progress is not mandatory |
| | Fair share of benefit to consumers not required | Fair share of benefit to consumers not required | Fair share of benefit to consumers not required | Fair share of benefit to consumers not required |
| | Agreements need not be indispensable to achieve the objective | Agreements need not be indispensable to achieve the objective | Agreements need not be indispensable to achieve the objective | Agreements need not be indispensable to achieve the objective |
| | Price agreements concerning charging on of sustainability costs to consumers likely permitted, certainly through value sharing clauses (Art. 172a CMO Regulation) | Price agreements concerning charging on of sustainability costs to consumers likely permitted, certainly through value sharing clauses (Art. 172a CMO Regulation), however no obligation for identical prices permitted | Price agreements concerning charging on of sustainability costs to consumers explicitly permitted, with or without value sharing clauses (Art. 172a CMO Regulation) | Price agreements concerning charging on of sustainability costs to consumers are prohibited |
| | Exclusion of competition is prohibited | Exclusion of competition is prohibited | Exclusion of competition is prohibited | No potential restriction of competition allowed, in particular no market sharing, impact on the proper functioning of the market organisation, price or quota fixing, discrimination or elimination of competition in respect of a substantial part of the products concerned. |
| | Objectives of Art. 39 TFEU not to be jeopardised | Objectives of Art. 39 TFEU not to be jeopardised | Objectives of Art. 39 TFEU not to be jeopardised | Objectives of Art. 39 TFEU not to be jeopardised |

The scope for the national competition authority ACM (or in the case of cross-border agreements, the EC) to disapprove such agreements or require modification is relatively limited. The ACM can disapprove agreements that do not meet the basic conditions, only if grossly flawed. Indeed, the relevant articles give as the criterion for this that there must be exclusion of competition or jeopardising of the objectives of Art. 39 TFEU (agriculture article). Art. 209(1), second paragraph CMO Regulation, adds to this that there must be no obligation to apply identical prices. The wording of these three criteria suggests that this is a marginal test, not a graduated weighting of the degree of infringement. This is consistent with the special nature of the derogation on Art. 101 TFEU and is explicitly recognised in the EC's draft guidelines for the application of Art 210a CMO Regulation.

The requirements linked to the derogations in the CMO Regulation for farmers and farmers' associations are summarised in Table 2 and summarised and for recognised producer organisations in Table 3.

3.1.7 Opportunities and restrictions for chain parties

Art. 157 and 158 CMO Regulation

Art. 157 and Art. 158 CMO Regulation allow recognition of IBOs with representatives of production, processing, marketing and distribution. Publicly recognised IBOs must consist of representatives of professional groups involved in production and in at least one of the following stages of the supply chain: processing or marketing, including distribution, of products of one or more sectors. They must pursue one or more objectives from a closed set of options.

With regard to sustainability, recognised IBOs can focus on objectives related to climate, environment, animal health and welfare and environmentally friendly production methods in general. This includes supporting activities such as research, methodology development and measures that mitigate risks and promote desired developments. Approved IBOs may focus on sustainability and conclude agreements about it.

Art. 172a CMO Regulation

Based on Art. 172a CMO Regulation, farmers and farmers' organisations can agree on value sharing clauses with parties further down the chain that determine how developments in the relevant market prices of the products concerned or other commodity markets should be allocated between them. This could include clauses (agreements) stipulating that compensation to farmers for sustainable production does not depend on market price fluctuations, but includes a certain fixed price premium. IBOs, whether recognised or not, can participate in agreements on such clauses.

Art. 210 CMO Regulation

Art. 210 CMO Regulation stipulates that the cartel prohibition of Art. 101 TFEU does not apply to agreements of recognised interbranch organisations necessary for the fulfilment of their objectives, unless those agreements lead to market partitioning, jeopardise the proper functioning of the market organisation, create undue distortions of competition, involve the fixing of prices or quotas, are likely to cause discrimination or eliminate competition to a significant extent (paragraph 4). Thus, a recognised IBO is subject to significantly stricter competition requirements than a non-recognised IBO. On the other hand, when entering into sustainability agreements, IBOs are not required to prove technical progress or a fair share of its benefits to consumers. A willingness-to-pay survey is not required.

The scope in the CMO regulation for sustainability agreements for recognised interbranch organisations is summarised in Table 4.

Art. 210a CMO Regulation

Chain parties, whether or not organised in an IBO, may participate in sustainability agreements under Art. 210a CMO. Where these are recognised IBOs, the competition law restrictions of Art. 210(4) CMO Regulation apply to the agreements made.

Consequences of concurrence of articles

When Art. 172a CMO Regulation is applied in conjunction with Art. 210 CMO Regulation, the competition law restrictions of paragraph 4 of that article apply to the agreements made. This is not the case if the agreements are made with chain parties separately or with a non-recognised IBO. The same applies to the concurrence of Art. 210 and Art. 210a CMO Regulation.

So for the conclusion of sustainability agreements, it is advisable not to involve recognised IBOs, but only non-recognised IBOs or individual chain parties.

Table 4 Possibilities and limitations for sustainability agreements of recognised interbranch organisations when applying Art. 210 CMO Regulation and Art. 210a CMO Regulation and general extension of rules. Red: unfavourable conditions; green: favourable conditions.

| Recognised IBO | Art. 210 | Jointly with Art. 210a | Jointly with Art. 164 (Extension of rules) |
|--|--|--|---|
| Limit of charging on of sustainability costs | Value sharing clauses (Art. 172a CMO Regulation) ⁵⁶ | Value sharing clauses (Art. 172a CMO Regulation) as regards non-mandatory requirements | Value sharing clauses (Art. 172a CMO Regulation) |
| Mandatory collectivity | Not itself active in production, processing, trading | Not itself active in production, processing, trading | Not itself active in production, processing, trading |
| Competition | Progress not required | Progress not required | Progress not required |
| | Fair share of benefit to consumers not required | Fair share of benefit to consumers not required | Fair share of benefit to consumers not required |
| | Agreements must be necessary for achieving the objectives of the IBO | Agreements must be necessary for achieving the objectives of the IBO | Agreements must be necessary for achieving the objectives of the IBO |
| | No division of markets, no impact on proper functioning of market organisation, no distortion of competition not necessary for achievement of CAP objectives of PO, no fixing of prices or quotas, no discrimination or elimination of competition to substantial part of products | No division of markets, no impact on proper functioning of market organisation, no distortion of competition not necessary for achievement of CAP objectives of PO, no fixing of prices or quotas, no discrimination or elimination of competition to substantial part of products | No division of markets, no impact on proper functioning of market organisation, no distortion of competition not necessary for achievement of CAP objectives of PO, no fixing of prices or quotas, no discrimination or elimination of competition to substantial part of products (Art. 210); nor harm to other companies, no restriction on entry of new companies (Art. 164) |

3.1.8 Monetatisation of costs and benefits

Not always necessary, not always possible

The previous paragraphs show that the derogations in the CMO Regulation to Art. 101(1) TFEU entail an exemption from the obligation under Art. 101(3) TFEU to substantiate that the benefits to consumers outweigh the additional costs when concluding sustainability agreements. This is of great importance because calculating the benefits of sustainability agreements is complex and not always possible. There is extensive literature on this, both in terms of economic logic (Inderst, 2022 and publications cited therein) and methodology.

A crucial question is whether the benefits for society may be included in the trade-off or only the benefits for the consumers concerned who have to pay a premium price. Views on this vary and the EC has shifted its view several times over time: from initially allowing room to include benefits for society as a whole to a stricter interpretation (Candel, 2021) and now back again under the Green Deal (EC, 2021c, 2022g, 2023).

A complex methodology of shadow pricing and damage costs (ACM, 2019b, 2021, 2022d; CE Delft, 2017) or true pricing methods (Galgani et al., 2021a, 2021b, 2021c) is used to quantify the consumer benefits of

⁵⁶ Recital 56 of the Omnibus Regulation (2017/2393) reads: 'With a view to improving the transmission of market signals and strengthening the links between producer prices and value added along the supply chain, farmers, including farmers' organisations, should be allowed to agree on value distribution clauses, including on market-generated profits and losses, with their first buyer. As inter-branch organisations can play an important role by facilitating dialogue between the parties active in the supply chain and by promoting good practices and market transparency, they should be allowed to adopt standard value distribution clauses. However, the use of value distribution clauses by farmers, farmers' organisations and their first buyer should remain voluntary.' This provision builds on Commission Regulation 2016/1166. It was extended to all parties in the chain in 2021 with the insertion of Art. 172a into the CMO Regulation.

sustainability agreements. This is not addressed in this report, given the derogations in the CMO regulation for sustainability agreements from monetising their benefits. However, sustainability agreements will require monetisation of the costs of their implementation for farmers (ACM, 2022d; EC, 2022g, 2023).

Animal welfare

For animal welfare, monetisation of consumer benefits is not relevant at all because of the mandate in Art. 13 TFEU to take full account of animal welfare when formulating and implementing policies. A willingness-to-pay survey is not appropriate to determine its intrinsic value. However, the costs of respecting animal welfare rights can be quantified (Vissers & Woltjer, 2022). Incidentally, this raises the question whether agreements under Art. 101 TFEU in respect of animal welfare are exempt from the duty to demonstrate consumer benefit, or whether agreements for the benefit of animal welfare are simply not possible under Art. 101 TFEU.

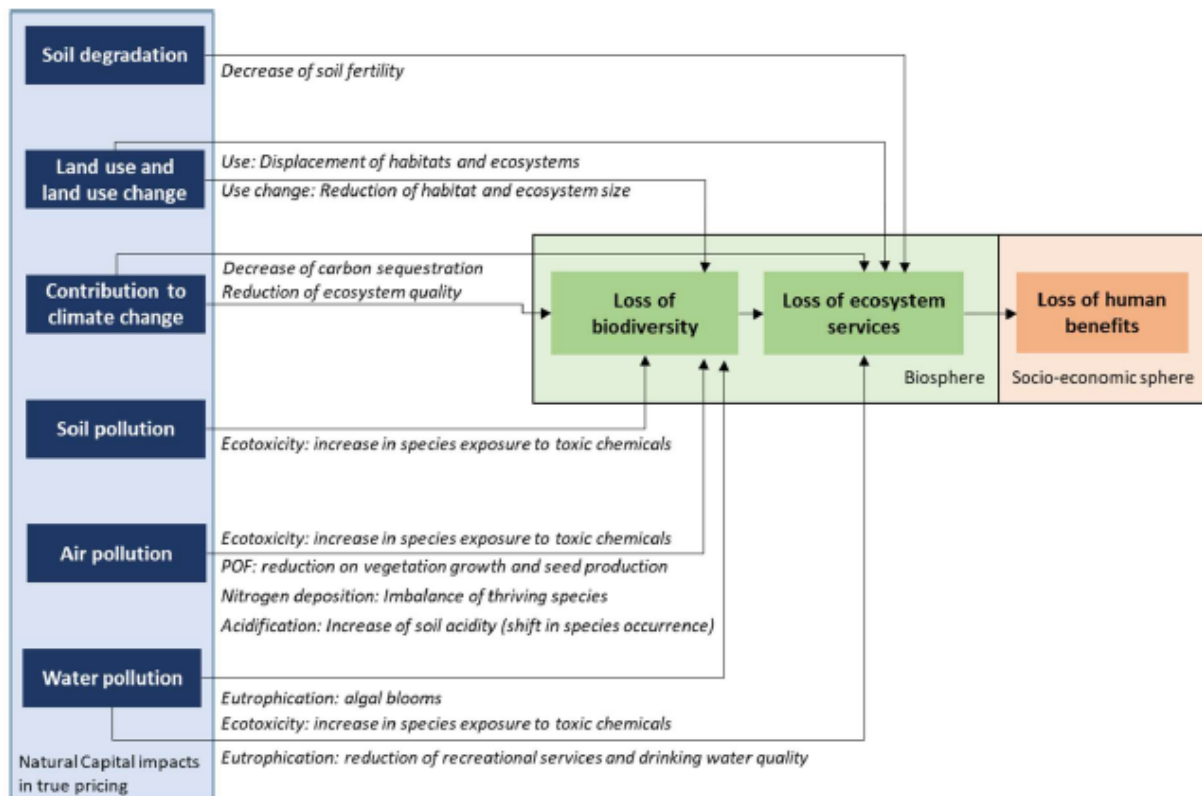


Figure 1 Diagram of the relationship between biodiversity loss and ecosystem services impacting natural capital in a true price determination (source: Galgani et al., 2022c).

Nature and biodiversity

Another issue when calculating the value of nature and biodiversity is whether to include its intrinsic value or only its value for humans. The first line is in line with international developments in which nature and biodiversity are given legal personality and an intrinsic right to protection (Putzer et al., 2022). Protected habitats under the Habitats Directive (92/43 EEC) are an example of this, albeit without formal legal personality, but de facto.⁵⁷ As with animal welfare, an approach based on the intrinsic value and protectability of nature and biodiversity runs counter to the third condition of Art. 101(3) TFEU (consumer benefit).

⁵⁷ Congress "The Habitats Directive as game changer for nature and law in the European Union: emerging trends and novel approaches", Brussels, 13-14 December 2022, <http://www.habitat-congress2022.brussels/>.

The alternative welfare theory approach uses estimates of the value of species and habitats to humans based on what people are willing to pay for them or the value of ecosystem services.⁵⁸ For a diagram from the true pricing approach, see Figure 1.

3.1.9 Rules as regards the internal market

Public sustainability rules

The free movement of goods within the EU internal market is a basic principle from the Treaty (Art. 28-37 TFEU). Quantitative restrictions on imports and exports and all measures of equivalent effect between Member States are prohibited (Art. 34-35 TFEU).

However, qualitative restrictions are not excluded and quantitative restrictions are even explicitly allowed in certain cases: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States" (Art. 36 TFEU). This article provides the basis for a variety of European and national restrictions on free movement in the areas of animal health and welfare, plant health and food safety.

The Court of Justice (ECLI:EU:C:2008:717, point 57) added the environment, subject to necessity and proportionality. The Ministry of Economic Affairs believes that, in this context, it should be considered whether the pursued goal of sustainability cannot be achieved in another, possibly less restrictive, way and whether there are alternative measures (subsidiarity) (Ministry of Economic Affairs and Climate Change, 2019b).

In addition to the Art. 36 TFEU exception, the rule of reason can be invoked to protect any (compelling) public interest. The ECJ has ruled that "obstacles to [the] intra-Community movement must be accepted in so far as urgent needs make them necessary" (ECLI:EU:C:1979:42). Again, the measure must be necessary and proportionate and alternatives must be considered (subsidiarity).

The EU treaty thus gives governments room to set national sustainability rules that impede free movement in a broad field (climate, environment, nature, landscape, animal welfare, animal and plant health), but limited (social objectives such as fair trade and fair remuneration of workers are excluded) and subject to necessity, proportionality and subsidiarity.⁵⁹

Private sustainability rules

The scope for private agreements affecting free movement within and between Member States is determined by the articles in the EU Treaty on competition (Art. 101 to Art. 106 TFEU) and its exceptions for agriculture in the CMO Regulation.

Art. 101 TFEU states that all agreements which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the internal market are incompatible with the internal market and prohibited. Sustainability agreements that, in their effect, foreclose the Dutch market are therefore not allowed. However, the derogations to Art. 101 TFEU in the CMO Regulation do provide room, with the limit that such agreements may not exclude competition (marginal test).

⁵⁸ The assumptions of such calculations are usually questionable. In nature, there is usually no linearity in dose-effect relationships, equilibria pass beyond a tipping point to another equilibrium, there are rarely reliable reference points of unaffected nature, and it is unclear how long in time to go back for this. Species extinction cannot be compared with species decline.

⁵⁹ The Netherlands' Supreme Court (Raad van State, 2022, footnote 28) also points this out in the context of the extension of rules: "(28) Declaring certain rules generally binding may lead to a restriction of free movement if, for example, an EOR sets (minimum) requirements for the feed used by agricultural producers. This in fact means that animal feed producers who do not meet these requirements are restricted in their ability to sell their products on the Dutch market. This is only allowed if there is a justification for this."

Art. 102 TFEU provides that any abuse of a dominant position within the internal market or in a substantial part of it is incompatible with the internal market and prohibited in so far as it may affect trade between Member States. Such abuse may, in particular, consist in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. Member States may in that case impose countervailing charges. This provision limits the scope of derogations in the CMO Regulation. Sustainability agreements featuring national labels may therefore run into problems, insofar as a dominant position would be involved. In practice, this is rarely the case and national competition authorities accept agreements on national labels.

That Art. 102 TFEU applies in full to the derogations in the CMO Regulation from Art. 101(1) TFEU is also evident from Council Regulation (EC) No 1184/2006 applying certain rules of competition to production of and trade in certain agricultural products. This regulation repeats the exceptions from that regulation, but explicitly states that Art. 101-106 and Art. 108 TFEU continue to apply.⁶⁰

Altogether, private sustainability agreements may not discriminate against trading partners on unequal terms for equivalent performance, thereby placing them at a competitive disadvantage. If they do, Member States may impose compensatory levies. For labels, this means that competitors from other Member States cannot be excluded from participating.

3.1.10 Rules as regards unfair trade practices

Following the findings of the Agricultural Markets Task Force (2016), Directive (EU) 2019/633 on unfair trading practices in relations between businesses in the agricultural and food supply chain was adopted in 2019.

The recitals recall that there are often significant imbalances in bargaining power between suppliers and buyers of agricultural and food products in the agricultural and food supply chain. Those bargaining power imbalances are likely to lead to unfair trading practices when larger and more powerful trading partners seek to impose certain practices or contractual arrangements that are advantageous to them in connection with a sales transaction. These include matters such as departing significantly from good commercial behaviour, violating good faith and fair treatment, and imposing an unjustified and disproportionate transfer of economic risk from one trading partner to another or significant imbalance between rights and obligations. Certain practices may be manifestly unfair even if agreed by both parties.

Directive 2019/633 provides a minimum standard of protection against unfair commercial practices, allowing Member States to adopt or maintain national rules which go beyond the unfair commercial practices listed in this Directive. However, this is within the limits of Union law applicable to the functioning of the internal market and provided that such rules are proportionate.

The Directive is without prejudice to the possibility for a buyer and a supplier to agree on a value-sharing clause within the meaning of Art. 172a of the CMO Regulation.

For a substantive elaboration of the situation in Member States with regard to unfair commercial practices and the case law thereon, see Schrijvershof & Heystee (2022).

3.2 Practice

3.2.1 Producer organisations

According to the EC⁶¹, there are around 11 million farmers in the EU, including many small family farms. In contrast, there is a much higher concentration of processors and retailers. This asymmetry in terms of

⁶⁰ To note that in the codified version of Regulation 1184/2006, the numbers of those articles are confused. In paragraph 1, the numbering correctly refers to the latest version of the TFEU ("Art. 101-106 and Art. 108"), while paragraphs 2, 3 and 4 refer to the numbering from the previous version of the Treaty ("Art. 81-86 and Art. 88").

⁶¹ https://agriculture.ec.europa.eu/common-agricultural-policy/agri-food-supply-chain/producer-and-interbranch-organisations_en

bargaining power makes it difficult for farmers to defend their interests in the chain. Producer organisations strengthen their collective bargaining power. For a description of producer organisations in the EU, see Bijman et al. (2012). Fig. 2 shows the numbers of recognised POs per EU Member State in 2018. Most POs cover the fruit and vegetable sector (52% in 2018) and milk and dairy (9% in 2018). The Netherlands has relatively few recognised POs, exclusively for fruit and vegetables.

In addition, many Member States have agricultural cooperatives that are not formally recognised by the government as producer organisations within the meaning of the CMO regulation, but are considered de facto producer organisations by the EC, because they existed before the relevant EU legislation entered into force (several of them date back to the 19th century) (Bijman et al., 2012). If those cooperatives are included, the degree of organisation of Dutch agriculture is one of the highest in the EU (K.J. Poppe, personal communication, 15 February 2023).⁶² Such unrecognised producer organisations are covered by the derogations of the CMO Regulation insofar as they meet the conditions in the relevant articles, in particular Art. 209 CMO Regulation.

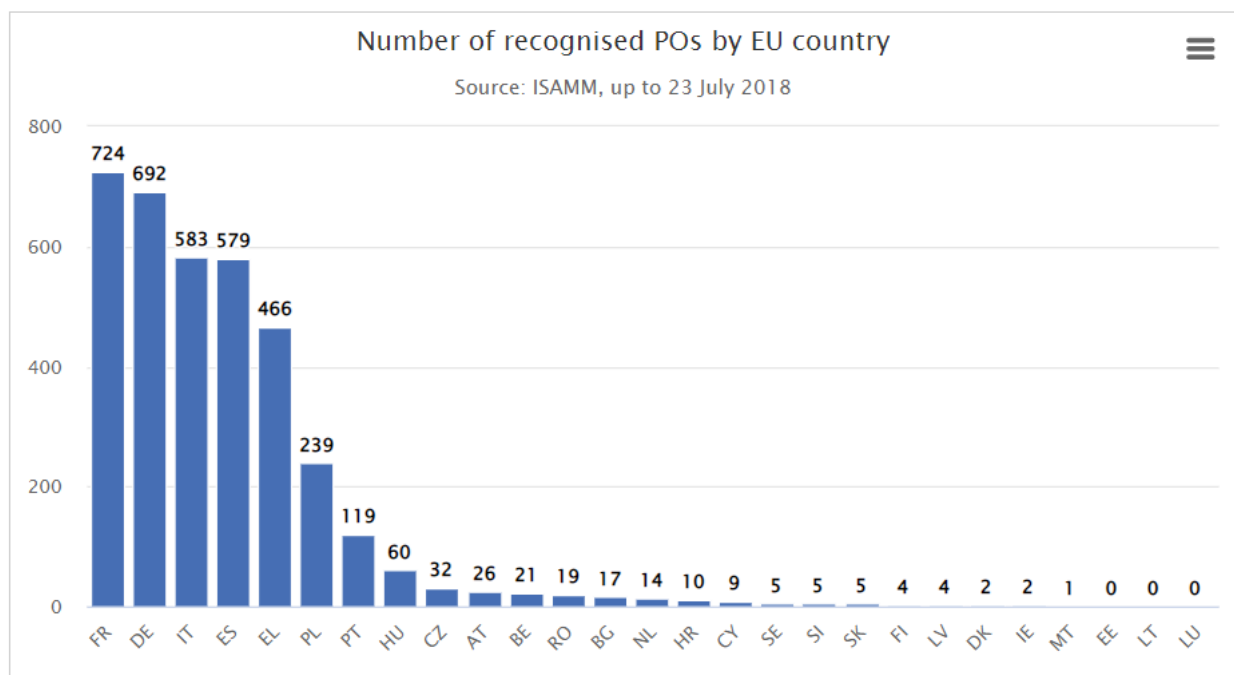


Figure 2 Numbers of recognised producer organisations per EU Member State in 2018 (source: EC).

3.2.2 Interbranch organisations

Farmers, processors and traders can unite in trade organisations. Such BOs adopt measures to make the chain work, but without being involved in production, processing or trade themselves. They are a platform for dialogue, sharing experiences of good practices and market transparency. Recognition of POs is not mandatory, except for olive oil, table olives and tobacco.

According to the EC, there are 133 recognised POs in the EU, including 9 in the Netherlands.⁶³

⁶² For the Netherlands, these include Agrico, Avebe, COSUN, FrieslandCampina, Royal Flora Holland and hybrid forms such as AVIKO (owned by COSUN) and VION (owned by farmer organisation ZLTO).

⁶³ https://agriculture.ec.europa.eu/system/files/2020-02/recognised-ibos_en_0.pdf

3.2.3 Quality labels

Conditions

Quality labels are a special case of sustainability standards in EU legislation (see section 3.1.1). In its guidelines on horizontal sustainability agreements, the EC points out that the development of sustainability standards must meet a set of requirements:

- Transparency;
- All interested competitors should be able to participate in the process leading to the setting of the standard;
- The standard should not oblige companies that do not wish to participate to do so;
- Companies should be allowed to go beyond the standard themselves;
- Parties should not exchange commercially sensitive information that is not necessary;
- Anyone should have access to the requirements and conditions for obtaining the label, and new entrants should be able to apply the standard once it has been developed;
- The standard should not lead to significant price increase or reduction of choice in the market;
- Compliance should be monitored and enforced.

Overview of quality labels in general

On request by the EP Agriculture Committee, Chever et al. (2022) reported on the sustainable agriculture labels used in the EU. The authors use the term "certification schemes" for this purpose. Such schemes provide assurance about certain characteristics or properties of a product or its production method based on a certification mechanism. The authors identified a total of 198 such schemes in the EU (170 schemes)⁶⁴ and some key third countries (28 schemes). They grouped the schemes into 9 typologies and subjected 15 of them to closer examination. The aim was to capture the extent to which the schemes contribute to EU sustainability goals.

Some schemes cover a wide range of sustainability objectives, while others specifically address one to three objectives (notably resource management, environmental protection, animal welfare, climate change) or even one specific objective (animal welfare or climate).

A significant proportion of the schemes cover requirements related to conditionality under the 'new' CAP (good agricultural and environmental conditions and statutory management requirements). Few schemes go beyond conditionality requirements. There is a large degree of overlap with practices under the eco-schemes and the agro-environment-climate measures. The authors see potential for using the schemes in the National Strategic Plan for the CAP, provided that "greenwashing" is avoided (e.g. stacking of private and public rewards, see also Silvis et al., 2022).⁶⁵ This requires examining the requirements and implementation methods of each scheme separately.

Over two-thirds of the schemes were private in nature and one-third public. Most schemes were applicable to all kinds of products, especially in relation to animal husbandry, followed by fruits and vegetables, crops, wine and seafood.

The typologies identified among the 15 schemes examined more closely were as follows:

- Good agricultural practices: Haute Valeur Environnementale (HVE), Integrowana Produkcja, IP Sigill, Leaf, Sistema di Qualità Nazionale di Produzione Integrata per le Produzioni Agricole (SQNPI);
- Origin and quality of finished products: geographical indications (GI), protected designations of origin (PDO) and protected geographical indications (PGI);
- Traceability and safety: no further research was conducted on this;
- Animal welfare: Beter Leven label, Initiative Tierwohl;
- Organic: Naturland;
- Climate: Bas-Carbone label, Wineries for Climate Protection (WfCP);

⁶⁴ For the Netherlands, these are the EKO quality label, Beter Voor, Weidemelk, Beter Leven quality label, IKB Ei, Food Security Standards FSSC 22000, On the way to Planet Proof (ex Milieukeur), Proterra non-GMO.

⁶⁵ However, that commitment is contrary to Art. 210a CMO Regulation, which stipulates that sustainability agreements may only relate to voluntary supra-legal activities. However, under Art. 152 and Art 209 CMO Regulation, this is in principle possible.

- Multi-purpose: Bord Bia Quality Mark, Certified Sustainable Beef Framework (CSBF), Equalitas, Global G.A.P. and Integrated Farm Assurance (IFA);
- Non-GMO: no further research was conducted on this;
- Fair trade: no further research was done on this.

For Denmark, the ACM (2022g) investigated the success of organic as a label. This found that the Danish government actively promotes organic and, partly because of this, consumers are willing to pay a premium price. Sustainability has even become a competitive parameter.

Animal welfare labels

For animal welfare, Maestre et al. (2022) reported that consumers have insufficient information to make good choices and would like to be better informed. Consumers are currently unwilling to pay as much or more for animal welfare as for organic products. They need simple, visual (preferably in different levels of animal welfare) and reliable information.

In addition, Maestre et al. (2022) found that existing animal welfare schemes create competition problems because Member States have different animal welfare schemes with different criteria and costs. This also restricts free movement between member states (partial renationalisation). Farmers feel forced to participate in such schemes even if there is no market for the welfare-friendly product. Farmers who maintain high animal welfare standards were also found to be crowded out by farmers with low standards, as consumers do not know the difference. Thus, the large number of labels not only leads to confusion but also to cannibalisation of high by lower standards.

