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Wine organizations & competition law. Another specificity of the wine sector?

Sustainability in the wine sector as a source of derogations to European Competition Law

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1.- The grounds

EU general principles governing internal market (namely, competition principles) and Common Agricultural Policy have an intersection point, which usually goes by the name of "agricultural exceptionalism".
Agricultural exceptionalism - at least in its prevailing European sense[1] - has its legal basis in the TFEU (as well as it had it, in an historical perspective, since the Treaty of Rome, with an identical wording) and its economic grounds in the very particular structure of the agricultural sector, in its "constitutional" vulnerability which, in turn, is due both to operators' exposure to more kinds of risks than other economic players, to European operators' average small dimensions (which, for many products, haven't significantly changed even after many decades of agricultural aids) and to the strategic nature of its products.

Law scholars, especially from Italy and France, have long analyzed this peculiarity. Let's go back to the studies of Luigi Costato[2], reminding us that the need for a special discipline of competition in agriculture has its roots within the peculiar approach of the Treaty of Rome: being its first aim the creation of a common market of products (and services as well, but mainly of products), it chose to define the entire agricultural sector starting, indeed, from its products (instead of starting from its production assets, such as land, which remain a strictly national competence), so that rules concerning the sale of agricultural products (and not only the primary ones in a proper sense, but also of first-stage processing, thus industrial products sometimes) were initially, and have been always, at the core of the EU agricultural law, of its definition, scope and rules. Among them are the rules setting the exceptions characterizing particularly the functioning of the market of agricultural products, namely the competition rules and the CMO.
While CMO was progressively built by assembling a combination of tools (mainly in the hands of the EEC Institutions, and only marginally of the Member States) all of which were intrinsically incompatible with the concept of "competition" itself (since minimum prices, intervention agencies, levies and tariffs, export subsidies, etc., were simply aimed at protecting farmers by correcting the "natural" effects of market dynamics, in an intrinsic anti-competitive logic which is originally

([1]) Since in the US, for example, this expression is somewhat more various: sometimes labor-related, usually referred to peculiarities that justify the exclusion of agricultural workers from many federal-level labor protections: see S. Rodman, *Agricultural Exceptionalism in U.S. Policies and Policy Debates: A Mixed Methods Analysis*, PhD Dissertation, available at https://jscholarship.library.jhu.edu/bitstreams/1c54d43c-06b4-4b90-8de3-c95b48b7f04a/download; sometimes it's been misrepresented, or it has led to a heterogenesis of purpose, originally aiming to safeguard the food system through distributed and vibrant farms, but finally transferring power from rural communities to industrial agriculture by safeguarding agribusiness interests and certain types of production from lawsuits and liability (e.g. from the environmental justice): in this sense, see D. Diamond et al., *Agricultural Exceptionalism, Environmental Injustice, and U.S. Right to Farm Laws, Environmental Law Reporter*, 52 ELR (9-2022), 10727. More generally, outside Europe there's a tendency to consider agricultural exceptionalism in a more negative sense, e.g. as a pretext to exempt agri-food chain from commitments to reduce greenhouse gases: A. Zahar, *Agricultural Exceptionalism in the Climate Change Treaties*, in *Transnational Environmental Law*, Volume 12, Issue 1, March 202, pp. 42-70.
([2]) See, *inter alia*, L. Costato, *La concorrenza in agricoltura nei trattati europei e nel diritto derivato*, at www.georgofili.net. But we like to remember also to the inspiring pages of A. Iannarelli, *Profili giuridici del sistema agro-alimentare e agro-industriale. Soggetti e concorrenza*, Cacucci, Bari, 2016, especially p. 133 and following.

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justified by law), the exception to the application of the s.c. «Rules applying to undertakings» set forth by the Treaty (formerly Articles 85 to 90 EEC, currently 101 to 106), since then, needed a rationale strictly connected to the aims of CAP in Article 39: only when necessary for attainment of the objectives set out in Article 39 of the Treaty, indeed, farmers – through their associations and other instruments of concentration of supply (which, in turn, are anti-competitive themselves) – may legally "derogate" to competition principles by means of agreements and concerted practices.
So, as to the competition rules, even since Article 42 EEC[3] and since the very first direct discipline of agricultural competition (EEC Reg. No. 26 of 1962, especially its Article 2)[4] - as well as is now doing Article 42 TFEU - a complex of rules has been set out, establishing a direct justification link between the agricultural exception (to general principles of competition market) contained in this Article and the objectives fixed in Article 39 EEC.

