Volume 1, Number 2 March–April 2024

THE GLOBAL REGULATORY DEVELOPMENTS JOURNAL

fastcase FULL COURT PRESS

The Global Regulatory Developments Journal

Volume 1, No. 2 March–April 2024

THE GLOBAL REGULATORY DEVELOPMENTS JOURNAL (ISSN 2995-7486) at $495.00 annually is published six times per year by Full Court Press, a Fastcase, Inc., imprint.

For customer support, please contact Fastcase, Inc., 729 15th Street, NW, Suite 500, Washington, D.C. 20005, 202.999.4777 (phone), or email customer service at support@fastcase.com.

Publishing Staff
Publisher: Morgan Morrissette Wright
Production Editor: Sharon D. Ray
Cover Art Design: Morgan Morrissette Wright and Sharon D. Ray

The photo on this journal's cover is by Gaël Gaborel—A Picture of the Earth on a Wall—on Unsplash

Cite this publication as:

The Global Regulatory Developments Journal (Fastcase)

Editorial Office

729 15th Street, NW, Suite 500, Washington, D.C. 20005
https://www.fastcase.com/

POSTMASTER: Send address changes to THE GLOBAL REGULATORY DEVELOPMENTS JOURNAL, 729 15th Street, NW, Suite 500, Washington, D.C. 20005.

Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to international attorneys and law firms, in-house counsel, corporate compliance officers, government agencies and their counsel, senior business executives, and others interested in global regulatory developments.

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in these volumes or reprint permission, please contact:

Morgan Morrissette Wright, Publisher, Full Court Press at morgan.wright@vlex.com or at 202.999.4878

For questions or Sales and Customer Service:

Customer Service
Available 8 a.m.–8 p.m. Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

ISSN 2995-7486

It's Not Easy Being Green: The European Commission's New Guidance on Sustainability Agreements

Karel Bourgeois, Karl Stas, and Benjamin Geisel*

In this article, the authors examine sustainability agreements between competitors in the context of the European Commission's revised Guidelines on Horizontal Cooperation Agreements.

The European Commission's (EC) revised Guidelines on Horizontal Cooperation Agreements have entered into force. This article examines sustainability agreements between competitors.

Why Has the EC Given Specific Guidance on Sustainability Agreements?

The previous 2011 Horizontal Guidelines did not contain specific guidance on sustainability agreements. Since then, sustainability and carbon neutrality have become the EC's top priorities[1] that require streamlining into all policy areas, including competition law. At the same time, environmental, social, and governance criteria are of growing importance for businesses and investors, and it was felt that EC guidance regarding the competition law assessment of sustainability agreements was needed to maximize company engagement in desirable sustainability initiatives with competitors.

The new Horizontal Guidelines[2] include an entire chapter on sustainability agreements, clarifying under which circumstances these would be seen as problematic—or not.

What Are Sustainability Agreements?

According to the Horizontal Guidelines, a sustainability agreement refers to any horizontal cooperation agreement—that is, an

The Global Regulatory Developments Journal / March–April 2024, Vol. 1, No. 2, pp. 119–128.

ISSN 2995-7486.

agreement concluded between actual or potential competitors—that pursues a sustainability objective, irrespective of the form of the cooperation. The notion of sustainability objectives is broadly defined, and includes addressing climate change (e.g., by reducing greenhouse gas emissions), reducing pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, promoting resilient infrastructure and innovation, reducing food waste, facilitating a shift toward healthy and nutritious food, ensuring animal welfare, and so on.

Which Sustainability Agreements Actually Fall Outside the Scope of the Cartel Prohibition?

The Horizontal Guidelines make clear that agreements cannot escape antitrust scrutiny simply by referring to a sustainability objective.

At the same time, not all sustainability agreements fall within the scope of Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits anticompetitive agreements and concerted practices. Where an agreement does not negatively affect the parameters of competition, such as price, quantity, quality, customer choice, or innovation, it does not raise any antitrust concerns. The following, nonexhaustive list includes types of agreements that are unlikely to raise concerns:

1. Agreements that concern the internal conduct of undertakings rather than their market activity. For example, competitors may seek to increase their industry's reputation for environmental responsibility by agreeing to eliminate single-use plastics from their business premises, not to exceed a certain ambient temperature in their buildings, or to limit the volume of printed internal documents.
2. Agreements to set up a database containing general information about the sustainability of suppliers' value chains (e.g., whether they respect labor rights or pay living wages), production processes, inputs, or information about whether distributors market products sustainably. The agreements should not, however, prohibit or require the parties to purchase from or sell to certain suppliers or distributors.