Regarding the value distribution in the chain, the authors found that retailers receive the largest margin⁶⁶, partly also the processors, while farmers receive the smallest margin. While the remuneration was sufficient to get out of costs, it was not sufficient to earn a better income than in conventional agriculture.

The contribution of labels to animal welfare varied, noting that multilayer schemes mainly led to increased demand at the lowest entry level (Label Rouge in France, Beter Leven label in the Netherlands). However, with a growing market share, animal welfare in the EU did improve thanks to the labels.

3.2.4 Chain agreements

Types of sustainability agreements

The European Network for Rural Development (ENRD) organised meetings on the interpretation and possible implementation of Art. 210a in the CMO Regulation in 2022, following its insertion. This has brought together and documented a considerable number of examples of sustainability initiatives in different member states (Carmona & Goto, 2022; ENRD, 2022a, 2022b, 2022c, 2022d, 2022e, 2022f, 2022g; Fiebinger, 2022, García Garrido, 2022a, 2022b).

García Garrido (2022b) structures the sustainability agreements as follows:

- *Producer organisations*, such as DCOOP and Cooperativa del Campo de Navaconcejo (objective: sustainable production, a.o. in mountainous areas)
- *Interbranch organisations*, such as Interbio Nouvelle-Aquitaine (objective: reduced pesticide use, transition to circularity, protection and restoration of biodiversity, better product quality, better prices and income for all actors in the chain)
- *Associations of farmers*, such as Bioland Association for Organic Agriculture, Belgian Feed Association, Belbeef, Cooperativa Ntra. Sra. Del Prado, SCL, Coldiretti – Filiera Italia (objective: organic farming, animal welfare etc.)
- *Operational groups under the EIP AGRI*, such as Sociedad Cooperativa Apícola de las Hurdes (APIHURDES), PDO Cereza del Jerte (GO CEREZA) (objective: cooperation and innovation)
- *R&D agreements*, such as Viñaoliva Cooperative (objective: circularity)
- *Data-exchange agreements*, such as Terra Vita – Agricultural Tradition and Biodiversity Certification (objective: knowledge transfer and certification)

⁶⁶ In the sense of consumer euro share, not the additional revenues minus additional costs for the sustainability issue.

- *Agreements as regards packaging*, such as Innovaciones Sun-bética, Naturcode, Europool System (objective: circular packaging and consumer information)
- *Public/private agreements*, such as the sustainability agreements of the Flemish government with the Belgian animal feed sector and the ILVO (objective: less nitrogen and phosphorus in animal feed, reduction of methane emissions from dairy cattle)
- *Agreements at the initiative of the retail*, for example of the Retail Soy Group, Lidl, Bioland, the REWE Group, the Retailers' Palm Oil Group, EDEKA Südwest Fleisch, Sonae, GlobalGap, Albert Heijn, Initiative Tierwohl (objective: promoting sustainable production and consumption)

In addition, there is a need among companies that process agricultural products to contribute to sustainability and make agreements with chain parties to this end. For instance, AIM, the European Brands Association, has urged the EC to apply the derogation of Art. 210a GMO regulation not only to primary agricultural products but also to processed products (AIM, 2022). For this, AIM invokes the principle of the useful effect of EU regulation. Indeed, the objectives of Art. 210a CMO regulation, namely making agriculture more sustainable, can only really be achieved if processed products can also be the subject of sustainability initiatives. After all, the majority of agricultural products are purchased by the processing industry.

Specific sustainability objectives

Initiative Tierwohl has over 10,000 participating farms, three-quarters of which are pig farmers and a quarter of which are poultry farmers. Pig farmers receive a price premium of €5.28 per pig from the abattoir. Piglet breeders receive an animal welfare premium of €3.07 per piglet from the sponsoring farm. This includes €1.80 premium for sow farmers per piglet from the piglet breeder. Broiler breeders receive €0.0275 per kg live weight, turkey hen and cockerel breeders receive €0.0325 per kg and €0.04 per kg respectively plus €0.025 per kg from the trade and catering industry. Germany's Kartellamt approved the modus operandi of Initiative Tierwohl.⁶⁷

Bioland e.V. is the leading association in Germany for organic farming, with both horizontal and vertical goals. Some 8,700 farmers, gardeners, beekeepers and winegrowers apply Bioland's guidelines and over 1,400 chain parties from processing, trade, distribution, retail and gastronomy are partners. Together they form the participants in Bioland's sustainability agreements. This is a voluntary private standard with requirements that go beyond EU regulations. Implementation of the standard is monitored by independent certifying bodies. Participants are allowed to display the Bioland logo when selling to consumers. The aim is to produce in balance with nature, support biodiversity, protect the environment and mitigate climate change.

After Art 210bis was inserted into the CMO regulation, Bioland developed the "Mehrertsicherungssystem Bioland Milch" as a sustainability agreement, in which producers are compensated for the sustainable way they produce milk, in line with EU requirements for organic farming. The level of compensation is determined objectively by independent external parties, adjusted regularly and must not exceed what is indispensable. Price transparency is seen as necessary (ENRD, 2022g; Fiebinger, 2022).

⁶⁷ https://eu-cap-network.ec.europa.eu/system/files/2022-11/04_f2f_ciulli.pdf

4 Legislation and practice in the Netherlands

4.1 Legislation

4.1.1 Current nationale legislation

Agriculture

The Landbouwwet (Agriculture Act)⁶⁸ and regulations developed under it implement the CMO regulation and other EU regulations regarding the CAP.

The Wet dieren (Animals Act)⁶⁹ implements EU regulations regarding animal health and welfare.⁷⁰

The Plantgezondheidswet (Plant Health Act)⁷¹ implements EU phytosanitary regulations.

Competition

The Mededingingswet (Competition Act) implements the obligations and rules of the EU Treaty in Articles 6 to 16. Art. 101 TFEU is implemented in Art. 6 and Art. 7 of the Competition Act.⁷²

The enforcement of the Mededingingswet is assigned to the ACM as an independent administrative body within the central government. This is regulated in the Instellingswet Autoriteit Consument en Markt (Establishment Act Authority Consumer and Market).⁷³

In view of the scope for concluding sustainability agreements, the Ministry of Economic Affairs adopted the Beleidsregel mededinging en duurzaamheid 2016 (Competition and Sustainability Policy Rule) in 2016.⁷⁴

The Wet oneerlijke handelspraktijken landbouw- en voedselvoorzieningsketen (Unfair Commercial Practices in the Agricultural and Food Supply Chain Act)⁷⁵ implements Directive (EU) 2019/633 on unfair commercial practices in relations between enterprises in the agricultural and food supply chain.

4.1.2 Legal proposal concerning Room for sustainability agreements

Problems with covenants

The Dutch government likes to work with covenants. However, such agreements between a range of parties encounter problems with coordination, so-called "free riders" and tension with competition law, in particular Art. 101 and 102. TFEU. For instance, in the case of the agreements around "Chicken of Tomorrow", the ACM ruled that these agreements, despite the broad support for them, were contrary to competition law.

⁶⁸ <https://wetten.overheid.nl/BWBR0002252/2019-01-01#HoofdstukIII>

⁶⁹ <https://wetten.overheid.nl/BWBR0030250/2022-12-22>

⁷⁰ Relevant in this context is the general prohibition in Article 2.1 of the Animals Act on breaches of animal welfare, which applies to every animal keeper: "It is prohibited to cause pain or injury to an animal or to harm its health or welfare without a reasonable purpose or beyond what is permissible to achieve such purpose." By amendment, the following was added: "A reasonable purpose shall in any case not include being able to keep animals in a certain type of husbandry system or housing." The interpretation of this is subject to debate (Ministerie van LNV, 2022a).

⁷¹ https://wetten.overheid.nl/BWBR0043194/2021-03-01/#Hoofdstuk12_Artikel27

⁷² <https://wetten.overheid.nl/BWBR0008691/2019-01-01>

⁷³ <https://wetten.overheid.nl/BWBR0033043/2022-05-01>

⁷⁴ <https://wetten.overheid.nl/BWBR0038583/2016-10-06>

⁷⁵ <https://wetten.overheid.nl/BWBR0045048/2021-11-01/>

First response: national policy rule (guideline)

The commotion this caused led the Ministry of Economic Affairs to adopt the Competition and Sustainability Policy Rule 2016. This policy rule weakens the interpretation of Art. 101 TFEU with regard to sustainability agreements in favour of sustainability. However, the policy rule does not go as far as balancing consumer and sustainability interests (see section 3.1.8). The sustainability of the policy rule is uncertain given the EC's criticism of its draft (Raad van State, 2018).

Second response: legal proposal

After problems with "Chicken of Tomorrow" in addition to the problems with fair trade agreements and the closure of coal-fired power plants, the government submitted a legal proposal in 2019 to better facilitate initiatives from society with regard to sustainability agreements (legal proposal Room for Sustainability Initiatives) (Ministry of Economic Affairs, 2019a).

At its core, this is a process bill of limited scope (greenhouse gas emission reduction, sustainable energy production, energy saving, animal health and animal welfare) and a limited horizon (five years). The scope could be extended by executive order. In response to the advice of the Netherlands' Supreme Court (Raad van State) (Ministry of Economic Affairs, 2019c), this was changed to a temporary delegation in the law itself for urgent cases.

The proposal aims to give citizens, civil society organisations and businesses the opportunity to take sustainability initiatives and propose them for capture as regulations with generally binding rules of a temporary nature (5 years), to be prepared by the government and passed by or by virtue of order in council. Their scope can be national, regional or area-specific. Pilots are also possible.

The usefulness of the law lies in removing barriers against sustainability agreements, especially free rider behaviour, the first mover problem and the prohibition of agreements under Art. 101 TFEU. It is unclear to what extent provisions on pricing or charging on of sustainability costs may be adopted under the forthcoming law.⁷⁶

Weaknesses of the legal proposal

The Raad van State considers that the legal proposal is at odds with European competition law (Art. 101 TFEU) and the principle of Treaty loyalty (also known as Union loyalty; Art. 4 TEU) (Ministry of Economic Affairs, 2019c). If agreements are covered by the cartel prohibition, Member States may not detract from the so-called useful effect of the European rules with national regulations by circumventing the prohibition with national regulations of similar scope. The ECJ has ruled on this issue in a series of cases.⁷⁷

The Raad van State therefore believes that the government does not offer an appropriate solution to the competition problem with this proposal. According to the advice, the government should not anticipate European guidelines (incidentally, this advice pre-dates the introduction in the CMO Regulation of Art. 210bis CMO Regulation, which gives a significant extension and in which guidelines are also announced). Alternative, according to the Raad van State, would be to rely on broadening European competition law itself, but the government was not in favour of this, as this could encourage greenwashing and would unnecessarily burden the ACM with political considerations on the desirability of sustainability agreements (see also Schinkel & Treuren, 2020; Baayen et al., 2022). Other alternative, according to the Raad van State, would be to work with extensions of rules (EOR), however, this would require agreements between parties first and that preliminary step alone would violate the cartel prohibition. The Raad van State prefers the use of EORs to the legal proposal and advises against its submission. The responsible Minister was of the opinion that, notwithstanding the case-law of the ECJ, there would be sufficient room to adopt national competition regulations, including when societal actors request them, as long as, in doing so, they act within the limits of what EU competition law and in particular Art. 101 TFEU requires.

⁷⁶ However, case applicants must provide a comprehensive cost-benefit analysis with the request to the Minister, including how stakeholders will be affected by the initiative and any offsets.

⁷⁷ Cases C-267/86 van Eycke ECLI:EU:C:1988:427, C-185/91 Reiff ECLI:EU:C:1993:886, C-153/93 Delta Schiffarts- und Speditionsgesellschaft ECLI:EU:C:1994:240, C-96/94 Centro Servizi Spediporto ECLI:EU:C:1995:308, C-35/96 Commissie/Italië ECLI:EU:C:1998:303, C-35/99 Arduino ECLI:EU:C:2002:97, C-250/03 ECLI:EU:C:2005:96 Mauri and the joined cases C-94/04 and C-202/04 Cipolla a.o. ECLI:EU:C:2006:758.

The principles of the useful effect ("effet utile") and the loyalty principle ("Union loyalty")

Member States must, under the loyalty principle of Art. 4 TFEU, take the necessary measures for the effective achievement of the result intended by European legislation. Member States must do or refrain from doing everything necessary for the full and effective application of European law in the national legal order. The implication is that implementation is not a purely technical matter of transposing European standards into national laws and regulations. The national legislator is expected to check what the objectives of the European regulation to be implemented are and then whether the implementation regime can meet them both on paper and, above all, in practice. The determining factor is whether the measures sufficiently realise the useful effect of the regulation at national level. For the national legislator implementing European regulations, this means that target clauses in the relevant regulations and the recitals preceding the articles (the 'recitals') are an important source of interpretation. Establishment history and context can also be important for this purpose.

The Court of Justice has developed the doctrine of useful effect in addition to the principle of Treaty loyalty (also known as "Union loyalty"). This doctrine entails that the useful effect of Union law may not be impaired. In assessing this, the Court starts from the objectives of Union law and how best to achieve them. The principle of European Union loyalty and the effectiveness of European Union law mean that, in order to guarantee the full and complete effect of European Union law, Member States cannot be content with being passive. On the contrary, Member States must take an active attitude to bring national law into conformity with Union law and ensure its effective application and enforcement.

De recitals in the CMO Regulation as regards competition are as follows:

- (171) In accordance with Article 42 TFEU, the provisions of the TFEU concerning competition apply to the production of and trade in agricultural products only to the extent determined by Union legislation within the framework of Article 43(2) TFEU and in accordance with the procedure laid down therein.
- (172) In view of the specific characteristics of the agricultural sector and its reliance on the good functioning of the entire food supply chain, including the effective application of competition rules in all related sectors throughout the whole food chain, which can be highly concentrated, special attention should be paid to the application of the competition rules laid down in Article 42 TFEU. To that end, there is a need for close cooperation between the Commission and the competition authorities of Member States. Moreover, guidelines adopted, where appropriate, by the Commission are a suitable instrument to provide guidance to undertakings and other stakeholders concerned.
- (173) It should be provided that the rules on competition relating to the agreements, decisions and practices referred to in Article 101 TFEU and to abuse of a dominant position apply to the production of, and the trade in, agricultural products, provided that their application does not jeopardise the attainment of the objectives of the CAP.
- (174) A special approach should be allowed in the case of farmers' or producer organisations or their associations, the objective of which is the joint production or marketing of agricultural products or the use of joint facilities, unless such joint action excludes competition or jeopardises the attainment of the objectives of Article 39 TFEU.

This shows that the legislator wanted the competition rules in Art. 101 TFEU to apply to agriculture, provided they do not impede the achievement of the objectives of the CAP (i.e. Art. 39 TFEU). Exceptions apply in certain cases, notably for POs and unions thereof, provided that their joint action does not exclude competition or jeopardise the achievement of the objectives of Art. 39 TFEU. This requires close cooperation between the EC and national competition authorities and guidance from the EC should provide guidance.

This makes Member States, in the light of the principles of utility and loyalty, to refrain from adopting their own regulations limiting the effect of Art. 101 TFEU in agriculture,⁷⁸ except for the derogations specifically defined in the CMO regulation, provided that they do not exclude competition and do not jeopardise the objectives of the Article on Agriculture in the Treaty.

This would be the case when the national legislator imposes obligations on companies that those companies are not allowed to agree under Art. 101 TFEU⁷⁹, unless those obligations coincide with the derogations in the CMO Regulation.⁸⁰

⁷⁸ Quote from ECJ, Case C-35/96, CNSD, paragraphs 51-54: "Although Article 85 [now 101] of the Treaty as such relates only to the conduct of undertakings and not to legislative or regulatory measures taken by Member States, it nevertheless follows from its connection with Article [...] of the Treaty that Member States may not adopt or maintain in force any measure, even of a legislative or regulatory nature, which is capable of nullifying the useful effect of the competition rules applicable to undertakings. [...] This is particularly the case if a Member State imposes or encourages the creation of agreements on competition contrary to Article 85 [now 101] [...]"

⁷⁹ If Member States do so anyway, compliance with those legal requirements falls outside the scope of Art. 101 TFEU (see paragraph 20 of the draft guidelines on cooperation agreements, Annex 2).

⁸⁰ Klamert (2014) discusses the tension between the loyalty principle and competition law (pp. 276-277), notes that the ECJ has drawn national law within the scope of Art. 101 TFEU, which is a major shift, and signals that what matters is whether or not private parties intended to enter into prohibited agreements. He believes that the ECJ should limit itself to prohibiting complicity in infringement of EU competition rules. In the Dutch situation, with regard to sustainability agreements in agriculture, it should

The principles of the useful effect ("effet utile") and the loyalty principle ("Union loyalty")

The Vice-President of the Raad van State (2022), in his opinion on the application of extension of rules, also points out that Member States may not adopt legislation that conflicts with EU competition rules:

"When testing against competition rules, the Minister concerned has a special responsibility. It is settled case-law of the Court of Justice EU that a Member State may not undo the useful effect of European competition law. Thus, it is itself in breach of EU law⁸¹ when it imposes a restrictive agreement or decision, or enhances its effect⁸² (p. 7)".

Much scholarly literature exists on the "effet utile" and loyalty principles. Both principles occupy a prominent if not central role in the ECJ's cases, which is accused of judicial activism in this regard by some, while others see it as a core task of the ECJ. The ECJ uses the principle of useful effect (and the related principle of effectiveness) to enforce serious implementation of EU rules, but more often to correct undesirable national regulations that are at odds with EU rules. Because the ECJ claims and exercises this right and national courts recognise it, there is a dynamic process of lawmaking.

Sources: Ministerie van Buitenlandse Zaken (2017)⁸³, Blockx (2022), Klamert (2014), Mendez-Pinedo (2021), Whish & Bailey (2021), Amtenbrink & Vedder, 2022

State of play

The government has amended the legal proposal in response to criticism from the Raad van State. The proposal is pending before the House of Representatives. The government recently asked the Lower House to postpone consideration of the legal proposal until early 2023, when the EC will have issued the expected horizontal guidelines on which a consultation took place in early 2022, and which will also address sustainability agreements. The government and ACM would like the EC to expand the space beyond the draft guidelines and bring it in line with the space the ACM maintains in its guidance documents. Furthermore, the government notes the new space due to Art. 210a CMO Regulation, on which separate guidance will be issued by the end of 2023.

be taken into account that private parties at "Kip van morgen" ("Chicken of Tomorrow") indeed made agreements that were rejected by the ACM due to infringement of Art. 101 TFEU. If the government, through a Room for Sustainability Initiatives Act, still makes this construction compulsory, it will undoubtedly go against the case law of the ECJ, unless the obligation coincides with the derogations from the CMO Regulation. Due to the importance of the issue, a full quote follows below: "The initial concept laid down in the wording of the Treaty foresees quite clearly that the fundamental freedoms are directed at the Member States, while the competition law rules target the behaviour of natural and legal persons. [...] More interestingly for our purposes, the Court has brought provisions of national law and national administrative practices within the scope of the competition rules when they adversely affect the application of the mentioned Treaty rules. Thus, Article 4(3) TEU has been invoked in conjunction with ex Article 3 EC and Article 101 TFEU, obliging the Member States 'not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of its implementing measures; nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings'. This has also been called the INNO doctrine. It is inapplicable in cases where the national legislation did not encourage or extend an anti-competitive private agreement that had already existed before. A breach of Article 4(3) TEU was affirmed if 'a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 85 [i.e. *het latere Art. 101 VWEU*] or reinforces their effects or deprives its own legislation of its official character by delegating to private traders responsibility for taking economic decisions affecting the economic sphere...'. I would argue that the Court invoked Article 4(3) TEU because this application of the competition law regime to governmental activity was never foreseen under the Treaty. Put in other words, loyalty was the requisite connection between the government and acts of private individuals, drawing within the scope of the competition regime that which was outside. The role of loyalty here arguably is different from its reinforcing function, such as with indirect effect. Without loyalty, it seems, Articles 101 and 102 TFEU could have never extended their reach to also target measures by the Member States. One can take the view that it is not particularly remarkable to apply Union rules to the Member States, who are the default addressees of obligations deriving from Union law. One might also remark that this case law is in line with the concepts of effet utile and effectiveness, further discussed later. However, I would suggest that loyalty operates differently here compared to when it is the basis for effects of Union law instruments, such as the direct or indirect effect of directives. Article 4(3) TEU in the cases mentioned earlier prevents the Member States from being accomplices to violations of Union law by natural or legal persons. While this may make a lot of sense from a practical point of view, from a legal perspective it arguably changes nothing less than the scope of core Treaty provisions."

⁸¹ Footnote by the Raad van State: "Specifically, this concerns Article 101 TFEU, read in conjunction with Article 4(3) of the EU Treaty (principle of loyal cooperation)."

⁸² Footnote of the Raad van State: "ECJ 4 September 2014, Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, API and Others, ECLI:EU:C:2014:2147, para 29. For a more detailed discussion on the application of the doctrine of beneficial effect, see the Division's opinion on the legal proposal on Room for sustainability initiatives (W18.18.0064/IV), para 4b."

⁸³ <https://www.kcbr.nl/beleid-en-regelgeving-ontwikkelen/handleiding-wetgeving-en-europa/1-module-1-eu-eisen-aan-implementatie-van-eu-regelgeving/12-eu-implementatieverplichting/123-algemene-eu-eisen-aan-implementatie/123a-nuttig-effect>

4.1.3 Role of the national competition authority (Autoriteit Consument en Markt)

The ACM contributes to a healthy economy by making markets work well for people and businesses, now and in the future. In well-functioning markets, companies compete fairly with each other and do not disadvantage anyone through unfair practices. People and companies know which rules apply and how they can stand up for their rights.

The ACM makes markets work well by enforcing the rules of play for free and regulated markets and promoting broad compliance, by providing information so that everyone knows these rules of play and can stand up for their rights, and by regulating energy, telecom, transport and postal markets to protect affordability, quality, continuity and accessibility in these markets. In addition, the ACM advises legislators to improve laws and regulations if it believes that markets function better as a result.

The ACM oversees competition, a number of specific sectors and consumer protection with the aim of making markets work well for people and businesses. It enforces the rules of the game that apply to businesses by countering unfair practices and promoting compliance. The ACM educates about the rules of the game so that everyone knows them and can stand up for their rights. In this context, the ACM has issued a series of guidance documents on cooperation between farmers and on sustainability agreements in agriculture. The ACM has also outsourced research on prices and margins in the food chain (the Agro-Nutri Monitor).

The ACM takes action when companies do not compete fairly with each other, for example because they have concluded price agreements. In case of a violation, the ACM can impose a fine. It issues this fine to the offender and possibly to the person who ordered the offence or played a leading role in it. Fines imposed by the ACM can amount up to 900,000 euros per violation. In some cases, the fine can be even higher and amount to a percentage of the total annual turnover.

While the ACM can prohibit and fine cartel agreements, it has no power to determine for sustainability agreements that they are lawful. If the ACM refrains from enforcement, the EC has the power to intervene as yet. There is no possibility of objection and appeal for informal views of the ACM in favour or against sustainability agreements, which stagnates legislative development (De Goffau & Van Heezik, 2020).

4.2 Practice

4.2.1 Chains

Production, trade and processing

Berkhout et al. (2022a, 2022b) provide a description of the main Dutch agricultural chains. Below are the most important of these, including a description of the sustainability issues, an indication of possible sustainability goals⁸⁴ and the chain parties involved:

- Cereals
 - Issues: The cultivation of cereals is a relatively environmentally friendly crop that requires no or minimal turning of the soil. Grain is called a rest crop for this reason. Grain sequesters carbon in the soil and not ploughing prevents the release of stored carbon. It reduces nutrient run-off and leaching. Grain is good for biodiversity (field birds). Even though grain is an extensive crop, growth regulators and pesticides are used. As a bulk product for animal feed in particular, grain offers limited opportunities for sustainability labels; as a consumer product, organic grain is grown.
 - Possible objectives: Larger part of cereals in rotation⁸⁵; support for organic production
 - Chain actors: Feed industry, malting plants, beer industry, consumers
- Sugar beet
 - Issues: Sugar beet is a soil-borne crop; when it is harvested, the soil is worked. This releases carbon sequestered in the soil. Ploughing is relatively unfavourable for soil quality and in terms of greenhouse

⁸⁴ For plant products, waste and use of residual flows can be a general concern in the chain.

⁸⁵ Agreements on the share of cereals in the crop plan can go beyond the cereal chain, so for example also include vegetables or other crops and parties active in them.

gas emissions. This is because a significant proportion of carbon sequestered in nature is in the soil, in comparable amounts to above-ground carbon sequestration in the form of woody biomass. In sugar beet cultivation, yellowing viruses transmitted by certain aphids are a serious problem. Against this, neonicotinoids were used in sugar beet cultivation. This was recently banned by the EC, although several Member States applied derogations. The Netherlands has not done so and vector control is now done by other means. With this, there is currently no clear need for sustainability agreements.

- Possible objectives: Sustainable soil management, wider crop rotation

- Chain actors: COSUN⁸⁶

- Potatoes

- Issues: Potatoes are a soil-borne crop. Ploughing the soil to plant seed potatoes and lifting the product are relatively unfavourable for soil quality and in terms of greenhouse gas emissions. In addition, the potato suffers from insects, including aphids that transmit viruses, cyst nematodes in the soil and fungal and bacterial diseases. To keep these under control, all kinds of pesticides are used. Potato blight (*Phytophthora infestans*) is sprayed and at the end of the season the crop has to be sprayed to death before aphids can transmit viral diseases.

- Possible objectives: Promotion of sustainable farming systems using less pesticides (organic, Planet Proof and others); wider crop rotations, especially in starch and ware potatoes, for soil health and to combat soil-borne diseases

- Chain actors: Trading houses, potato processing, retail, foodservice, consumers

- Fruit and vegetables

- Issues: Fruit and vegetables production in glasshouses has been at the forefront of developing biological control methods. Pesticide use in these crops is very low compared to almost all other sectors. Absolutely clean starting material is a prerequisite. The seed companies play a crucial role here and have achieved a very high level of quality. This does not alter the fact that further improvement in cultivation remains possible, especially in open cultivation, which has similar problems as arable farming. Glasshouse production requires a lot of energy and a transition to energy-neutral production systems is necessary. Fossil energy will have to be replaced by sustainable energy and/or residual and geothermal heat.

- Possible objectives: Improved sustainability performance through certification (organic, GlobalGap, Planet Proof and others); better organic matter balance (open crops), reduction in use of peat in substrate of planting and productive crops (closed crops)

- Chain actors: Retail, foodservice, consumers and, to a lesser extent, the food industry

- Pigs

- Issues: Animal husbandry, and pig farming in particular, has tensions with regard to human health (fine particulate matter problems) and animal welfare. A rational treatment of farm animals clashes with what society expects from animal husbandry, namely respect for the intrinsic needs of animals as laid down in the EU Treaty (Art. 13 TEU). Animal welfare includes animal health, and thus issues concerning the unnecessary use of antibiotics, excessive use of which poses risks to human health and the environment. Furthermore, reduction of greenhouse gas emissions is desirable and nutrient emissions from manure are an issue in relation to biodiversity and water quality. Finally, the use of unsustainable animal feed is a cause of environmental problems elsewhere in the world. The desire to move towards circular agriculture stems from the issues of sustainable livestock farming.

- Possible objectives: Improving animal welfare, reducing antibiotic use, reducing greenhouse gas emissions, reducing nutrient emissions, reducing particulate matter emissions, circularity, sustainably produced animal feed

- Chain actors: Livestock feed industry, slaughterhouses, cutting plants, trading companies, exporters, retail, foodservice, consumers

- Poultry meat and eggs

- Issues: In poultry farming, the general problems of animal welfare, antibiotic use, greenhouse gas emissions, nutrient emissions, animal feed and circularity, in addition to human health problems (fine particulate matter), are also relevant. The specific animal welfare problems take different forms, because poultry and pigs have different behaviour and needs.