2.- The legal basis

The legal basis of the s.c. "agricultural exceptionalism" therefore, claiming us to recall Article 42 TFEU, implies also an automatic and contextual referral to Article 38 TFEU (which outlines the application field of all Articles 39 to 44, thus including Article 42 as an essential element of the CAP), but also a referral to the aims and objectives of the CAP itself, set forth in Article 39, substantially unchanged since the foundation of the EEC. Better, they *seem* unchanged, right because such objectives are largely made of broad and continuously evolving concepts: the founding fathers of Europe did want to avoid any crystallization and, likewise, they wanted a CAP which has constantly been able to be "open to the future". We may say that it was born "open". So, in fact, although remaining still, those concepts have continuously changed their actual meaning.
This is how, when recalling the basic exception concerning competition law and agriculture, we can't neglect that «*account* [must be] *taken of the objectives set out in Article 39*», nor that the latter is calling EU Institutions not only «*to increase agricultural productivity*» – obviously – but also to do that «*by promoting technical progress*», by ensuring a development of agricultural production which must be «*rational*», and by granting an utilization of the factors of production which is required to be «*optimum*». Since at least the 2003 CAP reform (but perhaps we could also dare more, going even farther), the practical identification between «rational» and «sustainable», and still between «sustainable» and «*optimum*», is undeniable.
And, should we go even beyond the environmental borders of the term «sustainability», taking into consideration also its social and economic dimensions (not less essential than the environmental one), further communication lines can directly be drawn from it toward the aims «*to ensure a fair standard of living for the agricultural community*», «*to stabilise markets*», «*to assure the availability of supplies*» and, finally, even «*to ensure that supplies reach consumers at reasonable prices*», remembering that - just to stress the links with international law - under cover of the International Covenant on Economic, Social and Cultural Rights of 1966, no availability really exists without accessibility, since it's not only a matter of objective availability of food: there's also a problem of *subjective* access to it. Indeed, Article 11 of the Covenant reminds us that "accessible" necessarily means also "affordable"[5].

([3]) «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».
([4]) «Article 85 (1) of the Treaty [now: Article 101 TFEU] shall not apply to such of the agreements, decisions and practices referred to in the preceding Article as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article 39 of the Treaty. In particular, it shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardised».
([5]) In explaining the Covenant, the UN – FAO clarifies that «*Food must be available, accessible and adequate», and that «Accessibility requires economic and physical access to food to be guaranteed. Economic accessibility means that food must be affordable. Individuals should be able to afford food for an adequate diet without compromising on any other basic needs*»: Office of the High Commissioner for Human Rights of the UN - FAO, *The Right to Adequate Food*, Fact Sheet No. 34, Geneva, 2010.

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Although accessibility depends not only on low prices, of course (also because the concept of "low" is in itself somewhat relative to disposable income, to the spending power of most people, etc.), anyway in EEC founders' minds there seemed to be a clear project: European Institutions should have been seriously committed in building a supranational agri-food system able to grant food security (both availability and accessibility) to EU citizens and to all people living on the European territory, in a «*rational*» and «*optimum*» manner. That was, *ante litteram*, the future projection of a sustainable food system: "sustainable" even in an economic and social sense.