3. Agreements between competitors to carry out 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 promotion of specific products.
4. Agreements aimed solely at ensuring compliance with sufficiently precise requirements or prohibitions in legally binding international treaties, agreements or conventions (whether or not implemented in national law) that are not fully implemented or enforced by a signatory state. This exception applies only if the agreement requires the participating undertakings, or their suppliers and/or their distributors, to comply with such requirements or prohibitions, for example, by preventing, reducing, or eliminating the production or importation into the European Union of products not complying with such requirements or prohibitions.

How to Assess Sustainability Agreements Falling Within the Scope of the Cartel Prohibition?

Where an agreement affects one or more of the parameters of competition, it must be assessed under Article 101 of the TFEU to determine whether it raises competition concerns, and, if it does, whether these concerns are outweighed by the positive effects of the agreement on competition.

An infringement of Article 101 of the TFEU may arise either as a "by object" restriction of competition (i.e., one that, by its very nature, is harmful to competition and therefore presumed to be illegal) or as a result of the harmful effects of the agreement on competition.

According to the Guidelines, if an agreement genuinely pursues sustainability objectives, this must be taken into account for the purpose of determining whether the agreement restricts competition by object, as this may cast reasonable doubt on whether the agreement is, by its very nature, harmful to competition. However, no such doubts can exist where the agreement is merely used to disguise a by object restriction of competition, such as price fixing.

For example, in 2021, the EC fined BMW and Volkswagen Group more than €875 million for participating in a cartel with

Daimler, with the aim of preventing the introduction of a technology to reduce emissions from diesel cars beyond the legal requirements, even though such better technology was available. The EC found that the conduct constituted an infringement by object in the form of a restriction of technical development.

Where a by object restriction can be excluded, the agreement may benefit from a block exemption. The EC clarified that, while it recognizes that sustainability agreements require specific guidance, it does not consider them to be a separate category of cooperation agreement, and therefore they must also be assessed under other chapters of the Horizontal Guidelines, such as those on standardization agreements or research and development (R&D) agreements. This approach also allows the agreement to benefit from the safe harbors under the Horizontal Block Exemption Regulations (for both R&D and specialization agreements). In the event of inconsistencies between the EC's guidance on sustainability agreements and its guidance on other types of cooperation, companies may rely on the more favorable guidance.

In case no block exemption applies, the actual or potential harmful effects on competition resulting from the agreement must be assessed. In particular, the following factors are relevant:

- The market power of the parties participating in the agreement,
- The degree to which the agreement limits the decision-making independence of the parties in relation to the main parameters of competition,
- The market coverage of the agreement,
- The extent to which commercially sensitive information is exchanged in the context of the agreement, and
- Whether the agreement results in an appreciable increase in price or an appreciable reduction in output, variety, quality or innovation.

When Can a Sustainability Standardization Agreement Benefit from a Safe Harbor?

A substantial part of the chapter of the Horizontal Guidelines on sustainability agreements is dedicated to sustainability standardization agreements—which are likely to be the most common type of sustainability agreements.

The Guidelines define sustainability standardization agreements as agreements that set requirements to be met by producers, processors, distributors, retailers, or service providers in a supply chain in relation to a wide range of sustainability metrics, such as the environmental impact of production. Sustainability standardization agreements typically lay down rules, guidelines, or characteristics for products and processes related to such sustainability metrics. Sustainability standards may include quality marks or labels.

Sustainability standardization agreements often have positive effects on competition, for example, by empowering consumers to make informed purchase decisions or leveling the playing field between producers that are subject to different regulatory requirements. However, they may also restrict competition in three main ways: through price coordination; foreclosure of alternative standards; and the exclusion of, or discrimination against, certain competitors.

Sustainability standards that are used to disguise restrictions, such as price fixing, market or customer allocation, or limitations of output, quality, or innovation, themselves restrict competition by object. For example, an agreement between competitors on how to pass on increased costs resulting from the adoption of a sustainability standard in the form of increased prices, restricts competition by object.

For sustainability standardization agreements that do not contain by object restrictions, the Horizontal Guidelines provide a checklist of six criteria that, if met, provide a "soft safe harbor" for the parties. In other words, if all six conditions are met, the agreement is deemed unlikely to have an appreciable negative impact on competition.

The six cumulative conditions that must be met in order to benefit from the soft safe harbor are:

1. *Transparency and 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.
2. *No Obligations on Nonmembers*. 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.