⁸⁶ The cooperative COSUN is the leading Dutch industrial processor of sugar beet.

- Possible objectives: Improving animal welfare, reducing antibiotic use, reducing greenhouse gas emissions, reducing nutrient emissions, reducing particulate matter emissions, circularity, sustainably produced animal feed
- Chain actors: Feed industry, slaughterhouses, egg products industry, food industry, retail, foodservice, consumers
 - Dairy
- Issues: Basically, the sustainability issues in dairy cattle have the same characteristics as for other farm animals. For dairy cattle, an additional factor is that cattle are able to consume grass, which is not a suitable food source for most animals, thanks to a system of step-by-step breakdown in four stomachs and rumination. This releases a lot of methane, a potent greenhouse gas. Moreover, dairy cattle are kept in the peat pasture area where the groundwater level is kept low for this purpose, as a result of which the peat oxidises and the soil sinks in ever new cycles. Dairy farming thus contributes disproportionately to climate problems. The ammonia released when urine and manure mix is a major source of nitrogen emission problems. Manure also causes run-off and leaching of nitrate and phosphate to ground and surface water. The excess manure is linked to the lack of circularity and global commodity flows. The major problems facing dairy farming in the Netherlands cannot be solved with sustainability agreements alone, but require restructuring first at the moment.⁸⁷ This does not alter the fact that support will be needed afterwards for sustainable production methods
- Possible objectives: Reducing ammonia, nitrate and phosphate emissions, reducing greenhouse gas emissions, reducing particulate matter emissions, reducing antibiotic use⁸⁸, improving animal welfare (grazing⁸⁹, etc.), sustainably produced animal feed, circularity
- Chain actors: Livestock feed companies, dairy processors (unless cooperative of producers), slaughterhouses, consumers
 - Calves
- Issues: The sustainability issue in calf farming has special aspects in addition to the general aspects that apply to all farm animals. The sector causes a high nitrogen burden on the environment and is strongly focused on exports to third countries. Societally, there are questions about the sector's right to exist, which is incidentally (partly) a by-product of dairy farming (young bulls).
- Possible objectives: Reducing ammonia, nitrate and phosphate emissions, reducing greenhouse gas emissions, reducing particulate matter emissions, reducing antibiotic use, improving animal welfare (grazing, etc.), sustainably produced animal feed, circularity
- Chain actors: Animal feed industry, slaughterhouses, meat processing industry, retail, foodservice, consumers
 - Ornamentals
- Issues: Dutch floriculture is a global leader in the range of plants and flowers offered and in technical innovation. Tension exists between the wide range of plants and flowers offered and the availability of pesticides to control diseases and pests. In addition, starting materials for cut flowers and pot plants are often grown outside the EU. This entails risks of disease and pest introduction. Nowadays, greenhouses often have closed cultivation systems and pesticides do not or minimally escape to the environment.⁹⁰ On the other hand, pesticide use in ornamental plant cultivation is disproportionately high compared to other plant sectors, especially the cultivation of vegetables and fruit under glass. Improvement is therefore possible. This certainly applies to open crops such as flower bulbs, which often suffer from persistent soil-borne pests and diseases that may survive in the soil for many years. The core problems of ornamental plant cultivation, including arboriculture and perennial crops, lie with phytosanitary risks, pesticide use and peat as a substrate. Desiccated peat oxidises to CO₂ and methane, dewatered peatlands emit excessive amounts of greenhouse gases, and peatlands are at the same time vulnerable biological hotspots. Peat use is thus problematic, but at the same time it cannot be easily missed because of its specific physical and biological properties.
- Possible objectives: Reduction of pesticide use in open and closed crops; application of only environmentally certified peat that has been responsibly extracted

⁸⁷ The same applies to calf farming and, to some extent, pig and poultry farming.

⁸⁸ Antibiotic use has been reduced considerably in recent years and is currently at a low level compared to other sectors.

⁸⁹ Incidentally, in many cases there is a trade-off between objectives. What is good for the climate or environment may be unfavourable for animal welfare or biodiversity.

⁹⁰ Unless in the case of illegal discharges from greenhouses to surface water.

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- Chain actors: Trade, retail, consumers

Supermarkets and foodservice

Berkhout et al (2022a, 2022b) additionally provide a description of retail and food service in the Netherlands. The following is a summary of their findings.

About 3,000 companies were operating in the supermarket sector in 2020. Most of these are smaller businesses with one or a few branches. Besides those small supermarkets, about 15 large companies (formulas) with many branches are active. By market share, Albert Heijn (35.9%), Jumbo (21.8%), Lidl (10.7%) and Aldi (5.2%) were the four largest supermarket companies in the Netherlands with independent purchasing organisations in 2021. In addition, the purchasing cooperative Superunie had about 10 affiliated members and a market share of 26.6% in 2020 (Berkhout et al., 2022a, 2022b).

Besides supermarkets, speciality shops and itinerant trade are also important marketing channels to consumers. In 2022, there were about 865 fruit and vegetable speciality shops, 2,110 butchers, 760 fish shops, and 1,225 bread, pastry and confectionery shops. There were also 3,735 food market trade businesses. The number of speciality fruit and vegetable shops and butcher shops has gradually declined over the past decade, although the decline in fruit and vegetable shops seems to have stopped in recent years.

About a third of consumer spending on food in the Netherlands is done through food service. This consists of small and large parties in the hospitality and catering subsectors, in addition to parties affiliated with the transport sector (train and aircraft, petrol stations), sports facilities, recreational parks and amusement parks.

4.2.2 Producer organisations and interbranch organisations

Recognised producer organisations

The Netherlands had nine POs recognised by the national government in the fruit and vegetable sector as of 1 January 2022 (Rijksdienst voor Ondernemend Nederland, 2022). For example, they have joint packing stations and can implement operational programmes with support from the CAP (Smit et al., 2015). Nederlands kende per 1 januari 2022 negen door de nationale overheid erkende PO's in de groenten- en fruitsector (Rijksdienst voor Ondernemend Nederland, 2022). Zij hebben bijvoorbeeld gezamenlijke pakstations en kunnen met steun vanuit het GLB operationele programma's uitvoeren (Smit et al., 2015).

Other sectors have recognised Pos:⁹¹

- Producer organisation for ware potatoes
- Producer organisation for protein farmers of the Netherlands
- Producer organisation for dairy farming
- Producer organisation for pig farming
- Producer organisation Union of Poultry Producers
- Producer organisation Association of Wine Producers

There are also other forms of farmers' associations, such as cooperatives.

There are different forms of a cooperative. For instance, a cooperative can operate in the market as a company with its own activities. Alternatively, a cooperative can be a collaboration of several independent enterprises. A key question is whether the cooperative and its members form a single economic unit. Whether this is the case must be assessed on a case-by-case basis. The requirements are that the members pursue a common economic objective on a long-term basis, that the cooperative can exert decisive influence on the market behaviour of the individual members and that there is no possibility of competition between them. If a cooperative together with all its members qualifies as a single economic entity, the cartel ban does not apply to the mutual relationships within that cooperative. If there is no economic unity but several

⁹¹ <https://www.rvo.nl/onderwerpen/marktordening/samenwerken-landbouwsector>

independent stand-alone companies working together through the cooperative, the cartel prohibition does apply to the mutual relations between the members and the cooperative (Schrijvershof, 2017).

Recognised interbranch organisations

The Netherlands' government recognised the following IBOs:

- Interbranch organisation for Arable land farming (this covers the former recognised IBOs for cereals, sugar, potatoes and remaining arable crops)
- Interbranch organisation for vegetables and fruit of the Netherlands
- Interbranch organisation for the calves sector
- Interbranch organisation for ornamentals (flowers and plants)
- Interbranch organisation for dairy (ZuivelNL)
- Foundation AVINED (eggs and poultry meat)

Additionally, non-recognised interbranch organisations exist.

4.2.3 Quality labels

Common quality labels in the Netherlands

The quality label ("keurmerk") benchmarking organisation provides an overview of the quality labels used in the Netherlands (nota bene: the additions "topkeurmerk" (top ranked quality label) and "top bedrijfslogo" (top ranked company logo) are of Milieu Centraal; the list given below is not exhaustive):⁹²

- Meat
 - EU-biologisch (organic; topkeurmerk)
 - EKO (topkeurmerk)
 - Beter Leven keurmerk (three stars) (topkeurmerk)
 - Beter Leven keurmerk (two stars) (topkeurmerk)
 - Beter Leven keurmerk (one star)
 - Demeter (topkeurmerk)
 - Beter Voor Kip, Natuur en Boer (top bedrijfslogo)
 - Beter Voor Varken, Natuur en Boer
 - Kemper Kip
 - Keten duurzaam Varkensvlees
 - Friberne
 - Pork Best
 - Boerenhof Varkensvlees
 - Label Rouge
 - Livar
 - Boerderijkip
 - Krull
 - Wroetvarken
 - Gaasterlander Kruidenvarken
 - Tante Door
 - Keten Duurzaam Rundvlees
 - France Limousin
 - Nieuwe standaard kip
 - Pluimgarantie
 - Duroc d'Olives
 - Heyde Hoeve Varkensvlees
 - VIT's rundvlees Twente
- Dairy
 - EU-biologisch (organic; topkeurmerk)
 - EKO (topkeurmerk)
 - On the way to Planet Proof (topkeurmerk)

⁹² <https://keurmerkenwijzer.nl/>

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- Beter Leven keurmerk (three stars) (topkeurmerk)
 - Beter Leven keurmerk (one star) (topkeurmerk)
 - Weidemelk
 - Demeter (topkeurmerk)
 - Climate Neutral Certified (topkeurmerk)
 - Beter Voor Koe, Natuur en Boer
 - Caring Dairy
 - Duurzame weidezuivel
 - Vlog melk (GMO-free)
 - Drentse Aa-melk
 - Eggs
 - EU-biologisch (organic; topkeurmerk)
 - EKO (topkeurmerk)
 - On the way to Planet Proof
 - Beter Leven keurmerk (one star)
 - Beter Leven keurmerk (two stars) (topkeurmerk)
 - Beter Leven keurmerk (three stars) (topkeurmerk)
 - Demeter (topkeurmerk)
 - Vrije uitloop
 - Blije kip
 - Vegetables and fruit
 - EU-biologisch (organic; topkeurmerk)
 - EKO (topkeurmerk)
 - On the way to Planet Proof (topkeurmerk)
 - Rainforest Alliance (topkeurmerk)
 - Demeter (topkeurmerk)
 - Beter Voor Natuur en Boer (top bedrijfslogo)
 - Sustainable Rice Platform (topkeurmerk)
 - Sustainably Grown Certified
 - Climate Neutral Certified (topkeurmerk)
 - Nature and More
 - Responsibly Fresh
 - Fair trade (topkeurmerk)
 - Fair trade Original
 - Fair for Life (topkeurmerk)
 - Fair Produce
 - Vegaplan
 - Ornamentals and gardening
 - EU-biologisch (organic)
 - EKO
 - MPS-A+
 - MPS Natural Protected
 - MPS Potgrond
 - RHP
 - On the way to Planet Proof
 - Demeter
 - Groenkeur
 - Sustainable Florist
 - Green Florist Shop
 - Climate Neutral Certified
 - Nationaal Keurmerk Natuurlijk Tuinieren
 - NL Greenlabel
 - Fair trade

For an explanation of the different labels, see Milieu Centraal's Label Guide.

In the EU's conceptual framework, a label must meet requirements on transparency, voluntariness, participation, freedom of choice and enforcement (see section 3.1.3). Not all labels listed here meet these requirements. For example, Albert Heijn's "Better For" programme is in fact a company logo, which is transparent and has serious requirements⁹³, but participation is only open to farms from which Albert Heijn buys products⁹⁴. With a label as intended by the EC in its guidelines, other farmers should also be able to participate and an independent third party is needed to check and ensure conformity of participants' operations with the requirements package. At Albert Heijn, for that matter, such independence is also arranged, but internally (Albert Heijn 2020a, 2020b, 2021).

Organic and EKO

"Biologisch" (organic) is a European label, based on Regulation (EU) 2018/848 together with the Commission legislation derived from it. In the Netherlands, organic farming sales lag behind other Member States. At the urging of the EC, the government has increased the ambition for organic farming from the current 4% to 15% of the agricultural area (Ministerie van LNV, 2022b).

Organic farms use very limited pesticides and only natural means. Initially, they ward off diseases, pests and weeds with cultivation measures, e.g. mechanical (hoeing and weeding), but also by using natural enemies of parasites. The animals are given organic feed. A minimum amount of feed must come from the own farm or from the region (EU) (at least 60% for cattle, 30% for poultry and pigs). This limits imports of fodder and any associated tropical deforestation. The EU organic label does not guarantee no deforestation. The label does not set requirements on energy use or the limitation of greenhouse gas emissions, although these are indirectly limited by a ban on the use of artificial fertilisers. The number of animals per land area must be such that damage to the soil by the animals and their manure is minimal. The maximum number of animals is also limited to avoid excessive nitrogen emissions.

Regarding animal welfare, attention is paid to the type of housing, with sufficient space and means for species-specific behaviour. Animals always have access to outdoor space. Health problems that often occur in intensive farming must be avoided. No sedatives or restraints may be used during transport, for example, but no maximum transport duration is set.

EKO foods are produced according to European organic farming rules, but EKO-certified producers take extra steps for enhanced sustainability.⁹⁵

On the way to Planet Proof

The On the way to Planet Proof label covers dairy, fruit and vegetables, flowers and plants, and eggs.

The label sets requirements to reduce the environmental impact of dairy production. For instance, companies must calculate and register their greenhouse gas emissions and there is a maximum allowed amount of greenhouse gas emissions per quantity of milk. At least 5% of the farm is set up as extensive herb-rich grassland. Use of green electricity is mandatory. At least half of the protein in the feed must come from own land. All purchased soy must be RTRS-certified. There are limits on ammonia emissions and the amount of nitrogen allowed in the soil. There are no strict restrictions on plant protection products (glyphosate may not be used, however), but use must be registered.

Animal welfare requirements go beyond common practice, but requirements are missing on a number of aspects. Animals have 8 m² in a free-range barn, with grazing according to the standards of Stichting Weidemelk. There is one electric cow brush for every 70 cows. There are animal health monitoring requirements to ensure minimum animal health and cows must be at least 5 years and 3 months old when they are culled. There are no supra-legal requirements on transport distance or killing method.⁹⁶

⁹³ Stichting Milieukeur considers Beter Voor to be a top range label ("topkeurmerk").

⁹⁴ As this report went to press, Albert Heijn revealed that it intends to open up the Better For programmes to other parties and make it a widely accessible Milieu Centraal Topkeurmerk, rather than remaining a private company logo.

⁹⁵ <https://nieuws.ah.nl/albert-heijn-zet-in-op-breed-toegankelijk-topkeurmerk/>

⁹⁶ <https://keurmerkenwijzer.nl/keurmerken/eko-vlees/>

⁹⁶ <https://keurmerkenwijzer.nl/keurmerken/on-the-way-to-planetproof-zuivel/>

In the case of fruit and vegetables, the label sets requirements for monitoring greenhouse gas emissions, a neutral organic matter balance, the fertilisation plan, crop protection (with a preference for less environmentally damaging agents) and good water reuse. The ambitious requirements are mainly in the non-obligatory choice measures, such as substantial reduction of greenhouse gas emissions, positive organic matter balance, crop rotation and the share of renewable energy in total energy consumption.⁹⁷

Beter Leven label

The Beter Leven (better life) quality label, introduced by the Dutch Society for the Protection of Animals in 2007, gives consumers insight into the level of animal welfare among meat producers. Participants must meet the requirements of the quality mark and are checked for compliance. The Beter Leven quality label (one star) guarantees a certain minimum level of animal welfare, rising to the Beter Leven quality label (three stars), which corresponds to the welfare level of the EU organic label (Berkhout et al., 2022b) or animal-oriented designed housing systems, such as Rondeel and Kipster.

The Beter Leven label does not set environmental requirements in meat production. The label for meat says something about the welfare of dairy and beef cattle, veal calves, laying hens, broilers, rabbits, turkeys and pigs. What exactly a star means depends on the animal species, but generally speaking:

- One star is on meat products with an improvement in animal welfare compared to conventional meat products;
- Two stars are on products that go further in terms of animal welfare, but not yet as far as organic products. With two stars, animals have access to free-range housing;
- Three stars are on organic products or products with comparable animal welfare.

The largest differences between the three levels are in the space the animals are given and whether the animals can go outside. For meat pigs, this means 1.0 m² of living space for the Beter Leven label (one star), 1.8 m² for two stars and 2.3 m² for three stars, compared to 0.8 m² in conventional pig farming. From two stars onwards, pigs have outdoor access. Housing conditions (means for species-specific behaviour, straw on the floor and distraction material) are also better the higher the number of stars. The maximum transport time is shortest at three stars. There are above-legal requirements for the slaughter process. Animals may not be slaughtered in slaughterhouses that also slaughter animals without stunning.⁹⁸

In egg production, the Beter Leven label does not yet set any environmental requirements; it says something about the welfare of the chickens. One star represents an improvement in animal welfare compared to conventional eggs (free-range eggs). For example, the laying hens have covered runs and natural daylight enters the houses. The hens can display their natural behaviour: they can take a dust bath, scratch, grain and stomach stones are scattered around, there are straw bales and there is litter on the floor allowing them to forage. The combination of these enrichment materials, among others, prevents feather pecking and cannibalism. Two stars stands for more animal welfare than the Beter Leven label (one star) and conventional eggs (free-range eggs). For example, laying hens have a free range, which must be overgrown and provide adequate shelter. The same number of hens live per surface area of house as in the Beter Leven keurmerk (one star) (9 per m²), but during the day they are given access to the free range in addition to that.⁹⁹ With the Beter Leven label (three stars), fewer laying hens live per surface area house than with the Beter Leven label (two stars), namely 6.7 instead of 9 hens per m². In addition, the birds are given access to a free range or woodland edge during the day. The chickens can display their natural behaviour. Transport is in containers with large openings and should not exceed three hours. In the slaughterhouse, from one star upwards, unnecessary agitation and stress are avoided and chickens are slaughtered within 4 hours of unloading by means of two- or multi-stage CO₂ gas stunning and are stunned first.

Unlike for meat and eggs, the Beter Leven label for dairy products does impose nature and environmental requirements. There are requirements to stimulate biodiversity, for instance by using grasslands rich in herbs on at least 5% of the farm and attention is paid to nesting opportunities and feed availability for meadow birds. Phosphate and nitrogen fertilisers are not used. Farmers are obliged to purchase 100% green

⁹⁷ <https://keurmerkenwijzer.nl/keurmerken/on-the-way-to-planetproof-groente-en-fruit/>

⁹⁸ <https://keurmerkenwijzer.nl/keurmerken/beter-leven-keurmerk-2-sterren-vlees/>

⁹⁹ <https://keurmerkenwijzer.nl/keurmerken/beter-leven-keurmerk-2-sterren-eieren/>

electricity from wind or solar in the Netherlands and there is a cap on the electricity purchased per quantity of milk. All roughage (such as straw, beets and tubers) comes from no more than 50 km from the farm and all soy and palm products are certified sustainable. There is a maximum for environmental impact of crop protection products in relation to groundwater and soil and aquatic life. There are no requirements for (monitoring and limiting) climate impact and farms are not entirely land-bound; the proportion of grassland on own acreage is 80%. Of the farm land, 15% must be permanent grassland.

Regarding animal welfare, many ambitious requirements are set. Dairy cows get at least 8.5 m² of lying space in the barn and 10 m² for walking. The cubicles and walkways are more spacious and the cattle get grazing at least according to the standards of Stichting Weidemelk. There is one shed brush for every 60 cows. Besides criteria for dairy cows, standards for calves, young stock and bull are also included. Transport time is maximum 8 hours, or 4 hours to slaughter.¹⁰⁰

Weidemelk ("meadows milk")

Weidemelk is milk from farms where cows graze outdoors from spring to autumn for at least 120 days a year, at least six hours a day. Within modern dairy farming, it is no longer self-evident for cows to graze in pastures from spring to autumn. Dairy farmers can also choose to graze their dairy cows for at least 120 days and a minimum of 720 hours a year. If, for example, less grass is available, they can then put the cows out to pasture for fewer hours a day and more days.

The pasture milk logo guarantees that dairy products are made from pasture milk. The milk from farms where cows are put out to pasture is collected separately and processed in a separate chain into daily fresh dairy products - such as (carne) milk, custard and yoghurt -, cheese and other products. The responsible foundation (Stichting Weidegang) safeguards the production process, transport and processing of the meadow milk. Dairy farmers and the processing chain are monitored by independent, expert certification bodies.¹⁰¹

Beter Voor

To make its product range more sustainable, the retailer Albert Heijn has launched the Beter Voor ("Better For") programme. This involves working with what are now 1,100 producers with whom a long-term relationship has been established. There is a waiting list to join. The programmes focus on sustainability and a healthy earnings model for the farmer, with joint agreements being made and the bar being raised ever so slightly in consultation and with the consent of the group of farmers involved. This, according to Albert Heijn, produces demonstrable results, such as in the Better for Chicken, Nature and Farmer programme where all poultry farmers now keep Beter Leven (one star) free-range chickens. In addition, according to Albert Heijn, the approach within the Beter Voor Koe, Natuur en Boer ("better for cow, nature and farmer") programme is in line with the criteria for nature-inclusive dairy farming of the province of Noord-Brabant (based on recent research by CLM Research & Advice, which can be found under footnote 94, approximately 90% of the member dairy farms currently meet these criteria). A baseline measurement of carbon stock among participants in the Beter Voor Koe, Natuur en Boer programme found soil carbon stock on mineral soils to be twice as high as the average in the Netherlands (Ploum et al., 2022), which could be a consequence of the herb-rich grassland and ploughing ban in the certification scheme that had already been applied by participants in previous years. The use of glyphosate must be discontinued by participants in this programme by 2025.

For the additional costs of the sustainability efforts, Albert Heijn provides a financial compensation, which is independently calculated by external research institutes and determined together with farmers, growers and suppliers. Albert Heijn has drawn up certification schemes and manuals for the various sectors, which are available on the internet; not only for government and the public, but also for competitors (Albert Heijn, 2020a, 2020b, 2021, 2022a to 2022i). Compliance with the certification schemes is monitored through audits by an independent party, under the ultimate responsibility of Albert Heijn.

¹⁰⁰ <https://keurmerkenwijzer.nl/keurmerken/beter-leven-keurmerk-1-ster-zuivel/>

¹⁰¹ <https://www.weidemelk.nl/nl/>

Although Albert Heijn is a major player in the Netherlands with a 37% market share by 2022, its influence on the average income of Dutch farmers and growers is limited. The number of farmers it cooperates with is small compared to the total number of farmers in the Netherlands (Fig. 3). For example, by cooperating with only 3% (450 farmers) of all dairy farmers, Albert Heijn fully covers its own-brand dairy range (Albert Heijn, 2022i). Despite these proportions, the impact of programmes within the group's closed chains with farmers and growers is real.

Together with dairy producer Royal A-ware, the Better for Cow, Nature and Farmer label was developed in 2017 (Albert Heijn, 2021).¹⁰² It involves a closed chain with several hundred Dutch dairy farmers producing only for this programme. The milk stream is processed in a separate, closed process into a wide range of private label products. There may be a maximum of 2.5 cows per hectare of grass (or converted 1.9 cows per hectare of land) with an upper limit on milk production of 18,000 kg of milk per hectare of grass. Cows are fed mainly grass. There is also a focus on cow comfort (soft bedding available, massage brushes, spacious barn, attention to calf health and welfare). Part of the cooperation is the pursuit of climate-neutral milk by sequestering CO₂ in the soil. Within the grassland soil requirement, dairy farmers are only allowed to grow grass that cannot be ploughed. In addition, they sow herbs and deep-rooting grasses, which ensures carbon sequestration in the soil. Herb-rich meadows and edges also provide more insects and meadow birds. Each dairy farmer was also given an insect hotel (Albert Heijn, 2021).



Figure 3 The influence of Albert Heijn inside its own closed chains in the Beter Voor programmes (source: Albert Heijn, 2022i).

The programme was subsequently expanded to include Beter Voor Natuur en Boer ("Better For Nature and Farmer"), Beter Voor Varken, Natuur en Boer ("Better For Pig, Nature and Farmer"), and Beter Voor Kip, Natuur en Boer ("Better For Chicken, Nature and Farmer").

The Beter Voor Natuur & Boer programme¹⁰³ covers fresh fruit and vegetables and grew out of decades of cooperation with fixed producers with whom long-term contracts are concluded, sometimes for generations. These producers are offered security in the form of purchase guarantees and agreements on flexibility in terms of planning and volume to be delivered. The logo is based on GGN Certified Farming, but Beter voor Natuur & Boer producers take additional steps towards greater sustainability. GGN Certified Farming pays

¹⁰² <https://static.ah.nl/binaries/ah/content/assets/ah-nl/permanent/over-ah/certificatieschema.pdf>;

https://static.ah.nl/binaries/ah/content/assets/ah-nl/core/about/duurzaamheid/handleiding-certificering-van-beter-voor-koe-natuur-boer-zuivel-voor-be--en-verwerkende-locaties_albert-heijn.pdf

¹⁰³ https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.globalgap.org%2F.content%2F.galleries%2Fdocuments%2F220224_AH_Beter_voor_Checklist_v1_0_Mar22_protected_nl.xlsx&wdOrigin=BROWSELINK;

<https://static.ah.nl/binaries/ah/content/assets/ah-nl/permanent/over-ah/beter-voor-natuur--boer-handleiding-2022.pdf>;

<https://docplayer.nl/225378351-Handleiding-albert-heijn-beter-voor-natuur-boer-programma.html>;

<https://docplayer.nl/226746033-Samenwerken-aan-een-duurzame-toekomst-met-aandacht-voor-biodiversiteit-bodem-en-klimaat-met-als-basis-een-eerlijk-verdienmodel-voor-iedereen.html>

attention to the soil and crops are rotated annually. Beter voor Natuur & Boer sets additional requirements for soil quality in arable farming and fruit growing, including a maximum amount of slurry that can be used. GGN Certified Farming requires energy use to be monitored and Beter voor Natuur & Boer also requires the producer to use 100% green electricity. GGN Certified Farming assumes many preventive measures for crop protection, but there are no further requirements for agents with lower environmental impact. Beter Voor Natuur & Boer requires that there must be a plan to reduce the use of environmentally damaging agents. Certain substances are also banned or limited in quantity. A mechanical weed control method must be used at least once per crop. There are also requirements for efficient water use. There are no mandatory requirements for limiting climate impact, but there are non-obligatory choice measures, such as using only electric vehicles in combination with self-generating renewable energy, and using green electricity does limit climate impact indirectly.¹⁰⁴

The Beter voor Varken, Natuur en Boer ("Better for Pigs, Nature and Farmer") programme¹⁰⁵ imposes requirements on the electricity used: it must be 100% sustainably generated. Participating farms must make their carbon footprint transparent. There are no mandatory requirements for reducing climate impact, but the programme aims to achieve 18.5% reduction between 2020 and 2025. There is a focus on biodiversity in the form of installation of nest boxes, insect hotels and/or flower strips. Soy and palm oil used for feed must have a certificate of sustainable production (RTRS Credits for soy and RSPO Credits for palm oil), but there are no requirements on where the feed must come from. Use of food industry residues should be promoted, but this is not yet mandatory. Animal welfare requirements go a little further than the law requires. Pork with the Beter voor Varken, Natuur en Boer logo also meets the requirements of the Better Life (one star) quality mark. Among other things, this means that fattening pigs have 1 m² of living space, compared to 0.8 m² in conventional pig farming. The Better for Pigs, Nature and Farmer programme further requires the presence of scrub brushes. Tail length is monitored with the aim of working towards longer tails and intact tails (no docking) by 2030. When unloading pigs, there is continuous camera recording and analysis of abnormal situations.¹⁰⁶

The Beter voor Kip, Natuur en Boer ("Better for Chicken, Nature and Farmer") programme¹⁰⁷ requires poultry farmers to have at least a 15% lower carbon footprint in 2030 than in 2018. The carbon footprint of feed must be tracked annually, but there are no specific reduction requirements here. Poultry farmers are only allowed to use energy from renewable sources. All soy in the feed is RTRS-certified and all palm oil RSPO-certified. There are no requirements on where the feed must come from. Apart from the requirement for an insect hotel and a flower ring on the business premises, there are no far-reaching requirements for biodiversity stimulation. Affiliated poultry farmers must reduce emissions of particulate matter and ammonia by at least 20% a year. All poultry farmers must also be certified for Beter Leven Keurmerk (one star). Beter voor Kip, Natuur en Boer also requires that chicks have immediate access to water and feed as soon as they hatch. Animal-friendliness of catching and loading is checked (by counting bruises) and monitored.¹⁰⁸

Beter Voor is a (top) company logo tested for ambition, reliability and transparency by Milieu Centraal and in many ways resembles a general quality mark, but it operates within the framework of contractual relationships with farmers with whom Albert Heijn enters into a long-term relationship with purchase guarantees. Such purchase requirements fall outside competition law, as they do not involve agreements with competitors.