3.- The new derogations

This is, as a whole, the legal background in light of which the «Vertical and horizontal initiatives for sustainability» provided for by Article 210a of EU Regulation No. 1308/2013 - be they actually implemented in a horizontal or in a vertical manner, e.g. in the wine sector - must be considered. And in light of which only we can really, and fully, understand the actual meaning of this new legal "tool" (including the need for a strict interpretation of the scope of Article 210a, since all exceptional rules concerning competition are considered as of strict interpretation, and the severity of applicable sanctions), as well as the types of sustainability agreements, decisions and practices which should be covered by this exception, to be completely in line with its legal basis and, finally, to understand also the subsequent possible (economic) implications and opportunities for each agricultural sector.
Nothing strange if the agreements, decisions and concerted practices dealt with by this provision are allowed only provided that they're strictly limited to imposing restrictions of competition that are indispensable to the attainment of the sustainability standards covered by the provision: this is simply a proportionality clause, and it's perfectly normal when dealing with exceptions. The ultimate meaning of Article 210a is that the same legal treatment usually reserved to earliest CAP objectives is now applied also to sustainability standard, if they're «higher than mandated by Union or national law". That sounds like a formal, and total, equation (or even an express inclusion, by way of interpretation, if you prefer): sustainability is «rationality», now; and it's «optimum» utilisation of the factors of production, as well; but it must also be a means «to assure the availability of supplies» and «*to ensure that supplies reach consumers at reasonable prices*». Otherwise, we'd fall into the trap of making sustainability "a mono-dimensional solid": a contradiction in terms.
It's therefore a little bit alienating to read the approach to sustainability underlying the provision at stake, limited to allow derogations (to competition rules) only pursuing the application of standards which aim to contribute to environmental objectives[6], 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, finally, protecting animal health and promoting animal welfare. No reference is made, in any way, to the multiple dimensions of sustainability: there's only one of them, according to the EU legislator of 2021.
We may suppose that the economic and social profiles of "sustainability" are in some way (namely, very indirectly and implicitly) already implied in the other "agricultural exceptions" to the general competition rules, we can find in an overall vision of the EU legal system, particularly in EC Regulation No. 1184 of 2006,
(i) since the latter currently exempts the «*agreements, decisions and practices referred to in Articles 81(1) and 82 of the Treaty* [now 101.1 and 102 TFEU] *which relate to production of, or trade in, the products listed in Annex I to the Treaty*»;
(ii) since, in it, the reasons for exempting such agreements, decisions and practices are that they «*form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article 33 of the Treaty* [now 39 TFEU]»; and, finally
(iii) since, among the aforementioned objectives set out in Article 39 TFEU (formerly Article 33 of EC Treaty) – as reminded above – also the aims of granting availability of supplies and reasonable prices are included.
But please note that in this 2006 Regulation - currently

([6]) «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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disciplining the application of exceptional competition rules to the production of, and trade in, agricultural products in general - we can't expect to find any *express* recognition of *interrelation and interaction* with the environmental level; while one of the main problems we're experiencing - in the agricultural as well as in other strategic sectors (e.g. automotive) - is exactly this: the economic and social implications of the green transition (too often neglected), their reciprocal interactions and their mutual balance; whereas no mandatory rule is forcing EU Institutions to ensure that the attainment of one goal (the effective adoption of sustainable standards) is reached without compromising the others, no rule is obliging EU policy makers to ensure a reciprocal compatibility of those different aims and interests, in the output of their political choices. On the contrary, the (quite old, indeed) case law of the ECJ is somewhat different, having stated long ago that the objectives set out in Article 33 (now 39) «*may not all be simultaneously and fully attained*»[7].
Furthermore, from a procedural point of view, the s.c. "derogation" of 2021 is provided for by recalling some consolidated mechanisms which, in general, are considered somewhat "typical" of the EU competition law as a whole (see, e.g., Articles 1 to 7 of EC Regulation No. 1 of 2003), but even in broader terms, here[8]. For example, the provision that agreements, decisions and concerted practices, if fulfilling the conditions referred to in Article 210a, «*shall not be prohibited, no prior decision to that effect being required*», literally follows the wording of Article 1.2, EC Regulation No. 1/2003. The same we may say for the provision, in Article 210a, of the Commission's power to decide and declare that Article 101(1) TFEU shall apply in the future to an agreement, decision or practice (and to inform the producers accordingly), whenever it finds at any time that the conditions for the "derogation" (paragraphs 1, 3 and 7 of Article 210a) are no longer met 9; and the same for the powers which are recognized, both in Article 210a and in EC Regulation No. 1/2003, to national competition authorities in a typical subsidiarity perspective.

4.- The peculiarities: the powers of the EU Commission

The main differential element of the "sustainability exception" of 2021, compared to the general procedural rules on competition, is perhaps represented by the power of the EU Commission, introduced with Article 210a (and limited to it) to issue - on request of a producer - a prior opinion concerning the compatibility of sustainability agreements, decisions and practices. Not an ultimate opinion, of course, since its power to declare that Article 101(1) TFEU shall apply to them always remains, and since the Commission may at any time change the content of its opinion, at its own initiative or at the request of a Member State, in particular - but not exclusively - if it ascertains that the applicant had provided inaccurate information or has misused the opinion.
The reasons for providing for this peculiarity (the Commission's prior opinion) are probably linked to the particular justification mechanism, characterizing Article 210a. Different from the exceptions provided for by the general competition rules of the EU, allowed under condition they satisfy Article 101.3 TFEU[10], thus meeting requirements that are suitable to be evaluated based on their economic *effects* (not merely aims), the provision now inserted in EU Regulation No. 1308/2013 by the 2021 CAP reform applies to agreements, decisions and concerted practices that «*aim to*» apply a sustainability "reinforced" standard; and such standard is only the one which «*aims to*» contribute to one or more objectives, defined – in turn – by reference to general environmental *purposes and goals*, the determination of which is furtherly entrusted

