

ESG

RULES AND CONSTRAINTS UNDER EU COMPETITION LAW TO CONCLUDE SUSTAINABILITY AGREEMENTS BETWEEN COMPETITORS



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ESG and sustainability objectives are high on the agenda of many businesses and competition regulators are adapting to this new paradigm.

Cooperation between competitors can be welcomed or can appear as necessary to achieve the EU Green Deal and the EU's objective of climate neutrality by 2050.

Still, it raises concerns with respect to competition law compliance and regulators are publishing guidance papers to help companies better understand and assess what they can and cannot do. In this context, the European Commission ("Commission") adopted on 1 June 2023 revised Horizontal Guidelines allowing companies to self-assess

the compatibility of their horizontal cooperation agreements with EU competition rules. In particular, a new chapter to the Horizontal Guidelines now covers sustainability agreements to guide competitors pursuing a sustainability objective.



A sustainability agreement: what is it?

According to the new Horizontal Guidelines (para.521), sustainability

agreements are "any type of horizontal cooperation agreement between companies that pursues a sustainability objective, irrespective of the form of the cooperation."

Such agreements are typically meant to pursue goals aimed at economic, environmental and social development, such as combatting climate change, reducing pollution, limiting the exploitation of natural resources, upholding human rights, ensuring a living income, protecting animal welfare and reducing food waste.

For this reason, the new Horizontal Guidelines contain a broad definition of these sustainability objectives, based on the UN Sustainable Development Goals, and list various examples of sustainability agreements that would generally be considered as acceptable under EU competition rules.



Self-assessment: how to assess the compatibility of sustainability agreements with EU competition rules?

An agreement cannot escape the prohibition under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) by simply referring to a sustainability objective.

With that said, the Horizontal Guidelines provides a framework for companies to self-assess the compatibility of their joint sustainability initiatives with EU competition rules, and provide examples of sustainability agreements between competitors that are unlikely to raise competition concerns under Article 101(1) TFEU because they do not affect competition parameters:

- Agreements that aim solely to ensure compliance with sufficiently precise requirements or prohibitions in legally binding international treaties, agreements or conventions;
- Agreements that do not concern the economic activity of the parties, but their internal corporate conduct, such as measures to eliminate single-use plastics from their business premises, decisions not to exceed a certain ambient temperature in their buildings, or to limit the volume of internal documents that they print;
- Agreements to set up a database containing general information about the sustainability record of certain suppliers (e.g. regarding their value chains or production processes), or information about distributors that market products in an unsustainable manner, but which do not forbid or oblige the parties to purchase from such suppliers or to sell to such distributors; or

- Agreements between competitors relating to the organisation of industry-wide awareness campaigns, or campaigns raising customers' awareness of the environmental impact or other negative externalities of their consumption, provided that they do not amount to joint advertising of specific products.

Exemption: can a sustainability agreement that restricts competition be exempted?

Should a sustainability agreement restrict competition within the meaning of Article 101(1) TFEU, it may still be pursued if it can benefit from an exemption under Article 101(3) TFEU.

The Horizontal Guidelines provide specific guidance on agreements which, although restrictive of competition, provide sustainability benefits that can outweigh such competition restrictions, provided that four cumulative conditions are satisfied:



- **Efficiency:** does the agreement contribute to objective, concrete and verifiable efficiency gains? Efficiencies that can be generated by sustainability agreements may include e.g. the use of less polluting production or distribution technologies, improved conditions of production and distribution, more resilient infrastructure, better quality products, or reduction of supply chain disruptions.
- **Indispensability:** is the restriction necessary to the attainment of benefits? A sustainability agreement may be indispensable in cases where the parties can show that the consumers in the relevant market find it difficult, for example due to lack of sufficient knowledge or information about the product or the consequences of its use, to objectively assess whether the benefits that they will obtain from the sustainability agreement outweigh the harm that

they will suffer from the agreement and that, as a result, they overestimate the magnitude of the immediate negative effects.

- **Pass-on to consumers:** will consumers receive a fair share of the claimed benefits? Consumers must receive a fair share of the claimed benefits of the sustainability agreement, either in the form of individual use value benefits (which relate directly to the products), individual non-use value benefits (indirect benefits that result from the consumers' appreciation of the impact of their sustainable consumption on others), or collective benefits (benefits to a wider section of society than just the consumers in the relevant market).
- **No elimination of competition:** will there remain a degree of residual competition on the market? The agreement must not allow the parties the possibility to eliminate competition in respect of a substantial part of the products in question.

Soft safe harbour for sustainability standardisation agreements

The Horizontal Guidelines create a "soft safe harbour" for agreements setting sustainability standards, which are considered unlikely to produce appreciable negative effects on competition if they satisfy the following six cumulative criteria:

- **Transparency & participation:** The process for developing the sustainability standard must be transparent, and all interested competitors must be able to participate in the process leading to the selection of the standard.
- **Voluntary participation (no obligations on non-members):** The sustainability standard must not impose any direct or indirect obligation to comply with the standard on undertakings that do not wish to participate in the standard.
- **Members free to adopt higher standards:** To ensure compliance with the standard, binding requirements may be imposed on participants, but participants must remain free to apply higher sustainability standards.
- **No exchange of competitively sensitive information:** Parties to the sustainability standard must not

exchange commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption or modification of the standard.

• **Non-discrimination & Fair access:**

Effective and non-discriminatory access to the results of the standard-setting process must be ensured, including effective and non-discriminatory access to the requirements and conditions for the use of the agreed label, logo or brand name, and allowing undertakings that did not participate in the development of the standard to adopt the standard at a later stage.

• **Monitoring mechanism to ensure compliance and limited negative effects or limited market coverage:**

The standard must not result in a significant increase in the price or a significant reduction in the quality of the products concerned, or the combined market share of the participants must not exceed 20 % in any relevant market affected by the standard.

While sustainability collaboration, cooperation or agreements create opportunities and might be envisaged between competitors, these must be carefully self-assessed to avoid breaching competition law. Companies wishing to enter into a sustainability agreement may also request informal guidance from the European Commission in order to ensure compliance with EU competition rules. Regulators in some EU Member States have also expressed their willingness to examine sustainability projects or initiatives under competition law.