Fair trade

The Fair trade label focuses primarily on working conditions in agriculture in developing countries. In the context of this report on sustainability agreements, this is not discussed further, as both EU regulations and the trade literature (Inderst, 2022) state that social standards are outside it. That said, the Fair trade label also includes sustainability standards in a narrower sense (Fairtrade Belgium, 2022).

¹⁰⁴ <https://keurmerkenwijzer.nl/keurmerken/beter-voor-natuur-en-boer-groente-en-fruit/>

¹⁰⁵ <https://static.ah.nl/binaries/ah/content/assets/ah-nl/core/about/duurzaamheid/beoordelingsschemavarken.pdf>;
<https://static.ah.nl/binaries/ah/content/assets/ah-nl/core/about/duurzaamheid/handleidingvarken.pdf>

¹⁰⁶ <https://keurmerkenwijzer.nl/keurmerken/beter-voor-varken-natuur-en-boer/>

¹⁰⁷ <https://static.ah.nl/binaries/ah/content/assets/ah-nl/permanent/over-ah/certificatieschema-beter-voor-kip-natuur-boer-2022.pdf>

¹⁰⁸ <https://keurmerkenwijzer.nl/keurmerken/beter-voor-kip-natuur-en-boer/>

Table 5 Top labels of Milieu Centraal (source: Logatcheva, 2022).

| | |
|---|--|
|  | ASC is een standaard voor verantwoorde visweek. ⁴ In 2021 is voor € 460 mln. aan ASC-vis verkocht, een stijging van 11% ten opzichte van 2020. In de supermarkten is het aandeel van vis met dit keurmerk relatief hoog. Supermarkten streven ernaar dat alle verse en diepvries kweekvis in de schappen een ASC (of gelijkwaardig) keurmerk draagt. ⁵ De verschoven consumentenvraag van de foodservice naar de supermarkten zorgt ook in 2021 voor relatief meer bestedingen aan producten met dit keurmerk. |
|  | Het Beter Leven keurmerk van de Dierenbescherming is een label over dierenwelzijn. ⁶ Veel duurzame producten van dierlijke oorsprong, en vooral verse vleesproducten, dragen een 1-, 2- of 3-sterrenkeurmerk van Beter Leven. Met een omzet van € 3.227 mln. is Beter Leven het grootste keurmerk. Binnen de bestedingen aan duurzaam voedsel inclusief stapeling vertegenwoordigt Beter Leven circa 32% van de bestedingen. Beter Leven heeft in 2021 een stijging van 7% ten opzichte van 2020 laten zien. De groei wordt zowel in de supermarkten als in de foodservice gerealiseerd, hoewel de bestedingen in de foodservice ook in 2021 lager zijn dan vóór de coronapandemie door COVID-19-beperkingen. In de meeste supermarkten wordt nagenoeg alleen nog maar vers varkensvlees met dit keurmerk verkocht. Ook bij varkensvleeswaren, varkensvleesgerechten en eieren is het aandeel van producten met dit keurmerk hoog. Daarnaast wordt het keurmerk in toenemende mate op pluimveeproducten geïntroduceerd. Een aantal grotere Nederlandse retailers willen per 2023 over naar 1 ster Beter Leven-pluimveevlees. |
|  | Biologisch is de enige vorm van duurzame landbouw en voedselproductie waarvoor in de Europese wetgeving normen zijn vastgesteld. Het woord <i>biologisch</i> is dan ook wettelijk beschermd. Binnen de bestedingen aan duurzaam voedsel inclusief stapeling vertegenwoordigt Biologisch met een omzet van € 1.630 mln. circa 16% van de bestedingen. In 2021 is er een licht herstel in de omzet aan biologische producten in de foodservice (+12% ten opzichte van 2020); de bestedingen zijn echter relatief laag gebleven door COVID-19-beperkingen. In de supermarkten zijn de bestedingen (+2% ten opzichte van 2020) aan Biologisch licht gestegen. Als totaal zijn de bestedingen in de gemeten kanalen ten opzichte van 2020 eveneens licht gestegen (+2%). Voor een gedetailleerd overzicht van de bestedingen aan biologisch voedsel in de gemeten kanalen, zie bijlage B1. Op basis van additionele informatie, waaronder een verkenning van het assortiment, wordt geschat dat de omzet in de verkoopkanalen die in deze monitor buiten beschouwing zijn gelaten in 2021 enkele miljoenen euro's bedraagt. |
|  | Fairtrade richt zich op het helpen van boeren en arbeiders in ontwikkelingslanden een betere plek te verwerven in de handelsketen, zodat ze kunnen leven van hun werk en kunnen investeren in een duurzame toekomst. ⁷ Fairtrade is zowel een keurmerk als een wereldwijde beweging. Fairtrade is een keurmerk dat harde financiële eisen stelt met betrekking tot de betaling aan de boerencoöperatie en het premiecomité van arbeiders op plantages. Dit in de vorm van een Fairtrade-minimumprijs en -premie. De minimumprijs fungeert als vangnet. Als de wereldmarktprijs onder de minimumprijs duikt, dan is deze minimumprijs van kracht. Deze minimumprijs (garantieprijs) is gebaseerd op de kosten van duurzame productie. Daarnaast wordt er een vaste, niet-onderhandelbare ontwikkelingspremie (Fairtrade premie) boven op de prijs betaald. In 2021 heeft Fairtrade een stijging van 15% laten zien. Deze stijging wordt gedreven door enig herstel in belangrijke Fairtrade-producten als koffie en thee in de foodservice en door een toename van het aantal producten met dit keurmerk in de supermarkten. Door COVID-19-beperkingen in de foodservice blijven de bestedingen aan dit keurmerk ook in 2021 lager dan vóór de coronapandemie. |
|  | Vis met MSC-keurmerk is afkomstig uit een gezond visbestand dat goed wordt beheerd en waarbij de visserij minimale schade toebrengt aan de natuurlijke leefomgeving van de vis. ⁸ Met name supermarkten streven ernaar dat alle verse en diepvries wild gevangen vis in de schappen een MSC (of gelijkwaardig) keurmerk draagt. ⁹ In 2021 is de omzet van vis met MSC met 2% gestegen ten opzichte van 2020. In de foodservice zijn de bestedingen aan producten met MSC in 2021 iets hersteld, maar zijn nog altijd lager dan vóór 2020 door het wegvallen van de afzet door COVID-19-beperkingen. |
|  | On the way to PlanetProof is gebaseerd op een integrale benadering bij de verduurzaming van producten en diensten. Een gebalanceerde afweging tussen de verschillende duurzaamheidsthema's Bodem, landschap en biodiversiteit, Water, Energie, Productie en consumptie, Klimaat, Diergezondheid en -welzijn staat daarbij centraal. ¹⁰ De eisen van On the way to PlanetProof hebben daarbij betrekking op de hele levenscyclus van plantaardige en dierlijke producten. Het keurmerk is geïntroduceerd in 2017 en is inmiddels te vinden op producten zoals aardappelen, uien, groente en fruit, kruiden, zuivel en eieren, en dranken. In 2021 kennen producten met dit keurmerk een groei van 32% in de consumentenbestedingen ten opzichte van 2020 vooral door de verdere opschaling in het supermarktkanaal. |
|  | Rainforest Alliance is een keurmerk dat eisen stelt op het gebied van milieu en natuurbehoud, rechten voor arbeiders en arbeidsomstandigheden. ¹¹ In 2021 werd ruim € 1.327 mln. aan producten met dit keurmerk uitgegeven. Dit is een stijging van de bestedingen met 110% ten opzichte van 2020 in met name in koffie en thee, dranken en houdbare producten. Het Rainforest Alliance-keurmerk staat vaak op samengestelde producten, waarvan één bepaald ingrediënt, zoals bijvoorbeeld cacao, gecertificeerd is. Het keurmerk is in toenemende mate op producten te vinden die eerder het keurmerk UTZ Certified hebben gedragen. Begin 2018 is de Rainforest Alliance gefuseerd met UTZ Certified. Daarna is een nieuwe standaard ontwikkeld onder de naam Rainforest Alliance met een nieuw logo-ontwerp. Het UTZ Certified-logo en het oude Rainforest Alliance-logo worden uitgefaseerd. Beide keurmerken kunnen nog tot na 2022 op de verpakkingen staan. |
|  | UTZ Certified is een keurmerk dat eveneens eisen stelt op het gebied van milieu en natuurbehoud, rechten voor arbeiders en arbeidsomstandigheden voor producten van met name tropische origine. ¹² Aan producten met UTZ Certified is in 2021 circa € 1,1 mld. omgezet. Het UTZ Certified-keurmerk staat vaak op samengestelde producten, waarvan één bepaald ingrediënt, zoals bijvoorbeeld cacao, gecertificeerd is. De bestedingen aan producten met UTZ Certified zijn in 2021 met 23% gedaald ten opzichte van 2020. Begin 2018 is UTZ Certified gefuseerd met Rainforest Alliance. Daarna is een nieuwe standaard ontwikkeld onder de naam Rainforest Alliance met een nieuw logo-ontwerp. Het UTZ Certified-logo wordt uitgefaseerd. Het keurmerk kan nog tot na 2022 op de verpakkingen staan. |
|  | Producten met Vrije Uitloop zijn producten van eieren. De benaming 'vrije uitloop' is wettelijk geregeld in de Europese wetgeving. ¹³ Een code 1 op het ei betekent dat je te maken hebt met een vrije uitloopei. In 2021 zijn de bestedingen aan producten met dit keurmerk met 30% gestegen ten opzichte van 2020. Dit heeft vooral te maken met het groter wordende aanbod van eierproducten van Vrije Uitloop-eieren. |

Confusion among consumers

Clearly, there is a large number of labels in circulation, so much so that consumers do not know their way around them. This erodes consumers' confidence that buying labelled products makes sense and is worth the extra price. It also leads to the displacement of labels that offer a high level of guarantees but with a higher premium price by labels with lower guarantees and a lower premium price. This is undesirable as it slows down the necessary sustainability of agriculture. The ACM therefore recommends achieving uniformity in this

area and a smaller number of labels (ACM, 2022a, 2022e, 2022f, 2022h, 2022i). For an overview of the top labels, see Table 5.

4.2.4 Retail

Engagement for sustainability

For a description of the structure of retail, see section 4.2.1.

Although most products on the Dutch consumer market are sold by supermarkets, the retail umbrella organisation CBL points out that Dutch supermarkets have limited influence on the share of agricultural production destined for export (76%). There is increasing direct and long-term cooperation with farmers who do produce for the Dutch market. This provides the farmers and market gardeners concerned with the security they need to invest further in sustainability and innovation. However, their number is still limited. With about 680 out of 14,000 dairy farmers, supermarkets have a direct, long-term and strategic cooperation for the production of private label products. Their duration is 7 years on average. About 30% of the dairy product flow reaches the supermarket through private label and A brands. For pig farming, this concerns about 240 out of 2,200 pig farmers and 18% of the product stream pork and meat products. On average, 50% of vegetables and fruit come from the Netherlands (source: CBL, 2021 and internet site).¹⁰⁹

The CBL indicates that supermarkets support the switch to sustainable production and are committed to it in many ways. Examples include sustainable dairy products and concepts such as 'Pig of Tomorrow', setting sustainability requirements for raw materials (such as soy for cattle feed and palm oil) and involvement in the Delta Plan for Biodiversity Recovery, the Alliance for Sustainable Food and IMVO covenant Foodstuffs.¹¹⁰ All fresh private label dairy products from supermarkets carry the 'Weidegang' label. All fresh and frozen fish bear the ASC or MSC label or equivalent (ASC for wild-caught fish and MSC in the case of farmed fish).¹¹¹

An overview of the main sustainability initiatives of individual supermarkets can be found in CBL (2021), briefly summarised (and not exhaustive):

- Albert Heijn - Beter Voor; see section 4.2.3.
- ALDI: Kwekers trots ("Growers' pride"). Flowers and plants that comply with GlobalGAP and GRASP standards, 95% sourced in the Netherlands, in cooperation with 50-60 affiliated growers. In addition, at ALDI all daily fresh dairy and Dutch potatoes, vegetables and fruit comply with On the way to Planet Proof.
- DIRK: Beter Leven label for the entire beef chain, a closed system in-house.
- JUMBO: New standard chicken. Offering only the Beter Leven label (one star) daily fresh dairy.
- LIDL: Kipster. A production concept with great attention to animal welfare of poultry, sustainability and fine dust emissions. Also the Beter Leven label (three stars) and organically certified Beter Leven label (three stars) cheese.
- PLUS: Boerentrots ("Farmers' pride"). A cooperation with 15 Dutch pig farmers in the form of a closed, short chain. Offering Beter Leven label (one star) pork and Beter Leven label (two stars) beef.
- Superunie: On the way to Planet Proof for dairy.

Realisatie van duurzaamheid

Logatcheva (2020, 2022) provides an overview of consumer spending on sustainable food in the Netherlands in 2019, 2020 and 2021 in the Monitor Duurzaam Voedsel ("Sustainable Food Monitor"). The data are based on the sales of products bearing a sustainability label with independent verification. These are the products consumed in the Netherlands in the main sales channels for (sustainable) food: supermarkets, foodservice and sustainable food specialty shops.

Consumer spending on sustainable food in the Netherlands increased by 12% in 2021 compared to 2020. Total spending on food increased by 1%. Total food spending in 2021 was lower than in previous years, which was caused by restrictive measures in food service due to the corona pandemic. The share of sustainable food in total food spending increased from 17 to 19%. The increase in sustainable food sales was

¹⁰⁹ <https://www.cbl.nl/app/uploads/2022/10/CBL-factsheet-Positie-van-de-supermarkt-in-de-voedselketen-oktober-2022.pdf>

¹¹⁰ <https://www.cbl.nl/onderwerpen/kringlooplandbouw/>

¹¹¹ <https://www.cbl.nl/onderwerpen/duurzame-dierlijke-ketens/>

particularly visible in supermarkets. In almost all product groups, spending on labelled products increased. Only Eggs and Food, unspecified, saw a slight decrease.

Supermarkets showed a bigger increase in sustainable food than all food in that channel. Beverages showed the biggest increase due to the emergence of labels such as Fair trade, Rainforest Alliance and Organic in this product group on juices in particular. Sustainable food speciality shops saw a 2% increase in spending. These are shops that mainly sell food products of organic and biodynamic origin. The largest percentage increase in spending across all measured sales channels was for products carrying the Rainforest Alliance (+110%) and On the way to Planet Proof labels (+32%). Beter Leven label (around €3.2bn consumer spending) was the biggest label in terms of turnover in the measured sales channels in 2021, followed by Organic (€1.6bn).

Table 6 Spending on sustainable food by label in Dutch supermarkets, foodservice and sustainable food specialty shops in 2019, in mln. Euro (source: Logatcheva, 2022).

| Keurmerk | Bestedingen (mln. euro) 2020 | Bestedingen (mln. euro) 2021 | Ontwikkeling bestedingen (%), 2020-2021 |
|---------------------------|---------------------------------|---------------------------------|---|
| ASC | 415 | 460 | 11 |
| Beter Leven | 3.018 | 3.227 | 7 |
| Biologisch | 1.590 | 1.630 | 2 |
| Fairtrade | 487 | 558 | 15 |
| MSC | 374 | 382 | 2 |
| On the way to PlanetProof | 879 | 1.163 | 32 |
| Rainforest Alliance | 631 | 1.327 | 110 |
| UTZ Certified | 1.386 | 1.061 | -23 |
| Vrije Uitloop | 271 | 352 | 30 |

a) Een artikel kan meerdere keurmerken hebben. Het totaal van de keurmerken ligt daardoor hoger dan het totaal aan bestedingen aan duurzaam voedsel.

Bron: data CBS, Wageningen Economic Research, Foodstep, Bionext; bewerking Wageningen Economic Research.

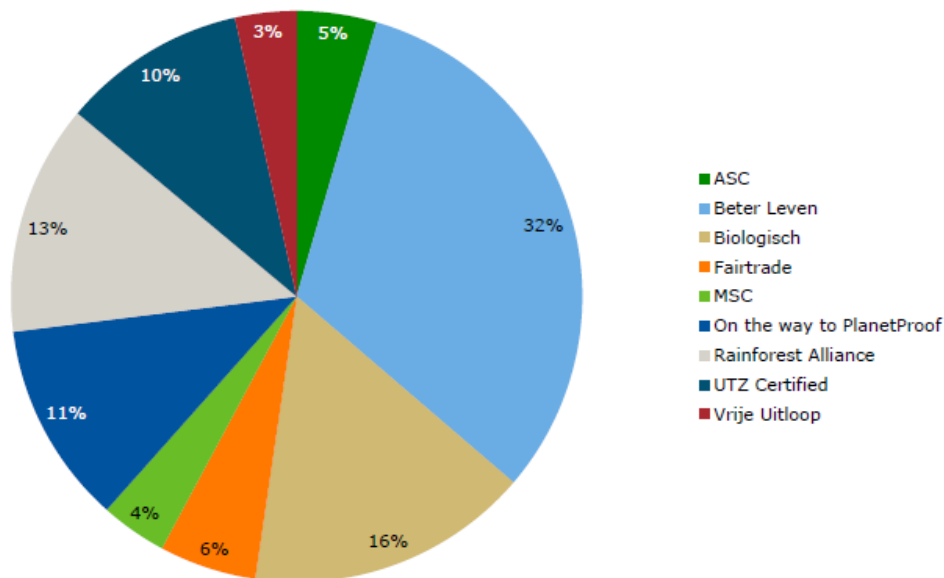


Figure 4 Share per label in sustainable food spending including stacking in Dutch supermarkets, foodservice and specialty shops for sustainable food in 2021. An item can have several labels. The total of the labels is therefore higher than the total expenditure on sustainable food (Source: Logatcheva, 2022, based on data from CBS, Wageningen Economic Research, Foodstep, Bionext, edited by Wageningen Economic Research).

Benchmarking of individual supermarket chains

The foundation "Stichting Questionmark" (2021) published an analysis of the sustainability of supermarkets in our country with the Superlijst Groen ("Superlist Green") 2021. The report's main findings are reproduced below.

Sustainability is high on the agenda at many supermarkets, given the many initiatives and examples of improvements they report. To assess these efforts, Questionmark says it is necessary to put them in perspective by comparing them with established references or generally accepted standards and agreements. Currently, however, policies and reporting are often still too anecdotal, focused on subtopics or not sufficiently quantified.

Supermarkets are taking all kinds of initiatives to make the food system more sustainable. In this respect, Ekoplaza and Albert Heijn emerge from this study as frontrunners. Ekoplaza leads the way in practice: many organic products on offer, little meat in its advertising folders. Albert Heijn leads the way in transparency; unlike other supermarkets, Albert Heijn provides important insights into the origin and sale of (un)sustainable products. However, all the supermarkets surveyed had not yet (visibly) fulfilled important agreements on sustainability in the national Climate Agreement, the Deltaplan Biodiversity Restoration and the Zero Deforestation Initiative when the report was published. To make their production chains more sustainable, supermarkets still rely heavily on the 'conscious consumer' who chooses the sustainable (certified) option of their own accord.

Supermarkets are not yet making a substantial contribution to promoting a more plant-based diet. Lidl, Aldi and Albert Heijn are the first supermarkets to explicitly name the large ecological footprint of meat and attach their own responsibility to it. In practice, although plant-based options are widely available in most supermarkets, meat is the norm. Measurable targets are still lacking in all supermarkets.

Nature-inclusive agriculture is not yet the norm in the supermarkets surveyed. Supermarkets place responsibility for leaving non-sustainable products with their customers. It is difficult to say to what extent supermarkets themselves contribute to agreements on circular agriculture or to the Deltaplan Biodiversity. The information in annual reports does not provide any guidance, apart from Albert Heijn's annual report. Ekoplaza is an exception with an almost entirely organic product range.

The risk of large-scale deforestation for palm oil and soy is high. Supermarkets have failed to meet the commitment to end deforestation in their supply chains by 2020. Although most of them do use certified palm oil, none of them yet require their suppliers to have a policy against deforestation. Similarly, policies for soy are often limited to certification, even if this does not make soy demonstrably free of deforestation.

However, it does appear that fish in the supermarket is almost always offered with relevant labels.

A summary of the findings is given in Figure 5.

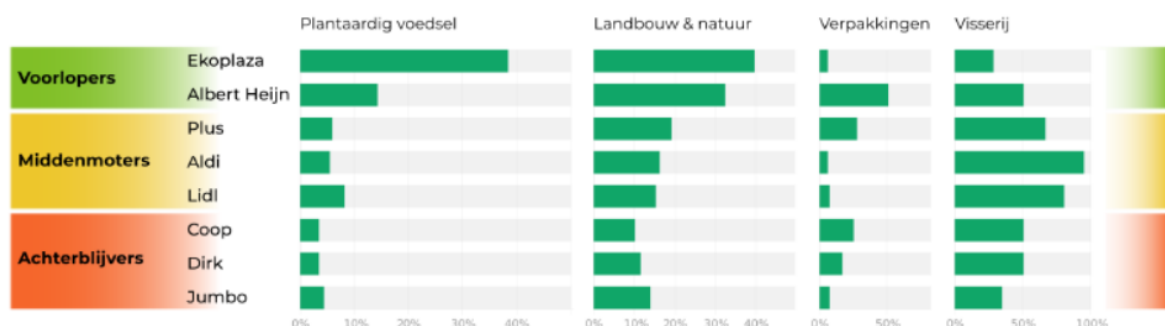


Figure 5 Ranking of supermarkets with regard to sustainable plant-based food supply, agriculture and nature, packaging and fisheries (source: Questionmark, 2021).

Distribution of margins

The Agro-Nutri Monitor 2022 shows that for the majority of organic products surveyed, farmers and market gardeners are reimbursed for the additional costs of organic production. The extra price paid by consumers is largely paid by producers. For supermarkets in particular, net margins on organic products are lower than on conventional products. For producers of agricultural products with a non-organic sustainability label, whether the producer receives a premium varies from product to product (ACM, 2022e, 2022f, 2022h).

For organic potatoes and pork, net margins are higher than for conventional products, but this is not the case for organic onions and milk. This indicates that the market is struggling to achieve the same margin on organic products as on conventional products, something that is also the case further down the chain at supermarkets. For most products, farmers' and growers' share of the consumer price for organic products is higher than for conventional products. The only exceptions are milk and pears. Here the farmers' and market gardeners' share in the chain is almost the same as for the conventional product. For potatoes, onions, tomatoes and pork, the share of farmers and market gardeners in the organic chains was 7%, 14%, 10% and 14% higher than in the conventional chains, respectively. This is caused by the fact that the costs of organic production at primary level tend to be significantly higher than for conventional production (Van Galen et al., 2022a, 2022b).

The share of agricultural and horticultural production certified by a sustainability label, such as On the way to Planet Proof, Albert Heijn's Beter voor Natuur en Boer or the Beter Leven label (one star), is increasing. It was smallest for onions in 2021 (3% of farms), almost 10% for milk and table potatoes (for table potatoes, 58% of acreage under On the Way to Planet Proof), 30-40% for pigs, tomatoes and pears and more than half of farms for mushrooms. The share under a sustainability label tends to be higher for products destined more for the domestic market. Whether Dutch buyers pay a premium price for products with a sustainability label varies per product. Dairy farmers usually receive a premium price for production under sustainability labels. In most cases, dairy farmers and stakeholders indicate that the additional cost is at least largely covered by the additional price. The same applies to pig farmers with the Beter Leven label (one star). In the vegetable sectors, it is much less common to pay an explicit extra price for products with a sustainability label (a sometimes significant part of which, incidentally, goes abroad). The study shows that this does happen in some cases, for example with table potatoes. That extra price is paid by the potato trade. Supermarkets do say they pay a bit more for potatoes with the On the way to Planet Proof label, but that extra price is not made explicit and is included in the negotiated price. For onions, pears, tomatoes and mushrooms, there was usually no stipulated extra price. For mushroom growers who sell under Albert Heijn's Better for label, there is a small compensation for costs incurred (Van Galen et al., 2022a, 2022b).

4.2.5 Export

Most European countries have developed their own labels and chain schemes with their own requirements and certification systems. To sell abroad, Dutch farmers and market gardeners have to be certified. Dutch mainstream sustainability labels do not always match the sustainability aspects in neighbouring countries one-to-one. In the plant sectors, a development is under way to benchmark labels with each other. This involves comparing the requirements for hallmarks, so that mutual recognition is possible for those parts that are equivalent. Mutual recognition can reduce audit costs. The animal sectors are lagging behind in this development. Dairy processors and pig slaughterhouses coordinate marketing to ensure that labelled production matches domestic demand as much as possible. Processors marketing surpluses on domestic demand do not receive a premium price for this. In the foreign market, an additional price for a Dutch label is not common. The price is determined by negotiation in the market (Van Galen et al., 2022a, 2022b).

An additional problem is the need for maximal carcass utilisation, i.e. optimising the value of products made from a single raw material.¹¹² It plays out especially in the animal sectors, where milk processors or slaughterhouses try to market products and by-products in domestic and foreign markets in such a way as to obtain the highest value for the raw material. Developments in different markets are not always synchronised. It is therefore a challenge for processors to achieve a good result on balance. Because the

¹¹² It is precisely because maximal carcass utilisation is so important for a label to be able to distribute costs more evenly, that there are also a lot of composite products with the Beter Leven label, such as meat products, meals, mayonnaise, etc. These products are also all controlled, from farmer to packaging, under the Beter Leven quality label.

labels can, by and large, only be sold in the domestic market at a premium price, four-way valuation is made difficult. After all, parts that cannot be sold in Dutch retail have to be sold in other markets at no additional price (Van Galen et al., 2022a, 2022b).

4.2.6 Chain agreements

Since the ACM's (2014a) negative verdict on "Chicken of Tomorrow", collective chain agreements in retail have been strictly avoided.¹¹³ Incidentally, "Chicken of Tomorrow" has found a new form, with individual retailers and processors entering into long-term relationships with farmers who supply them with animals produced under the Better Life label (one star) and give them a better price in return. Examples include Albert Heijn with its "Beter Voor" programme and supermarket chain Plus and meat producer VION regarding pork with the Beter Leven (one star) quality mark. All major supermarkets now have at least the Beter Leven quality mark (one star) on their pork.¹¹⁴

VION works with the "Good Farming Star" programme, in which 185 pig farmers participate, and for organic pork with the Beter Leven quality mark (three stars) and the EKO quality mark through the "Good Farming Organic" programme.¹¹⁵ Pig farmers participating in the latter programme have united in supplier association "De Groene Weg", a subsidiary of VION.