([7]) EEC Court, Judgment of 13 March 1968, *Beus GmbH*, Case 5-67.
([8]) There's no room, in this paper, for dealing also with other agricultural exceptions to competition principles, such as the ones disciplined by Articles 172b, 209, 210 and 222 of the CMO Regulation.
([9]) Thus bringing to the application of Article 7 of EC Regulation No. 1/2003.
([10]) According to Article 1 of EC Regulation No. 1/2003. Article 101.3 TFEU requires, in turn, that the agreements, decisions and practices *contribute* 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, without imposing on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and without affording such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question: criteria implying to consider which effects have been exerted on the concerned economic sector.

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to a *soft law* act (the EU Commission's guidelines, which have been adopted on 8th December 2023[11]).
In other words, the "definition technique" used by the EU legislator, with the aim of delimiting the scope of justified derogations, is merely teleological. Producers strongly need, therefore, a predictive assessment, first of all in order to establish what are the standards matching the requirements (also considering that such standards must be «*higher than mandated by Union or national law*», so that no operator can rely on a clear legal qualification of the environmental standard in question: simply, they're not - or not necessarily - legal standards, and that's the main applicative difficulty). Not by chance, the declared purpose of the Commission's guidelines is «*to provide legal certainty by helping producers and operators in the agri-food supply chain assess their sustainability agreements*»[12]; finally concluding that «*Given the potentially large number of types and combinations of sustainability agreements and market circumstances in which they may operate, it is impossible to provide specific guidance for every possible scenario. Therefore, these guidelines do not constitute a checklist that can be applied mechanically. Each sustainability agreement must be assessed in its specific economic and legal context*». The level of legal certainty is next to zero.
But the "glass half-full" is that, being it an open-ended provision, such a new possibility enables producers and their associations to a hugely flexible use of these exceptions.

5.- What opportunities for the wine sector?

We're in front of a maximum flexibility approach[13], whose most important side is the one related to the very wide range of contents that - though only within the borders of environmental issues - agreements, decisions and practices can have, and to the plurality of situations and decisions the derogation can apply to, such as, for example, the case of producers and distributors who are members of an IBO, either directly or indirectly through their representative bodies and associations, who are considered all party to the sustainability agreement, including those that have not voted in favor of the agreement; or even the case of agreements a party to which is based outside the Union (what matters for the EU Commission, in such case, is only the fact that the sustainability agreement is implemented in the Union, even if only partially, or that it is capable of having an immediate, substantial and foreseeable effect on competition in the internal market).
The key element, in order to have an agreement eligible for the application of Article 210a, is that two or more farmers and producers act on the basis of a «*concurrence of wills with other parties» constituting «the faithful expression of the parties' intentions*».
Wine, of course, is directly involved in the scope of the new Article 210a, since this rule applies (only) when the agreement, decision or practice concerns «producers» of «agricultural products» listed in Annex I to the TFEU, so that - except of the case of agreements only between retailers and wholesalers - any situation involving a vinegrower and or a wine-maker and/or a bottler, is suitable for the application of such "sustainability derogation".
Confirming what was noted above, about the broadness of the purposes and of the standards suitable for application of the exception under Article 210a (and fully confirming, as well, all the reservations expressed above on the consequent uncertain legal scenario in which producers are forced to operate, when concei-

(11) Communication from the Commission: «Commission guidelines on the exclusion from Article 101 of the Treaty on the Functioning of the European Union for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation (EU) No 1308/2013» (C/2023/1446).
(12) Also aiming to provide guidance on the application of Article 210a to national courts and national competition authorities, and on «*(i) the personal scope of Article 210a and the products covered by the provision; (ii) the material scope of Article 210a; (iii) the types of restrictions of competition that are excluded from the application of Article 101(1) TFEU under Article 210a; (iv) the concept of indispensability under Article 210a; (v) the temporal scope of Article 210a; (vi) the procedure for requesting an opinion from the Commission as to whether a given sustainability agreement satisfies the requirements of Article 210a; (vii) the conditions for ex post intervention by the Commission and national competition authorities; and (viii) the burden of proof for demonstrating whether the conditions of Article 210a have been fulfilled*». The fear that the new tool comes back to bite producers is quite evident.
(13) Actually, maximum flexibility even of the concept of "agreement" itself from a formal point of view, since EU Commission interprets such concept stating that even «*an exchange of emojis in text messages can (…) constitute an agreement*»; but of course, that's not the meaning of "flexibility" we're thinking of.

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ving and/or enacting an agreement, decision or practice eligible for this derogation), Commission's 2023 guidelines (C/2023/1446) make dozens of examples of situations falling within the scope (and even examples of what falls outside the scope); as well as it makes several examples of different types and variations of environmental objectives, *beyond* the ones expressly listed in Article 210a (which are recognized as merely «*illustrative*»). All of this, in an effort (which sometimes seems "a desperate effort") to go after an endless need for a casuistic clarification, but finally surrendering to the evidence that «*any objective pursued by an operator that has a positive effect on the environment in relation to the production or processing of agricultural products or to trade in agricultural products, including distribution, may constitute a sustainability objective within the scope of Article 210a*». This doesn't seem to help producers, actually.

In the Commission guidelines of 2023, the pattern is mostly recurrent: a decision (or agreement) implying the reduction of pesticides, or of other chemical treatment, or the adoption of an enhanced animal welfare standard, or a system of recycled containers, or a new waste collection system in the framework of a circular economy initiative implying the use of processed wastes as fertilisers, etc.: in a word, a business practice entailing major costs, or lesser yelds, and the need – on the one hand – to compensate the reduced profitability by means of price-setting decisions, and – on the other – to protect producers from unfair competition that could be enacted, not so much by other producers of the same sector in general, but especially by the ones appearing to have took part in the same agreement/decision/concerted practice, who might want to take profit of the competitive advantages of the sustainability claims (connected to the fact of being part to the agreement or of adhering to the concerted practice) without bearing the related disadvantages (more costs, more losses, less productivity, etc.).

An agricultural sector like the wine-producing one, characterized by an intense presence and an essential role of inter-professional bodies, professional associations, various kinds of consortia, associations of producers[14], should experience some more ease in taking the opportunities offered by Article 210a. Even more than by applying the exception to agreements (which of course are possible), the role of the bodies above could be in promoting concerted practices and in adopting decisions, which may become mandatory for all associated operators (in case of "*erga omnes*" consortia and similar) or only for those adhering to the decision. An opportunity, in any case.

Interesting suggestions can be found in a quite recent report elaborated by a private network of consultancy and research on behalf of the European Federation of Origin Wines (EFOW)[15]. The first idea is that, due to the competitive advantages commonly associated with the adoption of sustainable practices by producers, beyond the objective of directly pursuing a sustainable food system, a very relevant utility of adopting sustainability practices is to create agreed or

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([14]) «OIV Guide for the implementation of principles of sustainable vitiviniculture», Resolution OIV-VITI 641-2020, available at https://www.oiv.int/standards/oiv-guide-for-the-implementation-of-principles-of-sustainable-vitiviniculture- (last access 11th March 2024), point 1.3: «*The role of these collective organisations in introduction, formulation and application of sustainability approaches can be summarised as follows*:
1. *Sharing of knowledge: support in conducting participatory and multi-stakeholder sectoral reviews and identification of sustainability accelerators and issues to be addressed*
2. *Leading the way: definition of roadmaps, and focusing objectives*
3. *Sharing and mutualising tools, methodologies and actions*
4. *Sharing and mutualising results: provision of necessary support and tools to allow benchmarking between organisations, so as to be able to follow progress and adjust collective objectives.*
5. *Ensure such indicators are comparable among participants to allow monitoring of collective and individual sustainability progress.*
6. *Providing operational support: support for fundraising (public or private), organising training and capacity building activities, cost sharing of the eventual application for certification scheme, etc…*
7. *Driving innovation*
8. *Providing technical assistance*
9. *Sharing communication strategy and raising awareness-*
10. *Interaction with public authorities so as to exchange on sectorial needs, as well as to seek synergies and support in the development of the sustainability policies*».