Until 1 January 2023, the "Pig of Tomorrow" programme also existed since 2015. The Central Food Trade Office (CBL) owned it. The programme consisted of three pillars, namely animal welfare, animal health and the environment. This quality programme included above-legal standards for sustainable pork production. In the programme, chain parties together with the pork sector took steps to improve conditions for humans, animals and the environment. As the programme was not sufficiently distinctive from the Beter Leven mark, it was discontinued for the time being.¹¹⁶

Vegetable processor HAK recently announced its intention to switch completely to organic vegetables and pulses from the Netherlands by 2027, based on long-term contracts.¹¹⁷ As far as HAK is concerned, organic should become the obvious standard for consumers. With this ambition, HAK is going faster than the Dutch Action Plan for Growth of Organic Production and Consumption of the Ministry of Agriculture, Nature and Food Quality (LNV), which aims for 15% organic farming area by 2030. HAK aims to grow all its local vegetables and pulses organically by 2027, which is 85% by volume. Initial estimates are that this will allow HAK to account for about 10% of the total growth of organic arable land in the Netherlands.

Following the report "Wat wel kan. Uit de impasse en een aanzet voor perspectief" ("What can be done. Out of the deadlock and a start for a perspective") (Remkes, 2022), the government is committed to concluding an agricultural covenant. Part of this is agreeing on how to offer farmers better compensation for sustainable production and a better earning model (earning capacity) in general. The upcoming agricultural covenant is actually a chain agreement. As one of its goals is to give farmers a better earning model and to burden chain parties and/or consumers with the costs for this, there are potential frictions with competition law. The participants, including the government and the ACM, will have to monitor that the talks and the agreements to be made do not violate Art 101 TFEU.¹¹⁸

¹¹³ A precursor to this was initiated by the retail sector in 2001, to temporarily support farmers' income at the time of the foot-and-mouth crisis with a dime per litre, the "milk dime". The Netherlands Competition Authority (NMA), predecessor of the ACM, banned this initiative. <https://www.rd.nl/oud/010413home.html?pg=mkz%2F010413mkz01.html>

¹¹⁴ <https://www.cbl.nl/duurzamer-varkensvlees-nieuwe-standaard-in-nederlandse-supermarkten/>

¹¹⁵ <https://www.vionfoodgroup.com/nl/producten-en-merken/marktconcepten-en-kwaliteitslabels/>

¹¹⁶ <https://www.pigbusiness.nl/artikel/621521-na-8-jaar-stekker-uit-varkens-van-morgen/>

¹¹⁷ <https://hak.nl/pers/hak-gaat-over-op-biologisch-voor-alle-lokale-groenten-en-peulvruchten>

¹¹⁸ The EC's draft guidelines for cooperation agreements express this in point 20 as follows: "The fact that national authorities encourage a horizontal cooperation agreement does not mean that it is authorised under Article 101."

5 Responsibilities in the food chain

5.1 Consumers

Collective responsibility

Making Dutch agriculture more sustainable is only possible if its additional costs are covered by the buyers of agricultural products. Ultimately, those costs should be included in the price of agricultural products paid by consumers, either directly (for fresh products) or indirectly (for composite products). Economically, it is about internalising the negative externalities of agriculture, something that leads to a better outcome for society as a whole. This is because higher prices lead to competition and therefore innovation, thus solving problems with negative externalities more efficiently than with government subsidies or a laissez-faire policy.

In addition, the negative externalities of Dutch agriculture occur mainly on Dutch territory.¹¹⁹ Harmful effects on the environment (soil, water, air), nature and biodiversity are a national problem, for which the citizens of the Netherlands are collectively responsible. The situation is different for climate, as national greenhouse gas emissions have global effects. However, our country's highest court has ruled that the government, and thus citizens collectively, are bound to realise climate goals (Urgenda ruling). Animal welfare is not about damage to the environment, but about the welfare of farm animals. Here, Art. 13 TFEU binds both the EC and Member States to take full account of the welfare of animals as living sentient beings in their policies. Citizens thus have a collective responsibility.

Conflict of interest

Citizens have a Janus head, with moral views on how society should function on one side and personal interests on the other leading to conflicting choices. This involves the tension between individual and collective, but also between short-term and long-term interests and tensions between the interests of generations (the basis of the Supreme Court's Urgenda judgment). Inderst (2022) points out that consumers have views on how other consumers should behave (not themselves). The solution to this conflict of interests must be found in connecting the interests of Dutch citizens with Dutch consumers.

Export issues

The strong export position of Dutch agriculture and the rules on free movement in the EU internal market hamper the ability of Dutch citizens, in their role as consumers, to bear the costs of the harm done by Dutch agriculture. Trade, processing and retail source a significant proportion of agricultural products from surrounding countries, causing higher prices for consumers to leak abroad. Conversely, the sourcing of foreign products and raw materials needed for them leads to negative externalities outside the Netherlands, insofar as those products and raw materials are not sustainable. The need for full valorisation of carcasses from Dutch agriculture reinforces this, but also offers opportunities because - at least in meat production - increasing sustainability and animal welfare in the Netherlands positively impacts exports. A higher consumer price in the Netherlands for meat and meat products has a favourable international spin-off and is also legitimate in light of the need to make Dutch agriculture more sustainable. However, of concern is the reverse situation, where imported non-sustainable products are cheaper than nationally produced sustainable products. Rules on the EU internal market make solutions to this difficult.

Payment of higher prices by Dutch consumers for sustainable agricultural products is thus both necessary and insufficient for the necessary sustainability drive. This means that Dutch citizens will have to contribute not only as consumers (food prices), but also as citizens (taxes).

¹¹⁹ Some of the damage occurs abroad, for example when importing soy for which jungle is cut down elsewhere in the world. This does not alter the fact that mitigating environmental damage caused by agriculture on Dutch territory primarily concerns the inhabitants of the Netherlands.

Need for income support

In light of the sharp increases in food prices since the outbreak of war in Ukraine, higher prices for food are problematic. Economically, however, they are inevitable for a liveable planet and animal welfare. Refraining from sustainability means continuing to deplete natural capital when critical limits have already been exceeded. However, higher food prices can be compensated in the form of supplements or tax cuts for less well-off citizens (income policy).

5.2 Producers

Income

As indicated in section 2.3, incomes in agriculture are on average lower than in other sectors of the economy (EC, 2021a). This leaves little room for the costs of sustainability to fall on farmers. This is not to say that agriculture itself cannot contribute. Part of the sector is indeed capable of producing sustainably with a reasonable income. It is important to facilitate such pioneers. Support for laggards can thus be unfavourable to the sustainability transition, and business failure can be healthy to some extent (Baayen et al., 2021).

Capital

It is also a given that, on average, farms have considerable assets, which are released at the end of the career. In the Netherlands, these assets are the highest in the EU (EC, 2021a). Part of it can be capitalised at an earlier stage by downgrading farmland to so-called landscape or nature land or by establishing qualitative obligations (Baayen et al., 2022). This provides scope to produce more sustainably. With downgrading to landscape land, the agricultural function remains, albeit with restrictions, whereas with downgrading to nature land, the function of the land changes substantially and agriculture becomes subservient to nature.

5.3 Food chain actors

Role of parties concerned

Suppliers, buyers, processors, retailers, supermarkets and food service are all engaged with agriculture. As described in section 2.3, suppliers, processors and retail in particular involve a relatively small number of large companies compared to large numbers of farmers. This leads to a poor bargaining position for farmers (monopsony), whereby additional costs of sustainability will not be compensated automatically (Schrijvershof & Heystee, 2022). This is undesirable. The Agricultural Markets Task Force (2016) also pointed this out. In contrast, the OECD could find no evidence of market failure due to monopsony in the relationship between chain parties and farmers (Deconinck, 2021, p. 34). The margins of chain actors measured in practice did not demonstrably deviate from the expectation under full competition.

At the same time, the chain actors themselves are also subject to the laws of the free market and their own margins can also be narrow. As long as there are no disproportionate profits for shareholders, it is not by default logical to put the costs of sustainability on their shoulders, as the Rutte 4 coalition agreement does (page 15: "We are initiating the transition to circular agriculture with a good earning model, so that farmers are enabled and socially appreciated to realise the necessary change, giving young farmers a future. In doing so, we expect a significant and binding contribution from banks, suppliers, the processing industry and retail").¹²⁰

Nevertheless, chain parties do have an important role to play in sustainability.

Opportunities to support sustainable production

More than anyone else, chain parties have opportunities to promote sustainable production. In their business relationships, they can make sustainability a pre-condition and provide compensation for it, either financially or by entering into a long-term relationship with farmers, for example. This movement is taking place. It represents a shift from day trading with the lowest possible prices, to contractualisation and long-term relationships. With that, there are trade implications. Because long-term relationships are in many cases

¹²⁰ <https://open.overheid.nl/repository/ronl-f3cb0d9c-878b-4608-9f6a-8a2f6e24a410/1/pdf/coalitieakkoord-2021-2025.pdf>

entered into with Dutch farmers, there is also a de facto form of renationalisation (see section 3.2.3). The Beter Leven label is an example of this.

Chain actors can support sustainability by creating labels and, where necessary, standardising and benchmarking internationally, as is done in floriculture with the Floriculture Sustainability Initiative.¹²¹ A lot is already happening in this area, too. When streamlining labels, as the ACM recommends (ACM, 2022i), it should be recognised that while consumers need insight into the meaning and value of labels, they also want freedom to decide what they are willing to pay a premium price for. Some consumers do so for animal welfare, others for climate, still others for biodiversity. Such freedom of choice is indispensable and is demanded by the EC in several guidelines.

Furthermore, chain parties have the opportunity to price sustainable products more favourably (i.e. accept a narrower or even negative margin) than conventional products. Trade, industry and retail each have this possibility in their own areas. Retail actively uses this to keep organic products on the shelf at a lower price, at the expense of mainstream products (Van Galen et al., 20221, 2022b). Retail can also support sustainable products through targeted advertising and favourable shelf placement (ACM, 2022h).

Finally, chain parties can cooperate in sustainability agreements at the initiative of farmers, as under Art. 210a CMO regulation. In that context, they can give a price premium (as with Albert Heijn's Beter Voor, VION's Good Farming and in Germany with Initiatieve Tierwohl and Bioland), but also ensure that a price premium given by later chain actors is passed on to the producer through them.

5.4 Banks

In the EU logic, banks are not a chain party in agriculture. This means that banks cannot be participants in sustainability agreements under Art 210a CMO regulation. Nevertheless, banks have an important role to play in making agriculture more sustainable. Not only by supporting sustainable investments and innovation, but also by accepting higher risk when farmers switch to sustainable production methods. Banks and their shareholders can be expected to accept lower profits and profit distributions to their shareholders. While banks operate internationally, their shareholders are often citizens of the country where the bank is based. A contribution from banks thus amounts to an additional contribution from wealthy citizens, in line with the ability-to-pay principle.

Banks already provide loans with lower interest rates when converting to sustainable farming systems. Banks could also make a one-off contribution to a transition fund for the area-based approach.

5.5 Governments

The government's options for supporting the transition to sustainable agriculture have been described in detail by Baayen et al. (2022). This includes instruments such as communication, assistance in planning for sustainability, support for conversion, support for certain environmental efforts or results, pricing and norms setting.

For the purposes of this report, the relevant issue is how the government can encourage and facilitate private sustainability initiatives and agreements. First and foremost, private agreements are made without the government. However, the government can encourage and help parties to make such agreements, by bringing them around one table (as in the case of the agricultural covenant which is currently negotiated) and by finding what private parties need to make those agreements. For instance, the government could make a catalogue of sustainability services with associated cost recovery amounts, along the lines of the CAP's Catalogue of Green-Blue Services¹²² and in conjunction with the development of key performance

¹²¹ <https://www.fsi2025.com/>

¹²² <https://www.bij12.nl/onderwerpen/natuur-en-landschap/catalogus-groenblauwe-diensten/>

indicators and so-called product environmental footprints.¹²³ The government could also undertake to update those amounts annually. Where appropriate, the government could specify activities and costs by transition area as part of the area-based approach.

The government should leave room for market parties to determine together which goals and standards they want to agree on and how far they want to go in this. However, the government can indicate which standards are basic and should preferably recur in all agreements. Such benchmarking already takes place privately in a number of cases. This does not alter the fact that chains and chain parties must keep the room to profile themselves with unique choices (for instance with a specific focus on climate, environment, biodiversity or animal welfare). It would be unwise to reduce all goals to one score or key figure. To do justice to the fundamental differences between targets, a dashboard would be more appropriate. Moreover, consumers differ in their preferences for the type of sustainability service. However, the government can help bring order to the jungle of labels currently in circulation.¹²⁴

In case the government sets minimum requirements for sustainability standards and creates its own national label for that purpose, the government could either take on the certification at its own expense or reimburse the additional costs for the existing certification bodies. For instance, the government could fully assume the cost of the organics control body SKAL to help organic farming (cost reduction).

Sustainability agreements will never be able to cover all societal costs of agriculture. The reality of farmers and their associated industry, trade and retail is too complex for that. In addition to private money, financial support from public funds will continue to be needed. The possibilities for this have been elaborated in an earlier report (Baayen et al., 2022).

The government can help reduce price differences between sustainable and mainstream products by adjusting the VAT rate or by levies on unsustainable products.¹²⁵

In general, the government can actively support sustainable agriculture, including organic agriculture, through targeted communication campaigns, as the Danish government has successfully done (ACM, 2022g; Ministerie van LNV, 2022b, 2022c).

If the extra costs of sustainability are passed on to consumers through the chain, the government could compensate citizens in the form of tax measures or income support.

Finally, the government could temporarily tighten the Netherlands' Mededingingswet (Competition Act) to reduce farmers' economic dependence on large buyers, as has already been done in other EU Member States (Schrijvershof, 2022). This approach could be used to protect small-scale sustainability initiatives from possible abuse of power by large buyers, in addition to the Wet oneerlijke handelspraktijken (Unfair Commercial Practices Act), which in the Netherlands has a fairly limited scope. The tightening could focus on protecting farmers who meet certain - e.g. supra-legal - requirements. Along this path, the earning power of farmers in the transition to sustainability could be improved (Schrijvershof, pers. communication, 24 February 2023).

¹²³ It is recommended to (continue to) conduct research for the development of a transparent system of sustainability targets and standards, matching indicators with concrete parameters and objectively set standard amounts for fees for sustainability measures to achieve those standards (specified by land type or area where necessary).

¹²⁴ The possibilities of harmonising labels and setting shared minimum requirements require further investigation, in close coordination with the owners of existing private labels. In doing so, it would be good to distinguish between and maintain space for internal corporate sustainability standards (such as Beter Voor) alongside transparent externally managed standards (such as the Beter Leven label).

¹²⁵ In this area, there is societal debate whether healthy or sustainable products (e.g. fruit and vegetables) should have 0% VAT and unhealthy or unsustainable products (e.g. meat) a higher VAT.

6 Solutions within the EU legal framework

6.1 Scenario A: Incremental sustainability increase from existing initiatives

6.1.1 Solution envisaged

In this scenario, the retail and processing industries are committed to intensifying and accelerating existing commitment to sustainable procurement. For examples, see Annex 1.

Key elements:

- Strengthening the link between supermarkets/processors and Dutch farmers, with long-term agreements and a fair premium price for sustainable products and expanding the number of farmers participating;
- Stepwise replacement of conventional (regular) agricultural products by products with an organic or non-organic sustainability label;
- Further utilisation of the possibilities to use the margin mix in retail in favour of lower prices for sustainable products at the expense of mainstream products (however, agreements on this between supermarkets remain prohibited!);
- Active communication with consumers about the added value of sustainable agricultural products and a better place for them on the shelf;¹²⁶
- Streamlining the existing sustainability labels to a smaller number, while maintaining distinctions between goals such as climate, environment, biodiversity and animal welfare.

Legally, this scenario does not use the exceptions in the CMO regulation. It builds on the existing constructs, in which sustainability is regulated through contractual agreements between producer and buyer, with no horizontal or vertical agreements.

6.1.2 Pros and cons

The advantages of this scenario are:

- Certainty that the legal construction is lawful;
- Familiarity of all parties involved with the methodology;
- No additional adjustment problems, complexity or administrative burden;
- No need to calculate the advantages and disadvantages (although higher costs) or to substantiate the indispensability or effects on free movement or the objectives of Art. 39 TFEU;
- Broad support.

The disadvantages of this scenario are:

- Modest contribution to total required sustainability for the time being;
- Impact on sustainability depends on final consumer choice.

6.1.3 Effectiveness and feasibility

This scenario is of limited effectiveness in the light of the major agricultural sustainability challenge. It fits better in a reality after agricultural restructuring, in a new equilibrium situation.

The feasibility of the scenario is excellent.

¹²⁶ Supermarkets do not have a strategy to encourage customers to buy more organic products at the expense of conventional products or products with a non-organic sustainability label. This choice is left to the customer (ACM, 2022h).

6.1.4 Fallback options

In case of insufficient progress, a certain share of sustainable retail supply could be imposed through legislation. In order not to infringe on the free movement of goods in the EU internal market, such supply will also have to be able to come from abroad. The effect on making production sustainable in the Netherlands would therefore be limited. On the other hand, such an obligation would encourage retail to be even more creative in generating consumer interest in sustainable products. After all, unsold sustainable product should be put away elsewhere at a lower selling price.

In addition, the fallback would be scenario B, C or D.

6.2 Scenario B: Agreements on compensation of additional costs of sustainable production between farmers and chain parties under Art 210a CMO regulation

6.2.1 Envisaged solution

In this scenario, farmer associations (e.g. cooperatives) conclude sustainability agreements with chain parties in relation to production or trade in agricultural products that aim to apply a higher standard of sustainability than required by law. The agreements they make for this purpose are designed in such a way that - even if they involve a price premium for sustainable products - they are indispensable for achieving the sustainability objectives. For examples, see Annex 1.

Key elements:

- The agreements are initiated by farmers, not by other chain parties (retail or industry);
- Sustainability standards are ambitious and involve existing labels or new standards;
- The results of the sustainability standards must be concrete and measurable;
- The costing for a price premium must be transparent and substantiated for every aspect of it;
- Government subsidy is deducted from costs in that calculation;
- Sustainability costs are periodically reviewed for necessity and accuracy in terms of costs;
- Provisions that restrict the free movement of goods and services within the EU are not eligible;
- A competition impact assessment is carried out if the market share exceeds 15% (horizontal agreements) or 30% (vertical agreements).

If desired, farmers can better organise themselves for this purpose, whether as cooperatives or recognised POs or not.

6.2.2 Pros and cons

The advantages of this scenario are:

- Certainty that the construction is lawful, with possibility of prior review by the EC;
- Voluntary nature, but overarching agreements between farmers and chain parties to roll out this approach widely in agriculture are allowed;¹²⁷
- Price premium for sustainable production possible, if indispensable, where the cost system of the CAP agro-environment-climate measures can be followed with annual maintenance of the tables by the government;
- Price premium does not leak abroad (Dutch consumers pay for sustainable production at home);
- As a result of the initiative from farmers themselves, no barriers to free movement in the EU internal market;
- Production for the Dutch market becomes more attractive than export, reducing externalities;

¹²⁷ For example, in the forthcoming national agricultural covenant, where a general framework for the roll-out of sustainability initiatives could be agreed according to the systematics of Art. 210a CMO regulation, together with flanking framework from the government in the form of a catalogue of sustainable activities with associated cost calculations.

- Preservation of scope for different sustainability strategies among buyers and retail, keeping consumer choice as to which form of sustainability to support and maintaining competition;
- Settlement possible by tightening sustainability standards over time;
- Marginal test for exclusion of competition and endangering the objective of Art 39 TFEU;
- No requirement of concentration of (part of) supply.

The disadvantages of this scenario are:

- Only possible for supra-legal standards;¹²⁸
- Agreements must be strictly indispensable to achieve the stated objective;
- Careful preparation necessary;
- Periodic reassessment necessary on indispensability in terms of design and costs.

6.2.3 Effectiveness and feasibility

This scenario is very effective in light of the major sustainability challenge facing agriculture. Application requires serious sustainability ambitions, but allows for a price premium for this. If the systematics of the CAP agro-environment-climate measures are followed, the fee contains a modest "plus" as a contribution to income and incentive to participate. There are no leakage effects abroad.

The feasibility of the scenario is legally excellent. It is the instrument provided by the EU to make such agreements and significantly broadens the possibilities in this area. However, sustainability agreements under Art 210a CMO Regulation need to be carefully framed.

6.2.4 Fallback options

Should the application of Art. 210a CMO Regulation not take off well in practice, the government could create a legal obligation for all farmers and chain parties to join such sustainability agreements. In doing so - unlike in Scenario D - there is no tension with the useful effect of competition rules and loyalty to the EU Treaty.

6.3 Scenario C: Agreements on compensation of the extra costs of sustainable production between farmers and chain parties, using other CMO regulation derogations

6.3.1 Solution envisaged

In this scenario, farmer associations, whether organised into cooperatives or recognised producer organisations or not, make agreements with chain parties on a price premium for sustainable products of their participants. For examples, see Annex 1.

Key elements:

- Joint negotiations of recognised producer organisations (Art. 152 CMO Regulation) or of associations or cooperatives of farmers (Art. 209 CMO Regulation) with buyers on prices;¹²⁹

¹²⁸ For animal welfare, this is problematic. The provision in Art. 2.1 of the Wet dieren (Animals Act) that it is forbidden to cause pain or injury to an animal or harm its health or welfare without a reasonable purpose or beyond what is permissible to achieve such purpose, raises questions as to whether supra-statutory animal welfare standards are at all possible in the Netherlands. The standard that applies to every animal keeper and also livestock farmer is unimpaired animal welfare, which may only be breached in certain cases. Limiting the provision with a reference to the principles of effectiveness and proportionality does not solve this problem. In addition, the change in the law as a result of the parliamentary Westering amendment adds further ambiguity as to what conduct towards animals is prohibited (Ministerie van LNV, 2022a, p.10). This therefore increases uncertainty as to what the boundary is between statutory and supra-statutory obligations. In practice, it can be expected that the ACM will provide room for voluntary standards above the specific means rules in the regulations and will not reason from that the animal welfare general objectives apply to all farmers individually (<https://fd.nl/economie/1467915/kartelwaakhond-roept-boeren-op-prijzafspraken-te-maken-nqb3ca1usMI4>; <https://nos.nl/artikel/2464106-toezichthouder-herhaalt-oproep-aan-boeren-en-supermarkten-werk-vaker-samen>).

¹²⁹ Art. 152 CMO Regulation provides scope for recognised POs to plan production, optimise production costs, market products and negotiate contracts for the supply of agricultural products on behalf of its members in respect of all or part of their production.

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- Use of the space in Art. 172a CMO regulation to agree value distribution clauses between producers and chain parties (buyers as well as later links in the chain).

If desired, farmers can better organise themselves for this purpose, whether or not as cooperatives or recognised POs.

6.3.2 Pros and cons

The advantages of this scenario are:

- Strengthening the position of farmers in the chain, leading to more market power and hence a better price;
- Price premium for sustainable products possible; not only for supra-statutory, but also for statutory requirements;
- Price premium does not leak abroad;
- Agreements need not be indispensable to achieve set goal;
- Marginal test for exclusion of competition and jeopardising the objective of Art. 39 TFEU.

The disadvantages of this scenario are:

- Uncertainty whether the construction is lawful, in view of the EC's position with regard to Art. 209 CMO Regulation, even though the draft guidelines for Art. 210a CMO Regulation provide a precedent for a lenient interpretation of the requirements with regard to non-exclusion of competition and non-jeopardisation of the objectives of Art. 39 TFEU, and with regard to a price mark-up as a form of value distribution clause under Art. 172a CMO Regulation;
- In recognised POs, concentration of (part of) the supply is required and a series of conditions must be met.

6.3.3 Effectiveness and feasibility

This scenario is reasonably effective in light of the major sustainability challenge facing agriculture. A premium price is realised for sustainable products, including legally required standards if required. There are no leakage effects abroad.

The feasibility of the scenario is legally uncertain. It is recommended to ask the ACM for advice beforehand. A negative decision by the ACM can be challenged in court. This brings uncertainty and the risk of fines (De Goffau & Van Heezik, 2020).

6.3.4 Fallback options

In case of insufficient certainty or a negative opinion from the ACM, scenario B may be reverted to.

6.4 Scenario D: Mandatory procurement of more sustainable products by industry, retail and food service ("blending")

6.4.1 Solution envisaged

In this scenario, the government obliges industry, retail and foodservice through legislation to make their procurement more sustainable, and increasing so over time. This follows a proposal by the EEAC Network (2022), based on an idea by the Netherlands' Food Transition Coalition, which was embraced by the House of Representatives with the Boswijk (et al.) motion of 8 December 2022.

Key elements:

- Statutory legislation requiring buyers of primary agricultural products to have a certain proportion of their purchases consist of products with a sustainability label (which then needs to be specified);

Art 209 CMO regulation provides room for joint agreements on the production or sale of agricultural products or the use of common facilities for the storage, treatment or processing of agricultural products.

- Due to free movement in the EU internal market, no distinction between Dutch and foreign product.

If desired, the government can elaborate on what the price premium should be per product and quality label.

6.4.2 Pros and cons

The advantages of this scenario are:

- Securing the shift to more sustainable production;
- Increasing level of obligations possible and thus gradual phase-in of sustainability;
- Consumer prices increase gradually thanks to phasing-in;
- Simplicity: no calculation of advantages and disadvantages needed, nor substantiation of indispensability or effects on free movement or the objectives of Art. 39 TFEU.

The disadvantages of this scenario are:

- The construction is likely to be unlawful from the perspective of EU competition¹³⁰ and internal market rules,¹³¹ in view of the principles of the *effet utile* and Treaty loyalty (see section 4.1.2), the national Supreme Court (Raad van State) (2018, 2022) is clear on this;
- Scope of sustainability limited because customers can also source more sustainable product from abroad, partly at lower prices, displacing Dutch product by foreign product;
- Impairment of the competitiveness of chain parties because they cannot sell the more sustainable product or can only sell it at too low a price (therefore resistance is to be expected). Ultimate risk is that chain parties no longer buy Dutch product and farmers are left with unsellable products;
- Consumers may swerve to non-sustainable product as long as the obligation is phased in;
- In case of physical blending, consumers cannot be informed on the packaging to what extent the purchased product did or did not meet higher requirements;
- Cannibalisation (displacement) of labels with high effect in terms of sustainability by labels with low effect;
- Monitoring and enforcement needed.

6.4.3 Effectiveness and feasibility

This scenario is reasonably effective in light of the major agricultural sustainability challenge. It provides an instrument to force transition. However, there are significant leakage effects, partly because something is imposed on chain parties that will be perceived as unfair.

The feasibility of the scenario is legally uncertain. Referring to the opinion of the Vice-President of the Raad van State (2022), chain actors can ask the EC to launch an investigation into breach of Treaty loyalty with regard to competition rules. They can refuse to implement the procurement obligation on the same ground and go to court in case of enforcement (exceptive review of generally binding rules).¹³² It is not inconceivable that the latter may ask preliminary (prejudiciary) questions. Ultimately, the ECJ then decides the question of principle. This can take years and an unfavourable outcome can result in high fines, including for the State. Parties can also hold the government privately liable for damages for the unlawful government act (Schlössels & Zijlstra, 2019).