([15]) F. Montanari, J. Etienne, I. Ferreira, W. Cox, *Study on the state of play of sustainability initiatives in the wine appellation sector*, Herseaux (Belgium), 06.06.2022, available at http://efow.eu/wp-content/uploads/2022/07/Final-report_06-June-2022-EFOW-Study-State-of-play-sustainability-initiatives-wine-appellation-sector.pdf (last access 14th March 2024).

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concerted tools aiming at preventing the s.c. "greenwashing", which seems to have become, in general, a huge problem affecting most of the food chains, but recently also the wine sector in a particular manner[16].

Such deplorable commercial behaviour is obviously made easier for a product which is commonly perceived by consumers as "natural" (being it or not), whose production is commonly associated by the public to a strict contact with nature, environment and landscape, and finally thanks to the substantial lack of a precise and univocal regulatory definition of the term "sustainability" itself, at all levels of legal sources, whereas «*existing definitions often lack specificity and/or are not comprehensive enough, addressing only specific issues and/or stages of the supply chain*»[17].

Quoting some studies on this matter[18], for example, the above Report emphasizes how «*in the case of wine, for instance, "sustainability" is a concept that has been often reported to be specifically associated by consumers with organic or biodynamic wines, although those market segments do not exhaust the full range of attributes that can contribute to making a wine sustainable*» (in order to imagine different kinds of sustainability, let's think about, e.g., the use of some vinification's by-products, within other agri-food chains as ingredients or as raw materials, but even in the renewable energy sector as a fuel for co-generation).

This "undefined status" of sustainability as a legal concept has led, therefore, to «*different approaches, methods, practices and solutions across and within wine-producing regions*», so that «*several of the existing sustainability initiatives in the wine sector focus only on one or few stages of the wine supply chain, thus without the holistic approach that sustainability would require*»[19]. From this specific point of view, we could note that - on the one hand - overcoming such limits could have been one of the most prominent utilities of the sustainability agreements and practices dealt with in Article 210a, leading at least to an attempt of "empirical" definition of the concept, and that - on the other hand - the undefined dimension of the concept, in turn, could have been open to give the economic and social dimensions a stronger evidence than they usually have (and, mostly, stronger than they have in the commented provision). On these premises, we must admit that the environmental-only tool outlined in the Article at stake, represents a missed opportunity of rebalancing the interests that lay behind such a broad concept.

So conceived, Article 210a, is certainly a very useful instrument that can promote and stimulate a broader adoption of voluntary environmental sustainability standards by more and more wine operators, not only in the - almost obvious - direction of pesticides reduction and similar but, for instance, also towards the digital transition in agriculture, which can be a pathway to "greener" value-added productions. But the road to other parallel (though strictly related) externalities, which could also be fully susceptible to be included in the still undefined notion of sustainability (such as lesser and better land use, landscape protection, promotion of local wine-related traditions, contrast to agricultural areas depopulation, counterbalance of the consequences of climate change on quality wine productions, etc.) end up with being pursuable only in an indirect manner.

They would need not only to avoid the use of chemical

([16]) H. De Steur et al., *Drivers, adoption and evaluation of sustainability practices in Italian wine SMEs*, in *Business Strategy and the Environment*, 2020, 29, pp. 744-762; G. Gilardoni, *The Culture and Sustainability of Italian Wine: Comparison between these two Elements*, in *Business Management Sciences International Quarterly Review*, Vol. 11., No. 3/2020, pp. 359-368; E. Pomarici, R. Vecchio, *Will sustainability shape the future wine market?*, in *Wine Economic and Policy*, 8-2019, pp. 1-4.

([17]) «*As such, the word 'sustainability' is susceptible of different interpretations and, as a result, practical applications. It is therefore also prone to be misused by businesses, potentially resulting in business partners and final consumers being misled about the true characteristics of a product or a service marketed as 'sustainable', 'environmentally friendly' or under equivalent claims*»: on this specific issue see i.a. A. Baiano, *An Overview on Sustainability in the Wine Production Chain*, in *Beverages*, 2021, 7, 15, pp. 1-27; G. Szolnoki, *A cross-national comparisons of sustainability in the wine industry*, in *Journal of Cleaner Production*, 2013, No. 53, pp. 243-251).

([18]) C. Santini et al., *Sustainability in the wine industry: key questions and research trends*, in *Agricultural and Food Economics*, 2013, pp. 1-9; G. Szolnoki, *A cross-national comparison etc.*, pp. 243-251: «*Another critical point that makes the definition of sustainable wine-making essential is the difference between sustainable and organic or biodynamic wines, which still causes confusion, not only among consumers, but also in the circles of winemakers and wine companies*».

([19]) For a classification of environmental practices specific for the wine industry, according to the increased attention that has been paid to this topic in recent years, see R. Bandinelli et al., *Environmental practices in the wine industry: an overview of the Italian market*, in *British Food Journal*, Vol. 122, No. 5, 2020, pp. 1625-1646.

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substances in the vinification process (a processing practice which, for sure, can be usefully communicated to consumers as important skills of the wine products) but also measures aiming - for example - at reducing the environmental impact of wine cellars, or environmental choices concerning the bottling and distribution phase. Not all of them are suitable to become the object of an agreement or decision or practice under Article 210a, whereas - at the same time - some of them could finally result into lower profitability or into an economic disadvantage, discouraging such options: e.g. the choice of packages from recycled or alternative raw materials, «*presenting some limits in preserving wine quality (e.g. by preventing oxidation) or in terms of consumer acceptance*»[20], with possible negative impacts of economic and social nature.

6. Conclusive remarks

The necessity of giving more emphasis, in concrete, even to these two further dimensions of "sustainability" - namely the social and the economic ones - which seems to have been only indirectly in legislator's mind, is not only the worry of the author of this paper, but can also be drawn from the above-mentioned «OIV Guide for the implementation of principles of sustainable vitiviniculture», whose "Principle 1" states: «*a balanced and simultaneous consideration of environmental, social and economic aspects of sustainability is necessary. It is crucial that organisations assume a holistic attitude to integrate all these three aspects of sustainability into their management approach. Balance in the integration of the principles of sustainability should be respected*». Thus, the Guide observes that «*Environmental, Social and Economic aspects should be taken into consideration while conducting the analysis of organisation's impacts*», recommending therefore
- to «*Periodically publish evaluation reports on the organisation's environmental*, social and economic performance», and
- to «*Develop corrective measures in cases where the organization is responsible for a negative social or environmental event*».

As we can read, all those aspects seem to be mutually permeated, and all placed on an equal footing by the OIV, in a continuous reciprocal interrelation and in a continuous balancing perspective. At first sight (and perhaps even beyond the very first sight) this doesn't seem at all the spirit of Article 210a: everything but a holistic provision.

ABSTRACT

I principi generali unionali che regolano il mercato interno (in particolare i principi in tema di concorrenza) e quelli che regolano la PAC hanno un punto di intersezione, che va usualmente sotto il nome di "eccezionalismo agricolo", il quale – almeno nel suo significato Europeo – trova oggi la sua base giuridica nel TFUE (così come, in prospettiva storica, la ha avuta nel Trattato di Roma) e i suoi presupposti economici nella struttura molto particolare del settore agricolo, nella sua "costituzionale" vulnerabilità.
Tale base giuridica, che ci porta a richiamare l'art. 42 TFUE, implica un automatico e contestuale riferimento all'art. 38 TFUE (che delimita il campo di applicazione degli articoli da 39 a 44, comprendendo anche l'art. 42 quale elemento essenziale della PAC), ma anche ai fini e obiettivi della stessa PAC, fissati all'art. 39, i quali sembrano immutati ma, pur rimanendo testualmente fermi, hanno visto continuamente cambiare il loro significato.
Ecco perché, nel richiamare l'eccezione di base relativa ai rapporti fra diritto della concorrenza e agricoltura («Le disposizioni del capo relativo alle regole di concorrenza sono applicabili alla produzione e al commercio dei prodotti agricoli soltanto nella misura determinata dal Parlamento europeo e dal Consiglio»), non possiamo trascurare che ciò deve avvenire «avuto riguardo agli obiettivi enunciati nell'articolo 39», né che quest'ultimo esige dalle Istituzioni dell'UE non solo di «incrementare la produttività dell'agricoltura» – ovviamente – ma anche di farlo «sviluppando il progresso tecnico», assicurando uno sviluppo «razionale» della produzione agricola e garantendo l'utilizzo «migliore» dei fattori della produzione.
Almeno dalla riforma PAC del 2003 (ma forse, si

([20]) N. Barber, "*Green*" *wine packaging: targeting environmental consumers*, in *International Journal of Wine Business Research*, Vol. 22 No. 4, pp. 423-444, DOI: 10.1108/17511061011092447; R. Bandinelli et al., *Environmental practices in the wine industry etc*.