¹³⁰ The case law of the ECJ shows that legislation mandating what was previously prohibited because of Art. 101 TFEU is not permissible in any case (Klamert, 2014; Whish & Bailey, 2021). Thus, in any case, legislation may not cover animal welfare, at least for poultry. It is questionable whether generalisation of a sustainable procurement obligation from chicken to all agricultural products, or from animal welfare to all forms of sustainability, would then still be possible.

¹³¹ While the ECJ has allowed infringement of free movement for sustainability purposes, it has done so on the condition that such infringement is necessary and proportionate. Experience in other Member States shows that a higher level of sustainability in agriculture can be achieved even without such an infringement. In Austria, for example, the share of organic farming is much higher than in the Netherlands, and in Denmark consumer demand for organic products is much higher than in our country, without the imposition of a purchase obligation of organic agricultural products. Thus, it cannot reasonably be said that the necessity principle is met. With that, there is also no room to deploy the principle of inherent necessity or the rule of reason. For this reason, the legislator will also have to respect EU competition law and, for reasons of Treaty loyalty, ensure that the useful effect of the cartel prohibition is maintained. See also section 3.1.2.

¹³² See the opinion of the Staatsraad (State Counsel) to the Raad van State, Mr Widdershoven (ECLI:NL:RVS:2017:3557): "Finally, it is argued that, in principle, administrative bodies are authorised and obliged to test the generally binding provisions they apply against higher law and, in case of conflict, to disapply them. This power covers both the review against universally binding provisions of international law and that against higher national law, including general principles of law."

Legally, the situation is different from the mandatory blending of bioethanol in car fuel. That obligation is based on EU law (Art. 25 of Directive (EU) 2018/2001).¹³³ Member States are obliged to implement that legislation nationally (Treaty loyalty). For agriculture, there is no such EU legal basis to be allowed or required to set requirements on the share of sustainable product at national level. The upcoming Sustainable Food Systems Regulation could provide for this. The EC plans to issue a proposal for this regulation in 2023. The Netherlands could request the EC to include in it an article allowing Member States to impose legal requirements on the share of sustainable products when buying or on the shelf. If such an article would be lacking, the Netherlands could push for its inclusion during co-decision in the Council and via the EP. Political negotiations on new proposals usually take three years. This means that the EU legal basis cannot be expected before 2026. After that, a national legislative process is needed to translate that European space into national legislation on sustainable procurement, which could also take several years.

6.4.4 Fallback options

Alternatively, the legislator may provide that purchasing durable products without reimbursement of the extra cost is an unfair commercial practice under Directive 2019/633, by way of a national rule going beyond the unfair commercial practices listed in this Directive itself. However, the scope for doing so is limited. Additional national rules must remain within the limits of Union law applicable to the functioning of the internal market and provided that such rules are proportionate. The first condition can be met provided the rules do not distinguish between Dutch and foreign product. The second condition is problematic because such a requirement impinges on the normal scope of market players to negotiate prices. The requirement that sustainability must be fully remunerated at all times may be seen as disproportionate.

Alternatively, scenarios B or C could be resorted to.

¹³³ Based on Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport. Thus, the obligation to blend bioethanol has a long history.

Table 7 Main building blocks and pros and cons of four scenarios for sustainability agreements in agriculture (source: this report).

| | Scenario A Incremental increase of sustainability via existing initiatives | Scenario B Agreements under CMO Regulation, Art. 210a | Scenario C Agreements under CMO Regulation, Art. 152, 172bis and 209 | Scenario D Legislation imposing sustainable products purchasing percentage |
|---|--|---|--|--|
| Elements | | | | |
| <i>Who</i> | Producers and buyers | Producers and chain actors | Producers and chain actors | Chain actors |
| <i>Duration</i> | Multiannual contracts | Multiannual agreements | Multiannual agreements | Permanent |
| <i>Ambition level</i> | Limited to substantive | High (legally required) | Free choice | Government decides |
| <i>Formula</i> | Quality mark (existing or new) or company logo | Quality mark (existing or new) or company logo | Quality mark (existing or new) or company logo | Government decides |
| <i>Cost calculation</i> | Negotiable | Full transparency required | Negotiable | Government decides |
| <i>Price premium for sustainable production</i> | Yes | Yes | Yes | Possible |
| <i>Who pays</i> | Buyers and consumers (indirect) | Chain actors and consumers (indirect) | Chain actors and consumers (indirect) | Chain actors, rather than consumers |
| <i>Mechanism</i> | Gradual shift of price margins in favour of sustainable products | Agreements in food chain | Agreements in food chain | Legal obligation to purchase sustainable products |
| <i>Internal market</i> | Compatible, virtually no leakage effects | Compatible, virtually no leakage effects | Compatible, virtually no leakage effects | Incompatible and/or large leakage effects |
| <i>Phasing in</i> | Nudging of consumers to sustainable products | Stepwise introduction of sustainability norms | Stepwise introduction of sustainability norms | Increasing obligation level as regards purchasing of sustainable products |
| Pros and cons | | | | |
| <i>Voluntary or mandatory</i> | Voluntary | Voluntary | Voluntary | Legal obligation |
| <i>Scope</i> | Mandatory requirements as well as higher norms | Only norms exceeding mandatory requirements | Mandatory requirements as well as higher norms | Government decides |
| <i>Feasibility</i> | Good | Complex but feasible | Relatively simple | Resistance and enforcement problems |
| <i>Legality</i> | Certain | Certain | Probable (combination with Art. 172a) | Improbable |
| <i>Conditions</i> | None | Agreements must be strictly indispensable | Common selling required under Art. 152 | Equal treatment for Dutch and foreign products |
| Effectiveness | | | | |
| <i>Sustainability objectives</i> | Limited to medium (depending on ambition of buyer and consumer) | High (legally required) | Medium (intermediate solution) | Medium (leakage effects, escape behaviour) |
| <i>Earning capacity</i> | Limited to medium (problems of scale) | High (compensation of all additional costs) | Medium to high | Medium (leakage effects, escape behaviour) |
| Feasibility | Excellent | Excellent | Probably good | Probably poor |

7 Preconditions: earning power and purchasing power

7.1 Earning power

The previous chapter explained how chain parties can promote sustainable agriculture within the limits of European Union legislation and conclude agreements relevant to sustainability.

Underlying the desire to be able to make those agreements is the need to limit the negative externalities of Dutch agriculture on Dutch territory. Given the "polluter pays" principle in Art. 191 TFEU, Dutch farmers are first responsible for those impacts and thus also for the associated costs (for a comprehensive analysis of this issue, see Baayen et al., 2021). However, this does not alter the fact that they have too little room to achieve the necessary sustainability, at least without major restructuring of the sector. Sustainable agriculture must have an acceptable earnings model. In the words of the Taskforce Kringlooplandbouw (Taskforce Earning Capacity for Circular Farming) (2019), "You can't do green if you're in the red."

All chain parties are needed to enable that earning capacity, and so are the banks. When it comes down to it, however, it is consumers, in other words citizens, who have to bear the additional costs. This is justifiable because they - more than any other chain party - benefit from ways of farming that are at the expense of climate, environment, nature, biodiversity, landscape and animal welfare. Jongeneel (2022) points out that for decades our food has become increasingly cheaper and demands a steadily smaller share of our household budget.¹³⁴ The price for this is paid collectively in the form of insoluble problems for the living environment, substandard animal welfare and health damage from, among other things, particulate matter.

Consumers and citizens will have to sacrifice, via the price of food and taxes, for farmers to produce sustainably. In all scenarios, this is the end result. In return, by the way, the citizen gets more than merely a healthy living environment.¹³⁵ Hidden costs that are collectively reimbursed fall away and, to some extent, this also creates space in the national budget.

7.2 Purchasing power

Higher food prices may be inevitable, but they are also a social problem. In particular, lower incomes cannot afford more expensive food, as the price hikes caused by the war in Ukraine have shown. A transition to sustainable agriculture with a good earning model for farmers therefore also requires measures to protect the purchasing power of less well-off citizens.

¹³⁴ See also the Agricultural Markets Task Force (2016) observation, point 149: "The proportion of the average EU household's budget spent on food has fallen to 13% as compared to 30% at the beginning of the 1980s."

¹³⁵ Besides negative externalities, farmers often also produce positive externalities, such as an attractive landscape or natural values. This requires extensive farming, which is often detrimental to earning power (Baayen et al., 2021, 2022; Schrijver et al., 2022; see also section 2.3). In current agricultural practice in the Netherlands, rewards for positive externalities account for only a fraction of total revenue (Silvis et al., 2022). A fundamental problem is that with extensification, fewer kilograms of the private good end up on supermarket shelves as higher nature values are demanded. However, nature content is not indicated on any label so far. The targets imposed by EU regulations for protected habitats in particular are difficult to achieve after decades of deterioration due to negative externalities of agriculture even for specialised site management organisations (Adams et al., 2017), which is why the government is preparing drastic interventions in the light of European law obligations that raise major tensions.

The options for this include lowering taxes for lower income groups and providing targeted income support¹³⁶ or more generous social policies in general.¹³⁷ In essence, this restores the relationship between consumers and citizens, allowing them to buy the sustainable food they really should. Consumers "cannot buy green if they are in the red".

¹³⁶ Such income support will have limits. If agriculture were not committed enough to sustainability, the costs to society would continue to steadily increase. If the social costs of sustainability become higher than the economic benefits of agriculture, it would be better to end production in the Netherlands.

¹³⁷ Many economists and political scientists argue that sustainability transitions should be accompanied by wealth redistribution in order to meet basic social rights. See, for example, Newell & Mulvaney (2013), McCauley & Heffron (2018), Laurent (2021), Van der Weijden et al. (2021), Abram et al. (2022) and Piketty (2022).

8 Conclusions and recommendations

8.1 Conclusions

The aim of the study resulting in the present report was to map out the possibilities offered by EU legislation to conclude horizontal and vertical chain agreements (between farmers and chain parties respectively) for the benefit of nature and landscape, the environment, climate, animal welfare and enhanced earning capacity of the farmer. This concerned the new scope of Art. 210a CMO Regulation, as well as scope that had already existed for some time within that Regulation or under other EU legislation.

The task was also to identify which of these opportunities are promising and could be realised as a priority to help achieve the Netherlands' nature, water, climate and animal welfare goals.

The study enabled to draw the following conclusions.

Contradictory EU legal framework hampers improved sustainability

Enhancing sustainability of agriculture is a necessity but requires significant expenses. According to a Dutch expression, a farmer 'cannot act in a green manner if his bank account colours red'. Enhancing sustainability is simultaneously enforced and obstructed by EU legislation. First, this concerns a systematic interpretation of the polluter pays principle of the EU Treaty¹³⁸, in which only voluntary sustainability activities of farmers exceeding EU or national legal requirements may be compensated through state aid, services of general economic interest or the CAP. Second, the competition logic of the EU Treaty is based on welfare theoretical criteria, which prohibit the full inclusion of sustainability in competition policy considerations.

Furthermore, sustainability agreements are prohibited when the government imposes legal norms, under the assumption that private agreements would not be indispensable from a competition perspective in such cases. Hence, governments usually avoid imposing such norms, since these would negatively impact the competitive position of farmers on the international market. Without financial support, be it public or private, their production costs would increase and their income decrease. Such support is however prohibited, except for voluntary activities exceeding EU or national legal requirements. In cases in which support is permitted, exclusively the costs incurred and income foregone may be compensated, usually on the basis of average cost calculations, which are too high for some farmers and too low for others. Consequently, farmers stand the risk that the costs of any voluntary sustainability activities will be only partially reimbursed, while they themselves already have to bear the costs of compliance with legal sustainability requirements.

Given the gradual increase of sustainability norms over time and enforcement in court or by the European Commission (EC) of legal sustainability requirements, tensions are on the rise and the problem appears to be unsolvable within the framework of the current EU agricultural policy.

Liberalisation of the European legislation (Green Deal)

Under the Green Deal, the EU is widening the possibilities for better rewarding sustainability measures. For achieving this, the competition rules, state aid rules and the CAP have been amended.

The liberalisation of the CAP and state aid rules have been described in previous reports beschreven (Baayen en Van Doorn, 2020; Baayen et al., 2021, 2022). The present report describes the liberalisation of the competition rules as regards agriculture, which overtly permits to transmit the higher production costs of sustainable agriculture to consumers. This is essential because those additional costs will eventually need to be absorbed either by citizens (through taxation) or by consumers (through food prices).

¹³⁸ Art. 191 of the Treaty on the Functioning of European Union (TFEU).

Consumers generally are of the opinion that enhanced sustainability in agriculture is a must, however they are not always able or willing to pay higher prices themselves, in other words, consumers are not always able or willing to societal costs in their purchasing decisions, while they expect others to do so. It would be reasonable to assume that preferences of consumers concerning the behaviour of other consumers should not be solved through competition agreements, but by political decisions. For a viable solution, both approaches will be necessary. Sustainability agreements will result in higher food prices for consumers to the benefit of sustainable farming, and political decisions may compensate low-income citizens for those higher prices. Besides this, pollution norms setting and pollution pricing will remain necessary, as well as governmental support to farmers in relation to communication, consciousness raising and conversion to more sustainable forms of agriculture (Baayen et al., 2021, 2022).

Art. 210a of the CMO Regulation provides ample room for horizontal and vertical sustainability agreements
The conflicts in EU legislation as regards sustainability originate from the EU Treaty itself. Amending the EU Treaty is not an option and the jurisprudence of decades of the Court of Justice is a lasting reality. The solution should rather be sought in exceptions (derogations) to the fixed rules in the secondary legislation, i.e. the Directives and Regulations of the European Parliament (EP) and the Council which are based in the EU Treaties (the primary legislation).

In the framework of the CAP review, the CMO Regulation was amended to this end in December 2021. An article (210a) was inserted so as to better cater for sustainability initiatives in agriculture. The liberalisation in case of the competition rules is considerable. Farmers and their associations are permitted, by derogation to the cartel prohibition, to agree with food chain actors at different levels of industry, distribution and retail on sustainability objectives to be realised through sustainability norms. Those norms shall exceed existing EU and national legislative norms and the sustainability agreements need to be indispensable in all respects for achieving the sustainability objectives set. Full transparency is required as to the costs.

In January 2023, the EC opened a public consultation on draft guidelines as to the interpretation of Art. 210a of the CMO Regulation. The draft clarifies that the EC intends to provide for a truly liberal application of the article. The interpretation of the critical term 'indispensable' has been widened beyond what is usual in relation to the cartel prohibition in Art. 101 of the EU Treaty. Furthermore, national competition authorities and the EC will have little room for prohibiting sustainability agreements. They are supposed to restrict themselves to merely a marginal test whether competition is excluded or the objectives of Art. 39 of the EU Treaty are being jeopardised.

The risks associated to the application of Art. 210a of the CMO Regulation are limited. The guidelines provide clarity and interested parties may request the EC beforehand for an opinion. There is no tension with the EU rules as regards the free movement of goods on the single market.

Alternative options in the CMO Regulation may provide an attractive alternative

Apart from Art. 210a, the CMO Regulation offers alternative options for sustainability agreements. Art. 152 and Art. 209 of the CMO Regulation permit farmers and farmers' associations to jointly negotiate prices. By combining this with the possibility offered in Art. 172a of the same Regulation on value sharing clauses more or less the same results can be achieved as under Art. 210a, but including the option to cover compliance costs with sustainability norms in legislation. In these constructions, the indispensability criterion does not apply. In certain cases, this may be attractive.

Competition needs to be maintained

When concluding sustainability agreements, the question arises whether all aspects of sustainability could be combined into a single sustainability index, simplifying choices for policy makers and consumers alike. It is however important to maintain competition for the various aspects of sustainability, and equally so between retailers. Maintaining competition is not only a legal requirement, but also to do justice to the fact that consumer preferences as regards sustainability may differ considerably in terms of preferred objectives (for some animal welfare, for other biodiversity, for still others the climate or the environmental).

Agreements between retailers, food services and the food industry without participation of farmers remains illegal

Agreements of food chain actors such as retailers, foodservices or the food industry without involvement of farmers and their associations continue to be prohibited under the EU legislation (cartel prohibition), unless four conditions for exemption given in Art. 101(3) TFEU apply. In practice, this is highly complex and far from easy to justify. Anyhow agreements on price increases or reduced choice for consumers are not permissible.

This implies that participants to the ongoing negotiations in the Netherlands on an agriculture covenant for better earning capacity for sustainable farming (the so-called "landbouwakkoord"), including the government and the national competition authority, will need to ensure that those negotiations and that covenant do not infringe upon the cartel prohibition. This can be done by restricting any such agreements to the scope of the derogations in the CMO Regulation to the cartel prohibition.

Extension of rules is not a helpful solution

Extension of sustainability agreements through Art. 164 of the CMO Regulation does not provide a helpful solution, because such a construction reintroduces of a series of conditions under the cartel prohibition of the EU Treaty and thus annihilates a substantive part of the privileges of the derogations for recognised produced organisations.

The law on sustainability initiatives proposed by the government of the Netherlands is not a helpful solution either

The government's proposal for a law on sustainability initiatives does not provide much help either, due to the fact that the national legislator is only permitted to consolidate societal initiatives in legislation that are permissible under the EU competition legislation. At most, the national legislator could impose on farmers and food chain actors to conclude sustainability agreements complying with the derogations in the CMO Regulation (e.g. application of Art. 210a).

National legislation requiring mandatory purchasing of sustainable products by retailers, foodservices and the food industry is at odds with EU legislation

The Parliament of the Netherlands has requested the government to investigate whether a national law could be envisaged obliging retailers, foodservices and the food industry to purchase sustainably produced Dutch agricultural products. Such an approach is at odds with the competition law of the EU and the free movement of goods on the internal EU market.

The vice-chair of the highest court in the Netherlands for administrative law, the Raad van State, on request of the Minister of Agriculture, Nature and Food Quality advised the government in 2022 that EU Member States are not permitted to introduce national legislation that would be prohibited for private actors under competition law. The situation differs from that for biofuel, for which EU legislation provides for a legal obligation on Member States. Moreover, it is questionable whether such a legal obligation can be effective without infringing on the EU internal market rules.

Stimulate constructive developments that are already ongoing

Independently from competition legislation, food chain actors have already developed models for supporting sustainable production and purchasing. Retailers may use their so-called margins mix (i.e. price adjustment of certain products to promote these over other products) to lower the prices of sustainable products at the expense of regular products. This results in more affordable sustainable food and stimulates demand for such products. This perspective is promising and should be encouraged. It is not clear however in how far such an approach suffices to address the problems currently faced by agriculture in the Netherlands.

Government may help

The government would do well to encourage and facilitate the use of the derogations in the CMO Regulation for sustainability agreements. To this end, the government could provide for a catalogue of reliable quality marks together with tables concerning compensation costs for each type of sustainable activity. The existing catalogue under the CAP for blue-green sustainability services in the framework of the agro-environment-climate measures (AECM) could be extended for this purpose to also cover for example animal health and

welfare. The government could provide for an annual update of the catalogue and cost tables by an independent party and finance those updates.

Art. 210a of the CMO Regulation is the best way forward

The Netherlands have a tradition of societal covenants, in which the concerned parties express commitment to certain compromise solutions. The problems concerning the earning capacity of farmers however can only be solved through agreements concerning who will pay for what. Such agreements in principle fall under the cartel prohibition unless they coincide with the derogations in the CMO Regulation. The best way forward is to utilise the instruments offered by the EU for enhancing sustainability of agriculture, namely the possibility to conclude sustainability agreements under Art. 210a of the CMO Regulation. Such agreements are legally permissible.

The opportunity now provided is to compensate farmers for sustainability costs through a price premium. In order to do so, the rules of the game will need to be respected. The initiative may only come from farmers and farmers' associations, and cannot be restricted to retailers, foodservices or the food industry. Each group of farmers will themselves need to agree with its own chain partners and in many cases the sustainability objectives agreed upon will colour differently than with other groups of farmers and chain actors. What will need to be demonstrated is that the sustainability agreements concluded are truly indispensable. This will require a lot of work, but this is feasible. The fact that farmers conclude agreements with purchasers and other chain actors implies that the EU legislation concerning the internal market is not being jeopardised.

Conditions

Employment of the derogations in the CMO Regulation will result in higher food costs for consumers, as long as the consumers' diet remains unchanged.¹³⁹ At short term, however, this is inevitable to resolve the current sustainability problems in agriculture, at least in the Netherlands. It should be borne in mind that enhanced sustainability in agriculture also generates benefits for society and liberates resources to compensate citizens that are unable to cope with price increases. Moreover, society is in urgent need of a solution for the tensions in this politically sensitive file.

8.2 Recommendations

The following recommendations can be made:

- i. Acknowledge and encourage existing efforts of retailers and food industry to promote the sustainability transition in agriculture through multi-annual contracts with Dutch farmers and compensation of the higher cost level of sustainable production. This should be part of a broad mix of instruments for improved sustainability, including regulatory norms setting, environmental emissions pricing and governmental support for farmers as regards communication, consciousness raising and conversion from regular to sustainable mode of production.
- ii. Focus on implementation of Art. 210a of the CMO Regulation in all sectors for ensuring compensation for voluntary sustainability norms exceeding EU and national legislation by means of a price premium. Respect the condition that sustainability agreements need to be concluded by farmers and farmers' organisations in coordination with their respective chain actors, and that agreements between retailers, foodservices or the food industry without participation of farmers is not permitted.
- iii. As a government, facilitate the conclusion of sustainability agreements, in particular by making available and expanding the existing compensation system under the CAP for sustainability services to also include animal health and welfare, reduction of the use of pesticides and antibiotics, etc. (elements that are missing in the existing cost compensation tables of the CAP). Provide for cost figures which also cover the costs of marginal service offers (as for the blue-green services

¹³⁹ Consumers might choose to adjust their diets in response to food price increases. Some consumers will prefer less sustainable but cheaper products, while others will reduce their consumption of (expensive) animal products. Disruptive innovation may also occur as a result of price increases, such as replacement of animal dairy products by plant-based dairy products. This report assumes an unchanged diet.

catalogue under the CAP), i.e. do not use cost averages which will be insufficient for part of the farmers. Specify the costs where appropriate per sector and geographic area. The government should on its own expenses provide for an annual update of the cost tables by an independent body.

- iv. Furthermore, utilise the possibilities in Art. 152 and Art. 209 of the CMO Regulation to cover the costs of mandatory sustainability norms for agricultural production through a price premium. Take profit from the fact that agreements under these two articles do not need to be indispensable and will be relatively simple to justify.
- v. The government should refrain from imposing legal requirements for retailers and the food industry to purchase sustainable agricultural products, given the negative advice of the Netherlands' supreme court for administrative law (the so-called Raad van State) concerning legislation outside of the derogations in the CMO Regulation that would undermine the *effet utile* of the EU competition rules. Endeavour if so desired to create a legal basis for such rules at EU level in the future Sustainable Food Systems Regulation.
- vi. Encourage farmers to better organise themselves in recognised or not producer organisations and associations for sustainable production. This will reinforce their negotiation power and enable them to utilise the derogations in the CMO Regulation to the cartel prohibition.
- vii. Structure the excessive diversity in quality marks and norms for sustainability in the Netherlands by defining and implementing minimum requirements and benchmarking, while respecting the need to maintain diversity in sustainability objectives, both from a competition perspective and for sake of the freedom of choice of consumers.¹⁴⁰

¹⁴⁰ The ranking by Milieu Centraal, carried out on request of the Ministry, may serve as an example.

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Annex 1 Key articles in EU legislation as regards competition in relation to sustainability in agriculture

Treaty on the functioning of European Union (TFEU), consolidated version of 26 October 2012

Article 38

1. The Union shall define and implement a common agriculture and fisheries policy.
The internal market shall extend to agriculture, fisheries and trade in agricultural products. 'Agricultural products' means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products. References to the common agricultural policy or to agriculture, and the use of the term 'agricultural', shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector.
2. Save as otherwise provided in Articles 39 to 44, the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products.
3. The products subject to the provisions of Articles 39 to 44 are listed in Annex I.
4. The operation and development of the internal market for agricultural products must be accompanied by the establishment of a common agricultural policy.

Article 39

1. The objectives of the common agricultural policy shall be:
 - a. to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
 - b. thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
 - c. to stabilise markets;
 - d. to assure the availability of supplies;
 - e. to ensure that supplies reach consumers at reasonable prices.
2. In working out the common agricultural policy and the special methods for its application, account shall be taken of:
 - a. the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions;
 - b. the need to effect the appropriate adjustments by degrees;
 - c. the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.

Article 40

1. In order to attain the objectives set out in Article 39, a common organisation of agricultural markets shall be established.
This organisation shall take one of the following forms, depending on the product concerned:
 - a. common rules on competition,
 - b. compulsory coordination of the various national market organisations,
 - c. a European market organisation.
2. The common organisation established in accordance with paragraph 1 may include all measures required to attain the objectives set out in Article 39, in particular regulation of prices, aids for the production and marketing of the various products, storage and carryover arrangements and common machinery for

stabilising imports or exports.

The common organisation shall be limited to pursuit of the objectives set out in Article 39 and shall exclude any discrimination between producers or consumers within the Union.

Any common price policy shall be based on common criteria and uniform methods of calculation.

3. In order to enable the common organisation referred to in paragraph 1 to attain its objectives, one or more agricultural guidance and guarantee funds may be set up.

Article 41

To enable the objectives set out in Article 39 to be attained, provision may be made within the framework of the common agricultural policy for measures such as:

- a. an effective coordination of efforts in the spheres of vocational training, of research and of the dissemination of agricultural knowledge; this may include joint financing of projects or institutions,
- b. joint measures to promote consumption of certain products.

Article 42

The 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 in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.

The Council, on a proposal from the Commission, may authorise the granting of aid:

- a. for the protection of enterprises handicapped by structural or natural conditions;
- b. within the framework of economic development programmes.

Article 43

1. The Commission shall submit proposals for working out and implementing the common agricultural policy, including the replacement of the national organisations by one of the forms of common organisation provided for in Article 40(1), and for implementing the measures specified in this Title. These proposals shall take account of the interdependence of the agricultural matters mentioned in this Title.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.
3. The Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities.
4. In accordance with paragraph 2, the national market organisations may be replaced by the common organisation provided for in Article 40(1) if:
 - a. the common organisation offers Member States which are opposed to this measure and which have an organisation of their own for the production in question equivalent safeguards for the employment and standard of living of the producers concerned, account being taken of the adjustments that will be possible and the specialisation that will be needed with the passage of time;
 - b. such an organisation ensures conditions for trade within the Union similar to those existing in a national market.
5. If a common organisation for certain raw materials is established before a common organisation exists for the corresponding processed products, such raw materials as are used for processed products intended for export to third countries may be imported from outside the Union.

Article 44

Where in a Member State a product is subject to a national market organisation or to internal rules having equivalent effect which affect the competitive position of similar production in another Member State, a

countervailing charge shall be applied by Member States to imports of this product coming from the Member State where such organisation or rules exist, unless that State applies a countervailing charge on export.

The Commission shall fix the amount of these charges at the level required to redress the balance; it may also authorise other measures, the conditions and details of which it shall determine.

Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
 - a. directly or indirectly fix purchase or selling prices or any other trading conditions;
 - b. limit or control production, markets, technical development, or investment;
 - c. share markets or sources of supply;
 - d. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - e. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
 - any agreement or category of agreements between undertakings,
 - any decision or category of decisions by associations of undertakings,
 - any concerted practice or category of concerted practices,which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - a. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives,
 - b. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- a. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- b. limiting production, markets or technical development to the prejudice of consumers;
- c. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- d. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 103

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.
2. The regulations or directives referred to in paragraph 1 shall be designed in particular:
 - a. to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;

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- b. to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;
 - c. to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;
 - d. to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;
 - e. to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

CMO Regulation (EU) 1308/2013, consolidated version of 7 December 2021

Article 152

Producer organisations

1. Member States may, on request, recognise producer organisations, which:
 - a. are constituted, and controlled in accordance with point (c) of Article 153(2), by producers in a specific sector listed in Article 1(2);
 - b. are formed on the initiative of the producers and which carry out at least one of the following activities:
 - i) joint processing;
 - ii) joint distribution, including by joint selling platforms or joint transportation;
 - iii) joint packaging, labelling or promotion;
 - iv) joint organising of quality control;
 - v) joint use of equipment or storage facilities;
 - vi) joint management of waste directly related to the production;
 - vii) joint procurement of inputs;
 - viii) any other joint service activities pursuing one of the objectives listed in point (c) of this paragraph;
 - c. pursue a specific aim which may include at least one of the following objectives:
 - i) ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity;
 - ii) concentration of supply and the placing on the market of the products produced by its members, including through direct marketing;
 - iii) optimising production costs and returns on investments in response to environmental and animal welfare standards, and stabilising producer prices;
 - iv) carrying out research and developing initiatives on sustainable production methods, innovative practices, economic competitiveness and market developments;
 - v) promoting, and providing technical assistance for, the use of environmentally sound cultivation practices and production techniques, and sound animal welfare practices and techniques;
 - (vi) promoting, and providing technical assistance for, the use of production standards, improving product quality and developing products with a protected designation of origin, with a protected geographical indication or covered by a national quality label;
 - vii) the management and valorisation of by-products, of residual flows and of waste, in particular to protect the quality of water, soil and landscape, preserving or encouraging biodiversity, and boosting circularity;
 - viii) contributing to a sustainable use of natural resources and to climate change mitigation;
 - ix) developing initiatives in the area of promotion and marketing;
 - x) managing mutual funds;
 - xi) providing the necessary technical assistance for the use of the futures markets and of insurance schemes.
- 1a. By way of derogation from Article 101(1) TFEU, a producer organisation recognised under paragraph 1 of this Article may plan production, optimise the production costs, place on the market and negotiate

contracts for the supply of agricultural products, on behalf of its members for all or part of their total production.

The activities referred to in the first subparagraph may take place:

- a. provided that one or more of the activities referred to in point (b)(i) to (vii) of paragraph 1 is genuinely exercised, thus contributing to the fulfilment of the objectives set out in Article 39 TFEU;
- b. provided that the producer organisation concentrates supply and places the products of its members on the market, whether or not there is a transfer of ownership of agricultural products by the producers to the producer organisation;
- c. whether or not the price negotiated is the same as regards the aggregate production of some or all of the members;
- d. provided that the producers concerned are not members of any other producer organisation as regards the products covered by the activities referred to in the first subparagraph;
- e. provided that the agricultural product is not covered by an obligation to deliver arising from the farmer's membership of a cooperative, which is not itself a member of the producer organisations concerned, in accordance with the conditions set out in the cooperative's statutes or the rules and decisions provided for in or derived from those statutes.

However, Member States may derogate from the condition set out in point (d) of the second subparagraph in duly justified cases where producer members hold two distinct production units located in different geographical areas.

- 1b. For the purposes of this Article, references to producer organisations shall also include associations of producer organisations recognised under Article 156(1) if such associations meet the requirements set out in paragraph 1 of this Article.
- 1c. The national competition authority referred to in Article 5 of Regulation (EC) No 1/2003 may decide in individual cases that, for the future, one or more of the activities referred to in the first subparagraph of paragraph 1a are to be modified, discontinued or not take place at all if it considers that this is necessary in order to prevent competition from being excluded or if it considers that the objectives set out in Article 39 TFEU are jeopardised.

For negotiations covering more than one Member State, the decision referred to in the first subparagraph of this paragraph shall be taken by the Commission without applying the procedure referred to in Article 229(2) or (3).

When acting under the first subparagraph of this paragraph, the national competition authority shall inform the Commission in writing before or without delay after initiating the first formal measure of the investigation and shall notify the Commission of the decisions without delay after their adoption.

The decisions referred to in this paragraph shall not apply earlier than the date of their notification to the undertakings concerned.

2. A producer organisation recognised under paragraph 1 may continue to be recognised if it engages in the marketing of products falling within CN code ex 22 08 other than those referred to in Annex I to the Treaties, provided that the proportion of such products does not exceed 49 % of the total value of marketed production of the producer organisation and that such products do not benefit from Union support. Those products do not count, for producer organisations in the fruit and vegetables sector, towards the calculation of the value of marketed production for the purposes of Article 34(2).

Article 164

Extension of rules

1. In cases where a recognised producer organisation, a recognised association of producer organisations or a recognised interbranch organisation operating in a specific economic area or areas of a Member State is considered to be representative of the production of or trade in, or processing of, a given product, the Member State concerned may, at the request of that organisation, make binding for a limited period of time some of the agreements, decisions or concerted practices agreed within that organisation on other operators acting in the economic area or areas in question, whether individuals or groups, who do not belong to the organisation or association.
2. For the purposes of this Section, an 'economic area' means a geographical zone made up of adjoining or neighbouring production regions in which production and marketing conditions are homogeneous, or, for products with a protected designation of origin or protected geographical indication recognised under Union law, the geographical zone specified in the product specification.

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3. An organisation or association shall be deemed representative where, in the economic area or areas concerned of a Member State, it accounts for:
- as a proportion of the volume of production of, or of trade in, or of processing of the product or products concerned:
 - for producer organisations in the fruit and vegetables sector, at least 60 %, in other cases, at least two thirds; and
 - in the case of producer organisations, more than 50 % of the producers concerned.
- However, where, in the case of interbranch organisations, the determination of the proportion of the volume of production, or of trade in, or of processing of the product or products concerned gives rise to practical difficulties, a Member State may lay down national rules for determining the specified level of representativeness referred to in point (a)(ii) of the first subparagraph.
- Where the request for an extension of its rules to other operators covers more than one economic area, the organisation or association shall demonstrate the minimum level of representativeness as defined in the first subparagraph for each of the branches it groups in each of the economic areas concerned.
4. The rules for which extension to other operators may be requested as provided for in paragraph 1 shall have one of the following aims:
- production and market reporting;
 - stricter production rules than those laid down in Union or national rules;
 - the drawing up of standard contracts which are compatible with Union rules;
 - marketing afzet;
 - protecting the environment;
 - measures to promote and exploit the potential of products;
 - measures to protect organic farming as well as designations of origin, quality labels and geographical indications;
 - research to add value to the products, in particular through new uses which do not pose a threat to public health;
 - studies to improve the quality of products;
 - research, in particular into methods of cultivation permitting reduced use of plant protection or animal health products and guaranteeing conservation of the soil and conservation or improvement of the environment;
 - the definition of minimum qualities and definition of minimum standards of packing and presentation;
 - the use of certified seed except when used for organic production within the meaning of Regulation (EU) 2018/848, and the monitoring of product quality;
 - the prevention and management of phytosanitary, animal health, food safety or environmental risks;
 - the management and valorisation of by-products.
- Those rules shall not cause any damage to other operators, nor prevent the entry of new operators, in the Member State concerned or the Union and shall not have any of the effects listed in Article 210(4) or be otherwise incompatible with Union law or national rules in force.
5. The extension of the rules referred to in paragraph 1 shall be brought to the attention of operators by publication in full in an official publication of the Member State concerned.
6. Member States shall notify the Commission of any decisions taken under this Article.

Article 172a

Value sharing

Without prejudice to any specific value-sharing clauses in the sugar sector, farmers, including associations of farmers, may agree with downstream operators on value sharing clauses, including market bonuses and losses, determining how any evolution of relevant market prices for the products concerned or other commodity markets is to be allocated between them.

Article 206

Commission guidelines on the application of competition rules to agriculture

Save as otherwise provided in this Regulation, and in accordance with Article 42 TFEU, Articles 101 to 106 TFEU and the implementing provisions thereto shall, subject to Articles 207 to 210a of this Regulation, apply

to all agreements, decisions and practices referred to in Article 101(1) and Article 102 TFEU which relate to the production of, or trade in, agricultural products.

In order to ensure the functioning of the internal market and the uniform application of Union competition rules, the Commission and the competition authorities of the Member States shall apply the Union competition rules in close cooperation.

In addition, the Commission shall, where appropriate, publish guidelines to assist the national competition authorities, as well as undertakings.

Article 207

Relevant market

The definition of the relevant market is a tool to identify and define the boundaries of competition between undertakings, and shall be founded on two cumulative elements:

- a. the relevant product market: for the purposes of this Chapter, "product market" means the market comprising all those products which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use;
- b. the relevant geographic market: for the purposes of this Chapter, "geographic market" means the market comprising the area in which the undertakings concerned are involved in the supply of the relevant products, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas, particularly because the conditions of competition are appreciably different in those areas.

Article 208

Dominant position

For the purposes of this Chapter, 'dominant position' means a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, of its suppliers or customers, and ultimately of consumers.

Article 209

Exceptions for the objectives of the CAP and farmers and their associations

1. Article 101(1) TFEU shall not apply to the agreements, decisions and practices referred to in Article 206 of this Regulation necessary for the attainment of the objectives set out in Article 39 TFEU.
Article 101(1) TFEU shall not apply to agreements, decisions and concerted practices of farmers, farmers' associations, or associations of such associations, or producer organisations recognised under Article 152 or Article 161 of this Regulation, or associations of producer organisations recognised under Article 156 of this Regulation, which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, unless the objectives set out in Article 39 TFEU are jeopardised.

This paragraph shall not apply to agreements, decisions and concerted practices which entail an obligation to charge an identical price or by which competition is excluded.

2. Agreements, decisions and concerted practices which fulfil the conditions referred to in paragraph 1 of this Article shall not be prohibited, no prior decision to that effect being required.
However, farmers, farmers' associations, or associations of such associations, or producer organisations recognised under Article 152 or Article 161 of this Regulation, or associations of producer organisations recognised under Article 156 of this Regulation, may request an opinion from the Commission on the compatibility of those agreements, decisions and concerted practices with the objectives set out in Article 39 TFEU.

The Commission shall deal with requests for opinions promptly and shall send the applicant its opinion within four months of receipt of a complete request. The Commission may, at its own initiative or at the request of a Member State, change the content of an opinion, in particular if the applicant has provided inaccurate information or misused the opinion.

In any national or Union proceedings for the application of Article 101 TFEU, the burden of proving an infringement of Article 101(1) TFEU shall rest on the party or the authority alleging the infringement. The

party claiming the benefit of the exemptions provided in paragraph 1 of this Article shall bear the burden of proving that the conditions of that paragraph are fulfilled.

Article 210

Agreements and concerted practices of recognised interbranch organisations

1. Article 101(1) TFEU shall not apply to agreements, decisions and concerted practices of interbranch organisations recognised under Article 157 of this Regulation which are necessary in order to meet the objectives listed in Article 157(1), point (c), of this Regulation or, as regards the olive oil and table olives and tobacco sectors, the objectives listed in Article 162 of this Regulation, and which are not incompatible with Union rules under paragraph 4 of this Article.
Agreements, decisions and concerted practices which fulfil the conditions referred to in the first subparagraph of this paragraph shall not be prohibited, no prior decision to that effect being required.
2. Recognised interbranch organisations may request an opinion from the Commission concerning the compatibility of agreements, decisions and concerted practices as referred to in paragraph 1 with this Article. The Commission shall send the requesting interbranch organisation its opinion within four months of receipt of a complete request.
If the Commission finds at any time after issuing an opinion that the conditions referred to in paragraph 1 of this Article are no longer met, it shall declare that Article 101(1) TFEU shall apply in the future to the agreement, decision or concerted practice in question and inform the interbranch organisation accordingly.
The Commission may change the content of an opinion at its own initiative or at the request of a Member State, in particular if the requesting interbranch organisation has provided inaccurate information or misused the opinion.
3. Agreements, decisions and concerted practices shall in any case be declared incompatible with Union rules if they:
 - o. may lead to the partitioning of markets within the Union in any form;
 - p. may affect the sound operation of the market organisation;
 - q. may create distortions of competition which are not essential to achieving the objectives of the CAP pursued by the interbranch organisation activity;
 - r. entail the fixing of prices or the fixing of quotas;
may create discrimination or eliminate competition in respect of a substantial proportion of the products in question.
7. The Commission may adopt implementing acts laying down the measures necessary for the uniform application of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 229(2).

Article 210a

Vertical and horizontal initiatives for sustainability

1. Article 101(1) TFEU shall not apply to agreements, decisions and concerted practices of producers of agricultural products that relate to the production of or trade in agricultural products and that aim to apply a sustainability standard higher than mandated by Union or national law, provided that those agreements, decisions and concerted practices only impose restrictions of competition that are indispensable to the attainment of that standard.
2. Paragraph 1 applies to agreements, decisions and concerted practices of producers of agricultural products to which several producers are party or to which one or more producers and one or more operators at different levels of the production, processing, and trade in the food supply chain, including distribution, are party.
3. For the purposes of paragraph 1, 'sustainability standard' means a standard which aims to contribute to one or more of the following objectives:
 - a. environmental objectives, including climate change mitigation and adaptation, the sustainable use and protection of landscapes, water and soil, the transition to a circular economy, including the reduction of food waste, pollution prevention and control, and the protection and restoration of biodiversity and ecosystems;

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- b. the production of agricultural products in ways that reduce the use of pesticides and manage risks resulting from such use, or that reduce the danger of antimicrobial resistance in agricultural production; and
 - c. animal health and animal welfare.
4. Agreements, decisions and concerted practices that fulfil the conditions referred to in this Article shall not be prohibited, no prior decision to that effect being required.
 5. The Commission shall issue guidelines for operators concerning the conditions for the application of this Article by 8 December 2023.
 6. From 8 December 2023, producers as referred to in paragraph 1 may request an opinion from the Commission concerning the compatibility of agreements, decisions and concerted practices as referred to in paragraph 1 with this Article. The Commission shall send the applicant its opinion within four months of receipt of a complete request.

If the Commission finds at any time after issuing an opinion that the conditions referred to in paragraphs 1, 3 and 7 of this Article are no longer met, it shall declare that Article 101(1) TFEU shall apply in the future to the agreement, decision or concerted practice in question and inform the producers accordingly. The Commission may change the content of an opinion at its own initiative or at the request of a Member State, in particular if the applicant has provided inaccurate information or misused the opinion..

7. The national competition authority as referred to in Article 5 of Regulation (EC) No 1/2003 may decide in individual cases that, in the future, one or more of the agreements, decisions and concerted practices referred to in paragraph 1 are to be modified, discontinued or not take place at all, if it considers that such a decision is necessary in order to prevent competition from being excluded or if it considers that the objectives set out in Article 39 TFEU are jeopardised.

For agreements, decisions and concerted practices covering more than one Member State, the decision referred to in the first subparagraph of this paragraph shall be taken by the Commission without applying the procedures referred to in Article 229(2) and (3).

When acting under the first subparagraph of this paragraph, the national competition authority shall inform the Commission in writing after initiating the first formal measure of the investigation and shall notify the Commission of any resulting decisions without delay after their adoption.

The decisions referred to in this paragraph shall not apply earlier than the date of their notification to the undertakings concerned.

Annex 2 Key elements from the guidelines for horizontal cooperation agreements

The EC published drafts for two different guidelines in 2022 and 2023, both of which are relevant to this report:

- The first draft was published for consultation on 1 March 2022 and concerned guidelines for horizontal cooperation agreements for all domains, including agriculture (EC, 2022g). *This annex (Annex 2) covers this draft.*
- The second draft was published for consultation on 10 January 2023 and concerned guidelines for the application of Art 210a CMO Regulation (derogation for sustainability initiatives). The reader is referred to section 3.1.4 and to the original text for that purpose (EC, 2023). *This annex (Annex 2) does not deal with the guidelines for Art. 210a.*

The following is an extract from the draft guidelines for horizontal cooperation agreements, selected for relevance for the purpose of this report. The final version of these guidelines is expected to be adopted by the EC in 2023. The guidelines cover agriculture only insofar as the exemptions under paragraph 3 of Art. 101 TFEU are invoked and the derogations in the CMO regulation are not invoked. Indeed, the guidelines will not apply to the production of or trade in agricultural products and which aim to apply a sustainability standard that is stricter than required by Union or national legislation and which are exempted from Art. 101(1) TFEU under Art. 210a CMO Regulation (point 52). In the case of the other derogations in the CMO Regulation, the guidelines would apply (point 52) or yet not (points 55 and 359), so that is still unclear.

The reason for including this extract is that it is clear from the draft text published by the EC what logic the EC applies to sustainability agreements in general and how the concept is used. This is important to understand where the additional space is in Art. 210a CMO Regulation.

The extract shows that a reliance on paragraph 3 of Art. 101 TFEU will have to meet complex conditions compared to the derogations (exceptions) in the CMO Regulation. It is also clear that the EC considers that, in particular, agreements between competitors on how, as a result of the adoption of a sustainability standard, increased costs should be passed on in higher selling prices to their consumers, has an anticompetitive object and is therefore prohibited under Art. 101 TFEU. Similarly, an agreement between the parties to the sustainability standard to pressure third parties not to market products that do not meet the sustainability standard has a restrictive effect on competition (point 571). Agreements between retailers or processors to procure sustainably and pass on the additional costs thereof to consumers are thus prohibited on Art. 101 TFEU and only possible under the derogations to Art. 101 TFEU in the CMO Regulation.

1. INTRODUCTION

1.1. Purpose and structure of these guidelines

1. These Guidelines aim to provide legal certainty by assisting undertakings in the assessment of their horizontal cooperation agreements under the Union competition rules while ensuring an effective protection of competition. They also aim to make it easier for undertakings to cooperate in ways which are economically desirable and thereby, for example, contribute to the green and digital transitions and to fostering the resilience of the internal market.

3. In addition, as the Commission is committed to the attainment of the objectives of the Green Deal for the European Union, these Guidelines provide guidance on how the most common horizontal cooperation agreements will be assessed under Article 101 when they pursue sustainability objectives (Chapter 9).

1.2. Applicability of Article 101 to horizontal cooperation agreements

1.2.1. Introduction

10. One of the objectives of Article 101 is to ensure that undertakings do not use horizontal cooperation agreements to prevent, restrict or distort competition on the market to the ultimate detriment of consumers.

15. In order for Article 101 to apply to horizontal cooperation, there must be a form of coordination between competitors - in other words: an agreement between undertakings, a decision by an association of undertakings or a concerted practice.

16. The existence of an agreement, a concerted practice or decision by an association of undertakings does not in itself indicate that there is a restriction of competition within the meaning of Article 101(1). For ease of reference, unless otherwise stated, in these Guidelines the term 'agreement' also covers concerted practices and decisions of associations of undertakings.

1.2.2. Analytical framework

18. The assessment under Article 101 consists of two steps. The first step, under Article 101(1), is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anti-competitive object or actual or potential restrictive effects on competition.

19. The second step, under Article 101(3), which only becomes relevant when an agreement is found to be restrictive of competition within the meaning of Article 101(1), is to determine the pro-competitive benefits produced by that agreement and to assess whether those pro-competitive effects outweigh the restrictive effects on competition. The balancing of restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3). If the pro-competitive effects do not outweigh a restriction of competition, Article 101(2) stipulates that the agreement shall be automatically void.

20. Article 101 does not apply where the anti-competitive conduct of undertakings is required either by national legislation, or by a national legal framework which precludes all scope for competitive activity for the undertakings involved. In such situations, undertakings are precluded from engaging in autonomous conduct which might prevent, restrict or distort competition. The fact that public authorities encourage a horizontal cooperation agreement does not mean that it is permissible under Article 101. Undertakings remain subject to Article 101 if a national law merely encourages or makes it easier for them to engage in autonomous anti-competitive conduct. In certain cases, undertakings are encouraged by public authorities to enter into horizontal cooperation agreements in order to attain a public policy objective by way of self-regulation.

1.2.4. Restrictions of competition by object

28. Certain types of cooperation between undertakings can be regarded, by their very nature as being harmful to the proper functioning of normal competition. In such cases, it is not necessary to examine the actual or potential effects of the behaviour on the market, once its anti-competitive object has been established.

29. In order for a horizontal cooperation agreement to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the agreement must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the internal market.

30. In order to find that an agreement has an anti-competitive object, there does not need to be a direct link between the agreement and consumer prices. Article 101 is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.

1.2.5. Restrictive effects on competition

36. A horizontal cooperation agreement that does not in itself reveal a sufficient degree of harm to competition, can still have restrictive effects on competition. For a horizontal cooperation agreement to have restrictive effects on competition, it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. To establish whether this is the case, it is necessary to assess competition within the actual context in which it would occur if that agreement had not existed. Agreements can have restrictive effects by appreciably reducing competition between the undertakings that are parties to the agreement or between any one of them and third parties.

1.2.7. Assessment under Article 101(3)

40. The assessment of restrictions of competition by object or effect under Article 101(1) is only one side of the analysis. The other side, which is reflected in Article 101(3), is the assessment of the pro-competitive effects of restrictive agreements. Where, in an individual case, a restriction of competition by object or by effect, within the meaning of Article 101(1), has been proven, Article 101(3) can be invoked as a defence. According to Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, the burden of proof under Article 101(3) rests on the undertaking(s) invoking the benefit of this provision. Therefore, the factual arguments and the evidence provided by the undertaking(s) must enable the Commission to arrive at the conviction that the agreement in question is sufficiently likely to give rise to pro-competitive effects.

41. The application of the exception rule of Article 101(3) is subject to four cumulative conditions, two positive and two negative:

- the agreement must contribute to improving the production or distribution of products or contribute to promoting technical or economic progress, that is to say, lead to efficiency gains;
- the restrictions must be indispensable to the attainment of those objectives, that is to say, the efficiency gains;
- consumers must receive a fair share of the resulting benefits, that is to say, the efficiency gains, including qualitative efficiency gains, attained by the indispensable restrictions must be sufficiently passed on to consumers so that they are at least compensated for the restrictive effects of the agreement. Hence, efficiencies only accruing to the parties to the agreement will not suffice. For the purposes of these Guidelines, the concept of ‘consumers’ encompasses the customers, potential and/or actual, of the parties to the agreement; and
- the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

1.3. Relationship with other guidance and legislation

52. These Guidelines do not apply to agreements, decisions and concerted practices of producers of agricultural products that relate to the production of or trade in agricultural products and that aim to apply a sustainability standard higher than mandated by Union or national law and exempted from Article 101(1) pursuant to Article 210a of Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products. These Guidelines are without prejudice to the Guidelines the Commission will issue in accordance with Article 210a(5) of that Regulation. However, agreements, decisions and concerted practices of producers of agricultural products that relate to the production of or trade in agricultural products and that do not meet the conditions of Article 210a, are subject to Article 101(1).

54. These Guidelines are without prejudice to the interpretation the Court of Justice of the European Union may give to the application of Article 101 to horizontal cooperation agreements.

55. These Guidelines replace the Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements which were published by the Commission in 2011 and do not apply to the extent that sector specific rules apply as is the case for certain agreements with regard to agriculture or transport. The Commission will continue to monitor the operation of the R&D BER and Specialisation BER and these Guidelines based on market information from stakeholders and national competition authorities and may revise these Guidelines in the light of future developments and of evolving insight.

5. COMMERCIALISATION AGREEMENTS

5.1. Introduction

355. Commercialisation agreements involve cooperation between competitors in the selling, distribution or promotion of their substitute products. This type of agreement can have a widely varying scope, depending on the commercialisation functions which are covered by the cooperation. At one end of the spectrum, joint selling agreements may lead to a joint determination of all commercial aspects related to the sale of the product, including price. At the other end, there are more limited agreements that only address one specific commercialisation function, such as distribution, after-sales service, or advertising.

359. Specific rules apply to the commercialisation of agricultural products. Article 101 does not apply to (i) the commercialisation of agricultural products through recognised Producer Organisations and Associations of Producer Organisations and (ii) to certain commercialisation agreements that do not concern prices of joint sales and are concluded among farmers and among their associations, subject to specific conditions laid out in these rules. In addition there are specific provisions for the commercialisation of raw milk.

7. STANDARDISATION AGREEMENTS

7.1. Introduction

462. Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, value chain due diligence processes, services or methods may comply. Standardisation agreements can cover various issues, such as standardisation of different grades or sizes of a particular product or technical specifications in product or services markets where compatibility and interoperability with other products or systems is essential. The terms of access to a particular quality mark or for approval by a regulatory body can also be regarded as a standard as well as agreements setting out sustainability standards. While sustainability standards have similarities with standardisation agreements addressed in this Chapter, they also have features that are atypical for, or less pronounced in, those standardisation agreements. Relevant guidance for such sustainability standards is therefore provided in Chapter 9.

9. SUSTAINABILITY AGREEMENTS

9.1. Introduction

541. This Chapter focuses on the assessment of agreements between competitors that pursue one or more sustainability objectives ('sustainability agreements').

542. Sustainable development is a core principle of the Treaty on European Union and a priority objective for the Union's policies. The Commission committed to implement the United Nation's sustainable development goals. In line with this commitment, the European Green Deal sets out a growth strategy that aims to transform the Union into a fair and prosperous society, with a modern, resource-efficient and competitive economy, where there are no net emissions of greenhouse gases from 2050 onwards and where economic growth is decoupled from resource use.

543. In broad terms, sustainable development refers to the ability of society to consume and use the available resources today without compromising the ability of future generations to meet their own needs. It encompasses activities that support economic, environmental and social (including labour and human rights) development. The notion of sustainability objective therefore includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), eliminating pollution, limiting the use of natural resources, respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, ensuring animal welfare, etc..

544. Competition law enforcement contributes to sustainable development by ensuring effective competition, which spurs innovation, increases the quality and choice of products, ensures an efficient allocation of resources, reduces the costs of production, and thereby contributes to consumer welfare.

545. However, a concern related to sustainable development is that individual production and consumption decisions can have negative effects ("negative externalities"), for example on the environment, that are not sufficiently taken into account by the economic operators or consumers that cause them. Such market failures can be mitigated or cured by collective actions, for example through public policies, sector specific regulations or cooperation agreements between undertakings that foster sustainable production or consumption.

546. Where market failures are addressed by appropriate regulation, for example, mandatory Union pollution standards, pricing mechanisms, such as the Union's Emissions Trading System ("ETS") and taxes, additional measures by undertakings, for example through cooperation agreements, may be unnecessary. However, cooperation agreements may become necessary if there are residual market failures that are not fully addressed by public policies and regulations.

547. Sustainability objectives can be pursued with different types of cooperation agreements, including those addressed in the preceding chapters of these Guidelines. Agreements that pursue sustainability objectives are not a distinct type of cooperation agreements. The term 'sustainability agreement' used in these Guidelines refers in general to any type of horizontal cooperation agreement that genuinely pursues one or more sustainability objectives, irrespective of the form of cooperation. Where a sustainability agreement concerns a type of cooperation described in any of the preceding chapters of these Guidelines, its assessment will be governed by the principles and considerations set out in those chapters, while taking into account the specific sustainability objective pursued.

548. Sustainability agreements only raise competition concerns under Article 101(1) if they entail serious restrictions of competition in the form of restrictions by object, or produce appreciable negative effects on competition contrary to Article 101(1). When sustainability agreements infringe Article 101(1), they can still be justified under Article 101(3), if the four conditions of that provision are met. Detailed guidance on the assessment of these conditions is provided for in the Commission Guidelines on the application of Article 101(3). Agreements that restrict competition cannot escape the prohibition of Article 101(1) for the sole reason that they are necessary for the pursuit of a sustainability objective. However, restrictions that are ancillary to a sustainability agreement which is compliant with Article 101(1), will also fall outside the scope of that provision.

549. This Chapter provides additional guidance on assessing these conditions, in particular by clarifying when sustainability benefits can be taken into account as qualitative or quantitative efficiency gains in the assessment under Article 101(3).