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potrebbe azzardare, anche prima), l'identificazione pratica fra «razionale» e «sostenibile», e ancora fra «sostenibile» e «migliore», è innegabile. E se estendiamo il concetto di "sostenibilità" oltre i suoi confini ambientali, prendendo in considerazione anche il lato economico e sociale (non meno essenziali di quello ambientale), possono tracciarsi ulteriori linee di collegamento con gli obiettivi di «assicurare così un tenore di vita equo alla popolazione agricola», di «stabilizzare i mercati», di «garantire la sicurezza degli approvvigionamenti» e, infine, di «assicurare prezzi ragionevoli nelle consegne ai consumatori» (rammentando che, ai sensi della «Convenzione internazionale sui diritti economici, sociali e culturali», nessuna "sicurezza" di disponibilità alimentari esiste senza accessibilità, anche economica).

È questo il quadro giuridico nel quale le «Iniziative verticali e orizzontali per la sostenibilità» previste dall'art. 210a del Reg. UE n. 1308/2013 – siano esse applicate orizzontalmente o in chiave verticale, ad esempio nel settore dei vini – vanno studiate e considerate. E alla luce del quale soltanto possiamo pienamente comprendere l'effettivo significato di questo nuovo strumento (inclusa la necessità di interpretare in senso restrittivo il suo campo di applicazione e la gravità delle relative sanzioni), così come i tipi di "accordi di sostenibilità" che possono rientrare in questa eccezione, con le conseguenti possibili implicazioni e opportunità (di natura economica) per ciascun settore agricolo.

Questo saggio è un tentativo di analizzare le opportunità specifiche per il settore vitivinicolo, nascenti da questo nuovo strumento, assieme alle criticità che emergono in fase di implementazione, sia per via dei problemi che nascono nell'adempimento degli obblighi contrattuali, sia (seguendo richiami della stessa OIV) per via della limitata rilevanza che viene riservata alle dimensioni economica e sociale della sostenibilità.

EU general principles governing internal market (namely, competition principles) and Common Agricultural Policy have an intersection point, which usually goes by the name of "agricultural exceptionalism", which – at least in its European sense – has now its legal basis in the TFEU (as well as it had it, in an historical perspective, since the Treaty of Rome) and its economic grounds in the very particular structure of the agricultural sector, in its "constitutional" vulnerability.

Such legal basis, claiming us to recall Article 42 TFEU, implies an automatic and contextual referral to Article 38 TFEU (outlining the application field of Articles 39-44, thus including Article 42 as an essential element of the CAP), but also to the aims and objectives of the CAP itself, set forth in Article 39, which seem unchanged but, in fact, although remaining still, they have continuously changed their meaning.

This is how, when recalling the basic exception concerning competition law and agriculture («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»), we can't neglect that «account [must be] taken of the objectives set out in Article 39», nor that the latter is calling EU Institutions not only «to increase agricultural productivity» – obviously – but also to do that «by promoting technical progress», by ensuring a «rational» development of agricultural production and by granting an «optimum» utilisation of the factors of production.

Since at least the 2003 CAP reform (but we could also dare more), the practical identification between «rational» and «sustainable», and still between «sustainable» and «optimum» is undeniable. And, should we extend our concept of "sustainability" even beyond its environmental borders, taking into consideration also its social and economic dimension (not less essential than the environmental one), further communication lines can directly be established also toward the aims «to ensure a fair standard of living for the agricultural community», «to stabilise markets», «to assure the availability of supplies» and, finally, even «to ensure that supplies reach consumers at reasonable prices» (remembering, under cover of the International Covenant on Economic, Social and Cultural Rights, that no availability really exist without accessibility and that «accessible» means also «affordable»).

This is the legal framework in which the «Vertical and horizontal initiatives for sustainability» provided for by Article 210a of EU Regulation No. 1308/2013 – be they actually implemented in a horizontal or in a vertical manner, e.g. in the wine sector – must be considered. And in light of which only we can fully understand the actual meaning of this new legal "tool" (including the need for a strict interpretation of the scope of Article 210a, and the severity of applicable sanctions), as well as the types of sustainability agreements which are likely to be covered by this exception and

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the subsequent possible (economic) implications and opportunities for each agricultural sector. This paper is an attempt to analyze the specific opportunities for the wine sector, rising from such new tools, together with the implementation criticalities, both because of the problems in fulfilling contracts and (following an alert from the OIV) of the limited relevance attributed to the economic and social dimensions of sustainability.

□