550. This Chapter is structured in the following way: Section 9.2 sets out examples of sustainability agreements that are unlikely to raise any competition concerns because they neither restrict competition by object, nor have any appreciable effect on competition and thus fall outside the scope of Article 101(1); Section 9.3 provides guidance on specific aspects of the assessment of sustainability agreements under Article 101(1) and focuses on the most typical sustainability agreements which set sustainability standards. Section 9.4 focuses on specific aspects of the assessment of sustainability agreements under Article 101(3). Section 9.5. considers the consequences of the involvement of public authorities in the conclusion of sustainability agreements. Finally, Section 9.7 provides an assessment of hypothetical examples of sustainability agreements.

9.3. Assessment of sustainability agreements under Article 101(1)

9.3.1. Principles

555. When sustainability agreements affect one or more parameters of competition, they may need to be assessed under Article 101(1).

556. Sustainability agreements that correspond to one of the types of cooperation agreements addressed in the preceding chapters of these Guidelines, will be assessed under Article 101(1) as described in those chapters. For example, an agreement between competitors to jointly develop a production technology that reduces energy consumption must be assessed according to the principles set out in Chapter 2 (R&D agreements). An agreement to share infrastructure with a view to reducing the environmental footprint of a production process must be assessed under the principles set out in Chapter 3 (Production agreements).

557. An agreement between competitors to jointly purchase products having a limited environmental footprint as an input for their production, or to only purchase from suppliers observing certain sustainability principles, must be assessed in line with the principles set out in Chapter 4 (Purchasing agreements).

558. Similarly, sustainability agreements that take the form of R&D or specialisation agreements are covered by the respective block exemption regulations if the conditions for an exemption set out in those regulations are met.

559. The fact that an agreement genuinely pursues a sustainability objective may be taken into account in determining whether the restriction in question is a restriction by object or a restriction by effect within the meaning of Article 101(1).

560. In this regard, when parties claim that an agreement, which appears to pursue price fixing, market or customer allocation, limitation of output or innovation, actually pursues a sustainability objective, they will have to bring forward all facts and evidence demonstrating that the agreement genuinely pursues such objective and is not used to disguise a by object restriction of competition. If the evidence allows to establish that the agreement indeed pursues a genuine sustainability objective, its effects on competition will have to be assessed.

9.3.2. Sustainability standardisation agreements

9.3.2.1. Definition and characteristics

561. In order to contribute to sustainable development, competitors may wish to agree to phase out, withdraw, or, in some cases, replace non-sustainable products (e.g. fossil fuels such as oil and coal, plastics) and processes (e.g. gas flaring) with sustainable ones. Competitors may also wish to agree to harmonise packaging materials to facilitate recycling or harmonise packaging sizes (and hence product content) to reduce waste. Competitors may also wish to agree on purchasing production inputs only if the purchased products are manufactured in a sustainable manner. Similarly, competitors may wish to agree on certain conditions improving animal welfare (e.g. agreed standards to provide animals with more space). For these purposes, competitors may agree to adopt and comply with certain sustainability standards. Such agreements are referred to as 'sustainability standardisation agreements' or 'sustainability standards' in this Chapter.

562. Sustainability standardisation agreements specify the requirements that producers, traders, manufacturers, retailers or service providers in a supply chain may have to meet in relation to possibly a wide range of sustainability metrics such as the environmental impacts of production. Sustainability standardisation agreements usually provide rules, guidelines or characteristics for products and production methods on such sustainability metrics and are sometimes referred to as sustainability systems. They are often private initiatives and can range from codes of conduct set unilaterally by undertakings, to civil society organization driven standards and multi-stakeholder initiatives that involve undertakings across the entire value chain. These Guidelines cover only sustainability standards developed by competitors or in which competitors participate, including quality marks or labels.

563. Sustainability standardisation agreements have similarities with the standardisation agreements addressed in Chapter 7. However, they also have features that are atypical for, or less pronounced in, those standardisation agreements.

564. First, the adoption of a sustainability standard may often lead to establishing a green label, logo or brand name for products that meet certain minimum requirements. The use of such label, logo or brand name in principle obliges the adopters to comply with the standard. These undertakings can make use of the label/logo/brand name as long as they meet the sustainability conditions, and they will lose the use of the label/logo/brand name when they no longer meet these requirements.

565. Second, the cost of adhering to, and complying with, a sustainability standard can be high, particularly if changes to existing production or trading processes are required to comply with the sustainability standard. Therefore, adhering to a sustainability standard may lead to an increase in production or distribution costs and consequently to an increase in the price of the products sold by the parties.

566. Third, unlike technical standards, which ensure interoperability and encourage competition between technologies from different undertakings in the standard development process, the questions of interoperability and compatibility between technologies are generally irrelevant for sustainability standards.

567. Fourth, many sustainability standards are process, management or performance based. This means that, unlike many technical standards, sustainability standards often prescribe a goal to be met without imposing any specific technologies or production methods. Adopters of sustainability standards may commit to the target but will remain free to decide on the use of a particular technology or production process to attain that target.

9.3.2.2. Main competition concerns

568. Sustainability standardisation agreements often have positive effects on competition. They contribute to a sustainable development and therefore may enable the development of new products or markets, increase product quality or improve supply or distribution conditions. In particular, by providing information about sustainability matters (e.g. via labels), sustainability standards empower consumers to make informed purchase decisions and therefore play a role in the development of markets for sustainable products. Lastly, sustainability standards can also level the playing field between producers that are subject to different regulatory requirements.

569. In some circumstances, however, sustainability standards may also restrict competition. This can occur in three main ways: through price coordination, foreclosure of alternative standards, and the exclusion of, or discrimination against certain competitors.

9.3.2.3. Restriction by object

570. Sustainability standards that do not genuinely pursue a sustainability objective but cover up price fixing, market or customer allocation, limitations of output or limitations of quality or innovation, restrict competition by object.

571. In particular, an agreement between competitors on how to translate increased costs resulting from the adoption of a sustainability standard into increased sale prices towards their customers restricts competition by object. Similarly, an agreement between the parties to the sustainability standard to put pressure on third parties to refrain from marketing products that do not comply with the sustainability standard restricts competition by object.

9.3.2.4. Restrictive effects on competition

(a) Soft safe harbour

572. Where an agreement does not qualify as a restriction by object, it can infringe Article 101(1) only if it produces an appreciable negative effect on competition. However, sustainability standardisation agreements are unlikely to produce appreciable negative effects on competition and will fall outside Article 101(1) if the following cumulative conditions are met:

First, the procedure for developing the sustainability standard is transparent and all interested competitors can participate in the process leading to the selection of the standard.

Second, the sustainability standard should not impose on undertakings that do not wish to participate in the standard an obligation - either directly or indirectly - to comply with the standard.

Third, participating undertakings should remain free to adopt for themselves a higher sustainability standard than the one agreed with the other parties to the agreement (e.g. they may decide to use more sustainable ingredients in their final product than the standard may require).

Fourth, the parties to the sustainability standard should not exchange commercially sensitive information that is not necessary for the development, the adoption or the modification of the standard.

Fifth, effective and non-discriminatory access to the outcome of the standardisation procedure should be ensured. This should include effective and non-discriminatory access to the requirements and the conditions for obtaining the agreed label or for the adoption of the standard at a later stage by undertakings that have not participated in the standard development process.

Sixth, the sustainability standard should not lead to a significant increase in price or to a significant reduction in the choice of products available on the market.

Seventh, there should be a mechanism or a monitoring system in place to ensure that undertakings that adopt the sustainability standard indeed comply with the requirements of the standard.

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9.4. Assessment of sustainability agreements under Article 101(3)

576. Any sustainability agreement that infringes Article 101(1), can be exempted under Article 101(3), if the parties to the agreement prove that the four cumulative conditions of that provision are satisfied.

9.4.1. Efficiency gains

577. The first condition of Article 101(3) requires that the agreement in question contributes to improving the production or distribution of goods or contributes to promoting technical or economic progress. In essence, it requires that the agreement contributes to objective efficiencies, understood in broad terms, as encompassing not only reductions in production and distribution costs but also increases in product variety and quality, improvements in production or distribution processes, and increases in innovation. It therefore allows for a broad spectrum of sustainability benefits resulting from the use of specific ingredients, technologies, production processes to be taken into account as efficiency gains.

578. For example, sustainability agreements can produce efficiencies, such as the use of cleaner production or distribution technologies, less pollution, improved conditions of production and distribution, more resilient infrastructure or supply chains, better quality products, etc. They can also avoid supply chain disruptions, reduce the time it takes to bring sustainable products to the market and can help to improve consumer choice by facilitating the comparison of products. These efficiency gains can contribute to a resilient internal market.

579. These efficiencies will need to be substantiated and cannot simply be assumed. They also need to be objective, concrete and verifiable. For instance, if the claimed efficiency consists of product improvement, the parties have to demonstrate the exact characteristics of the product improvement. If the claimed benefit is for example the reduction of water contamination, the parties have to explain how exactly the agreement contributes to the reduction of water contamination and provide an estimate of the size of the claimed benefit.

9.4.2. Indispensability

580. For the purposes of these Guidelines, it is appropriate to deal with the third condition under Article 101(3) i.e. that of indispensability, before the second condition i.e. that of consumer fair share. The reason for this is that the analysis of consumer fair share should not include the effects of any restrictions that do not meet the indispensability condition and that are thus prohibited by Article 101.

581. According to the third condition of Article 101(3), the restrictive agreement must not impose restrictions, that are not indispensable to the attainment of the benefits brought about by the agreement. To satisfy this condition, the parties to the agreement need to demonstrate that their agreement as such, and each of the restrictions of competition it entails, are reasonably necessary for the claimed sustainability benefits to materialise and that there are no other economically practicable and less restrictive means of achieving them.

582. In principle, each undertaking should decide for itself how to pursue sustainability benefits, and insofar consumers value these benefits, the market would reward good decisions and punish bad ones. Where there is demand for sustainable products, cooperation agreements are not indispensable for the attainment of sustainability benefits themselves. They may also, however, be indispensable for reaching the sustainability goal in a more cost efficient way.

583. Public policy and regulations often take care of negative externalities. They typically aim to do so by imposing rules, requiring collective actions, which ensure efficient market outcomes that account for the sustainability implications of individual actions. Therefore, where EU or national law requires undertakings to comply with concrete sustainability goals, cooperation agreements and the restrictions they may entail, cannot be deemed indispensable for the goal to be achieved. This is because the legislator has already decided that each undertaking alone is required to achieve the goal. In such circumstances, cooperation agreements may be indispensable only for reaching the goal in a more cost efficient way.

584. There may be other instances where, due to market failures, sustainability benefits cannot be achieved if left to the free interplay of market forces or can be achieved more cost efficiently if undertakings cooperate. For example, a sustainability agreement may be necessary to avoid free-riding on the investments required to promote a sustainable product and to educate consumers (overcoming the so-called “first mover disadvantages”).

585. In this context, a restrictive agreement may also be necessary to achieve economies of scale, in particular to reach a sufficient scale to cover the fixed costs of setting up, operating and monitoring the label. Restrictions may also be indispensable in order to align the incentives of the parties and ensure that they concentrate their efforts on the implementation of the agreement³³⁴. If the agreement obliges the parties not to operate outside of the label or standard, the parties will need to prove why merely establishing a label or standard will not be sufficient to obtain the efficiencies. Usually, it is sufficient that the agreement defines the sustainability standard as a common minimum standard, thereby leaving room for participating undertakings to individually apply a higher sustainability standard than the commonly agreed standard.

586. An agreement may also be necessary in cases where the parties can show that the consumers in the relevant market find it difficult, due to, for example, lack of sufficient knowledge or information about the product itself or the consequences of its use, to objectively balance the future benefits they obtain from an agreement, against the immediate harm they suffer from the same agreement and that, as a result, they overestimate the importance of the immediate effect. For example, consumers may not be able to appreciate future benefits in the form of improved quality and innovation, if the immediate effect is a price increase of the product.

587. As a general rule, the obligations imposed by sustainability agreements should not go beyond what is necessary to achieve the aim of the agreement.

9.4.3. Pass on to consumers

588. The second condition of Article 101(3) requires that consumers receive a fair share of the claimed benefits. The concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement. Consumers receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the same agreement, so that the overall effect on consumers in the relevant market is at least neutral³³⁶. Therefore, sustainability benefits that ensue from the agreements have to be related to the consumers of the products covered by those agreements.

589. In many instances, it might be obvious that either the sustainability benefits are unrelated to the consumers in the relevant market or that they would not be significant enough to compensate for the harm in the relevant market. Conversely, there might be instances where the competitive harm is clearly insignificant compared to the potential benefits, obviating the need for a detailed assessment. However, there may also be cases in which a detailed assessment cannot be avoided.

9.4.3.2. Individual non-use value benefits

594. Consumers' benefits from sustainability agreements may not only comprise direct benefits from the use of a sustainable product but also indirect benefits, resulting from the consumers' appreciation of the impact of their sustainable consumption on others. In particular, some consumers may value their consumption of a sustainable product more than the consumption of a non-sustainable product because the sustainable product has less negative impact on others than the non-sustainable one.

595. For example, consumers may opt for a particular washing liquid not because it cleans better but because it contaminates less the water. Similarly, consumers may be ready to pay a higher price for furniture made from wood that is grown and harvested sustainably not because of the better quality of the furniture but because consumers want to stop de-forestation and loss of natural habitats. In the same vein, drivers may opt for using more expensive fuel not because it is of higher quality and better for their vehicles, but because it pollutes less.

596. In these circumstances, the consumers' use experience with the product is not directly improved. Nevertheless, consumers are ready to pay a higher price for a sustainable product or limit their consumption choice by not using a non-sustainable variant of the product, in order for society or future generations to benefit. Hence, indirect, non-use value benefits accrue to consumers within the relevant market via their personal/individual valuation of the effect on others, including on non-users outside the relevant market.

597. Consumers who are ready to pay more for such products perceive them to be of a higher quality, precisely because of the benefits accruing to others. Therefore, from an economic perspective, such indirect qualitative benefits are not different from the usual quality-enhancing benefits that increase the direct use value of a product, discussed above in Section 9.4.3.1. Measurement of such indirect, non-use value benefits can be undertaken by investigating the consumers' willingness to pay, for instance, through customer surveys.

598. There may be a difference between what consumers state to be their preferences and what their purchasing behaviour suggests to be their preferences. This may indicate that the stated preferences over-estimate or on the contrary, under-estimate the true preferences. To mitigate such biases related to hypothetical choices in surveys, the surveys need to provide useful and appropriate context. In addition, the questions posed may need to take into account societal norms, consumer knowledge and habits, or expectations about the behaviour of others..

599. More generally, to discharge with their burden of proof under Article 101(3), the parties to an agreement need to provide cogent evidence demonstrating the actual preferences of consumers. Parties to the agreement should avoid superimposing their own preferences on consumers.

600. In the assessment of the consumers' willingness to pay, it is not necessary that the willingness of each and every consumer in the relevant market is assessed. It is sufficient for the purpose of the investigation that the assessment is based on a representative fraction of all consumers in the relevant market.

9.4.3.3. Collective benefits

601. Section 9.4.3.2. refers to individual non-use value benefits which are limited to voluntary (altruistic) choices of individual consumers. However, not all negative externalities can be cured through voluntary, individual actions of consumers. As the sustainability impact from individual consumption accrues not necessarily to the consuming individual but to a larger group, a collective action, such as a cooperation agreement, may be needed to internalise negative externalities and bring about sustainability benefits to a larger group of the society. For example, consumers may be unwilling to pay a higher price for a product produced with a green but costly technology. To ensure that the benefits related to the use of that green technology materialise, an agreement to phase out the polluting technology may be necessary. These benefits are referred to as 'collective benefits' as they occur irrespective of the consumers' individual appreciation of the product and objectively can accrue to the consumers in the relevant market if the latter are part of the larger group of beneficiaries..

602. Although the balancing of negative effects with the benefits resulting from restrictive agreements is normally made within the relevant market to which the agreement relates, where two markets are related, efficiencies achieved on separate markets can be taken into account, provided that the group of consumers affected by the restriction and benefiting from the efficiency gains is substantially the same.

603. By analogy, where consumers in the relevant market substantially overlap with, or are part of the beneficiaries outside the relevant market, the collective benefits to the consumers in the relevant market occurring outside that market, can be taken into account if they are significant enough to compensate consumers in the relevant market for the harm suffered.

604. For example, drivers purchasing less polluting fuel are also citizens who would benefit from cleaner air, if less polluting fuel is used. To the extent that a substantial overlap of consumers (the drivers in this example) and the beneficiaries (citizens) can be established, the sustainability benefits from cleaner air are in principle relevant for the assessment and can be taken into account if they are significant enough to compensate consumers in the relevant market for the harm suffered. Conversely, consumers may buy clothing made of sustainable cotton that reduces chemicals and water use on the land where it is cultivated. Such environmental benefits could in principle be taken into account as collective benefits. However, there is likely no substantial overlap between the consumers of the clothing and the beneficiaries of these environmental benefits that occur only in the area where the cotton is grown. Therefore, it is unlikely that these collective benefits would accrue to the consumers in the relevant market. To the extent that consumers are willing to pay more if their clothing is made of sustainably grown cotton, the local environmental benefits can be taken into account as individual non-value benefits for the consumers of the clothing (see Section 9.4.3.2).

605. For collective benefits to materialise, the market coverage of the agreement may often need to be significant. If, for example, only two out of ten washing machine producers agree to abandon the more polluting variants, then the agreement will unlikely be able to prevent free-riding and hence will unlikely sufficiently reduce pollution, since self-interested consumers could still purchase the polluting variants from one or more of the remaining suppliers.

606. For collective benefits to be taken into account, parties should be able to:

(a) describe clearly the claimed benefits and provide evidence that they have already occurred or are likely to occur;

(b) define clearly the beneficiaries;

(c) demonstrate that the consumers in the relevant market substantially overlap with the beneficiaries or are part of them; and

(d) demonstrate what part of the collective benefits occurring or likely to occur outside the relevant market accrue to the consumers of the product in the relevant market.

607. Evidence for collective benefits based on public authorities' reports or on the reports prepared by recognized academic organisations may be of a particular value for this assessment.

608. When there is no data available allowing for a quantitative analysis of the benefits involved, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one. The current experience with measuring and quantifying collective benefits remains scarce. The Commission will be able to provide further guidance on this matter after accumulating experience in dealing with concrete cases, which could allow the development of methodologies of assessment.

9.4.3.4. Any or all types of benefits

609. In every case, the parties to the sustainability agreement are free to bring forward evidence and arguments to support claims for any of the three types of consumer benefits or for all of them. The parties' choice may depend on the specificity of the case and the robustness of the available evidence. In some cases, showing only individual use value benefits may be enough to satisfy the conditions of Article 101(3), whereas in other cases, the individual non-use value benefits, or the collective benefits will suffice. In other cases, a combination of two, or all three types of benefits may be possible.

9.4.4. No elimination of competition

610. According to the fourth condition of Article 101(3) the agreement must not allow the parties the possibility to eliminate competition in respect of a substantial part of the products in question. In essence, the condition ensures that some degree of residual competition will always remain on the market concerned by the agreement, regardless of the extent of the benefits.

611. This last condition may be satisfied even if the agreement restricting competition covers the entire industry, as long as the parties to the agreement continue to compete vigorously on at least one important aspect of competition. For instance, if the agreement eliminates competition on quality or variety, but competition on price is also an important parameter for competition in the industry concerned and is not restricted, this condition can still be satisfied.

612. Moreover, if competitors compete with a range of differentiated products, all in the same relevant market, the elimination of competition for one or more of the variants of the product does not necessarily mean that competition in the relevant market is eliminated.

613. Similarly, if competitors decide not to use a particular polluting technology or a particular non-sustainable ingredient in the production of their products, competition between the competitors will not be eliminated if they continue to compete on price and/or quality of the final product.

614. Finally, elimination of competition for a limited period of time, which has no impact on the development of competition after this period elapses, will not be an obstacle to meeting this condition. For example, an agreement between competitors to temporarily limit the production of one variant of a product, containing a non-sustainable ingredient, in order to introduce in the market a sustainable substitute for it, aimed at creating consumer awareness about the properties of the new product, will satisfy the last condition of competition.

9.5. Involvement of public authorities

615. The involvement of governmental or local authorities in the process of conclusion of sustainability agreements, or the knowledge of those authorities of the existence of such agreements, is not in itself a reason to consider such agreements compatible with the competition rules. Such involvement or knowledge on the part of public authorities does not release the parties to the sustainability agreement from liability for

an infringement of Article 101(1). Similarly, if acts of public authorities merely encourage, or make it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Article 101(1).

616. However, the parties to a sustainability agreement that restricts competition will not be held liable for competition law infringements if they have been compelled or required by public authorities to conclude the agreement or where the public authorities reinforce the effect of the agreement.

Annex 3 Fictitious examples of permitted and forbidden sustainability agreements¹⁴¹

Scenario A: Incremental sustainability increase from existing initiatives

Permitted construction

Supermarkets A, B and C increase the share of sustainable products of Dutch origin in their assortment and increase their attractiveness to consumers by pricing those products little or no higher than mainstream products. To make this possible, they settle for minimal and sometimes even negative margins on the sustainable products, while increasing margins on mainstream products to get out of costs.

Supermarket A profiles itself with organic products, supermarket B with its own sustainability label and supermarket C with On the way to Planet Proof. They give those products a prominent place on the shelf and in advertising leaflets. Together, they have 60% market share.

Supermarket A sells both Dutch and foreign organic products, supermarkets B and C prefer to enter into long-term relationships with Dutch farmers. All three pay farmers a cost-covering premium for the extra cost of sustainable products.

There is no coordination between the supermarkets on sustainability. All three are committed to steadily increasing the share of sustainable products, with the ultimate goal of 70% sustainable supply on the shelves. They have agreed that target with the government.

Why allowed:

- No agreements between supermarkets, just a commitment to the government of a target of 70% sustainable on shelf in general terms;
- Competition between supermarkets on sustainability;
- No barrier to free trade, supermarkets decide for themselves whether they buy more or less from Dutch farmers.

Forbidden construction

Supermarkets A, B and C agree to increase the share of sustainable products in their assortment. All three will increase the share of sustainable Dutch products to at least 70% products with the On the way to Planet Proof label. Together, they have a 60% market share.

To this end, all three will enter into long-term relationships with Dutch farmers, to whom they will pay a cost-covering premium for the extra costs of sustainable production.

In preparation for the agreements, no cost calculation was made whether the benefits for consumers outweigh the costs, as this is a societal interest for which commitments were made in the national agricultural covenant.

Why not permitted:

- Agreements between supermarkets do not fall under the CMO Regulation's derogations from the cartel prohibition (Art. 101 TFEU) and the conditions of Art. 101(3) TFEU are not met.
- Moreover, the design of the agreements infringes internal market rules.
- The agreements are unlawful despite a covenant with the government.

¹⁴¹ For each of the sustainability agreement scenarios in Chapter 6, examples are provided of constructions that the authors of this report consider to be permitted or prohibited.

Scenario B: Agreements on compensation of additional costs of sustainable production between farmers and chain parties under Art 210a CMO regulation

Permitted construction

Cooperatives X, Y and Z independently conclude sustainability agreements with parties further down the chain from their customers. In these, they agree that certain concrete sustainability targets will be pursued, with a high level of ambition in areas where the Netherlands has a large and problematic sustainability challenge. To this end, the members of the cooperatives will receive a cost-covering price premium, to which each chain party will contribute.

The agreements concern different sustainability objectives and different labels or chain party-specific standards for each cooperative and related chain parties. Full transparency is provided to the public on the nature of these. For each aspect, the additional costs are precisely calculated and justified, using the tables for the CAP agro-environment-climate measures. Government subsidies are deducted from the basis for the price premium calculation.

Annually, it is verified whether the agreements are still indispensable, given the progress of sustainability in the Netherlands. Where necessary, the agreements are adjusted and the price premium adjusted.

None of the cooperatives has a market share greater than 15%.

Why permitted:

- Initiative comes from an association of farmers, as required by Art. 210bis CMO regulation.
- The sustainability agreements are indispensable to meet the target, both in terms of content and price premium, and this is monitored over the years.
- No tension with the internal market, Dutch farmers may make such agreements with their buyers and parties further down the chain; moreover, the market share remains below the 15% ceiling for horizontal agreements in the guidelines.

Forbidden construction

Retailers A, B and C and industrial processors P, Q and R jointly conclude sustainability agreements with cooperatives X, Y and Z, in which they agree to pursue certain concrete sustainability targets, with a high level of ambition in areas where the Netherlands has a large and problematic sustainability challenge. To this end, members of the cooperatives will receive a cost-covering price premium, to which each chain party will contribute.

Part of the agreements is that retailers and industrial processors will switch to buying exclusively Dutch product wherever possible within ten years.

The agreements concern different sustainability objectives and different labels or chain party-specific standards for each cooperative and related chain parties. Full transparency is provided to the public about the nature of the agreements. For each aspect, the additional costs are precisely calculated and justified, using the tables for the CAP agro-environment-climate measures. Government subsidies are deducted from the basis for the price premium calculation.

Annually, it is verified whether the agreements are still indispensable, given the progress of sustainability in the Netherlands. Where necessary, the agreements are adjusted and the price premium adjusted.

None of the cooperatives has a market share greater than 15%.

Why not permitted:

- Horizontal agreements between retail and industry are not permitted outside Art. 101 TFEU.
- Moreover, the agreements infringe internal market rules.
- The fact that the further substantiation is solid does not make the agreements lawful.

Scenario C: Agreements on compensation of additional costs of sustainable production between farmers and chain parties under the old derogations in the CMO regulation

Permitted construction

Cooperatives X, Y and Z independently agree with their customers and related chain parties on a price premium for sustainable products of their participants. They agree how the price will be adjusted according to fluctuations in that price on the world market.

Part of the agreements is that in all cases the additional costs of sustainable production will be reimbursed. To this end, the cooperatives accept a slightly lower basic price. The chain parties involved agree who will cover what part of the price premium.

The parties have not conducted a detailed cost analysis. The price premium also covers the additional costs of legally required production requirements.

Parties have not substantiated why the agreements would be indispensable.

Why permitted:

- The agreements combine the space in Art 209 CMO regulation for farmers to conduct price negotiations together with the space in Art 172a CMO regulation to make agreements with involved chain parties on value distribution clauses.
- The three cooperatives act independently of each other.

Forbidden construction

Cooperatives X, Y and Z independently agree with their customers and related chain parties on a price premium for sustainable products from their participants. They agree on a fixed, higher price, which in principle should be sufficient to cover the costs of sustainable production. The price premium also covers the additional costs of statutory production requirements.

The parties have not conducted a detailed cost analysis.

The parties have not substantiated why the agreements would be indispensable.

Why not permitted:

- Cooperatives can use Art 209 CMO Regulation to enter into horizontal agreements (i.e. agreements on behalf of all members), provided fixed prices are not agreed. This would not come into play if a recognised PO made the agreements, as Art. 152 CMO Regulation does not have that restriction.
- Compensation for the extra cost of complying with legal requirements is not the problem, nor is the absence of cost analysis and substantiation of indispensability. That logic is not at issue with Art. 209 CMO Regulation.

Scenario D: Mandatory sourcing of sustainable products by industry, retail and foodservice

For scenario D, no examples of permitted and prohibited constructions can be given. It is not clear to what extent this construction is legally possible at all and if so, where the limits lie.

In any case, legislation requiring retailers to respect minimum requirements for poultry products with regard to animal welfare is not permissible due to principles of Treaty loyalty and the *effet utile* of competition rules. What was prohibited by the ACM for "Chicken of Tomorrow" may not be enforced by the legislature. It is uncertain to what extent generalised variants of "Chicken of Tomorrow" for all agricultural products or all sustainability goals would then be permissible.

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Wageningen Environmental Research
Report 3239
ISSN 1566-7197



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