3. *Members Free to Go Further*. To ensure compliance with the standard, binding requirements may be imposed on participating undertakings, but the undertakings must remain free to apply higher sustainability standards.
4. *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.
5. *Fair Access*. Effective and nondiscriminatory access to the results of the standard-setting process must be ensured. This includes providing effective and nondiscriminatory 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.
6. *The Sustainability Standard Must Meet at Least One of the Following Two Conditions*.
    a. Limited negative effects: The standard must not result in a significant increase in the price or a significant reduction in the quality of the products concerned; or
    b. Limited market coverage: The combined market share of the participating undertakings must not exceed 20 percent in any relevant market affected by the standard.

Under Which Conditions Can a Sustainability Agreement That Restricts Competition Benefit from an Exemption?

A sustainability agreement that restricts competition may nonetheless qualify for an individual exemption if it satisfies the following four cumulative conditions:

1. *Efficiency Gains*. The agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. With respect to sustainability agreements, a broad range of sustainability benefits resulting from the use of particular ingredients, technologies, and production processes (e.g., less polluting

production methods) can be taken into account. However, such efficiencies need to be substantiated and be objective, concrete, and verifiable.

2. *Indispensability*. The restrictive agreement may only impose restrictions of competition that are indispensable to the attainment of the benefits generated by the agreement. In other words, the agreement as such, and each of the restrictions of competition it includes, must be reasonably necessary to achieve the sustainability benefits; that is, there must not be any other economically practicable and less restrictive means available to achieve these benefits. For example, cooperation may be necessary to avoid free-riding on the investments required to promote a sustainable product and overcome the "first-mover disadvantage."
3. *Pass-On to Consumers*. Consumers need to receive a fair share of the claimed benefits of the agreement. With regard to sustainability agreements, the EC distinguishes between individual use value benefits, individual nonuse value benefits, and collective benefits:
   - Individual use value benefits relate directly to the products. For example, organically grown vegetables may taste better and/or be healthier for consumers than nonorganic vegetables.
   - Individual nonuse value benefits concern indirect benefits that result from the consumers' appreciation of the impact of their sustainable consumption on others. For example, an eco-friendly laundry detergent, while not cleaning better, may result in less water pollution.
   - Collective benefits occur irrespective of the consumers' individual appreciation of the product and accrue to a wider section of society than just the consumers in the relevant market. For example, less polluting fuel for cars may lead to cleaner air for society as a whole, rather than just for the car driver concerned. However, for collective benefits to be taken into account, it must be shown that the consumers who suffer the harm caused by the agreement (e.g., higher fuel prices) form a substantial part of the total group of people who benefit from the positive effects (e.g., cleaner air).

It is up to the parties to the agreement to prove the existence and materiality of such benefits, and this may not be an easy task. Adding a further layer of complexity, the EC notes that where benefits will only arise in the future, the efficiencies must be greater the longer consumers have to wait for them to materialize (while suffering harm in the meantime).

4. *No Elimination of Competition*. The agreement must not allow the parties to eliminate competition in respect of a substantial part of the products concerned. This condition may be fulfilled as long as the parties still compete vigorously on at least one parameter of competition. For instance, if competitors decide not to use a certain polluting technology or a certain nonsustainable ingredient in the production of their products, competition is not eliminated as long as they continue to compete on the price and/or quality of the final product.

Are There Any Other Considerations Companies Should Take into Account?

The fact that public authorities are involved in the process of concluding a sustainability agreement, encourage or facilitate its conclusion or are otherwise aware of such agreement, does not mean that the agreement is in the clear. It is only where parties have been compelled or required by public authorities to enter into the sustainability cooperation that they will escape liability under Article 101 of the TFEU.

Where further assistance is needed in assessing a particular cooperation, the EC has made clear that it is prepared to provide informal guidance on novel or unresolved issues relating to individual sustainability agreements. A number of national competition authorities have taken a similar approach and have already publicly expressed their views on sustainability agreements. For example, the German competition authority and, more recently, the Belgian competition authority reviewed a cooperation aimed at the introduction of voluntary common standards to promote living wages along the private-label banana supply chain. The German competition authority also examined an animal welfare initiative aiming to reward livestock owners for improving the conditions under which animals are kept. The Dutch competition authority reviewed a cooperation between TotalEnergies, Shell, and two Dutch state-owned companies to use empty offshore gas fields to provide carbon capture and storage services to Dutch CO_2 emitters. It also investigated an agreement between Coca-Cola, Vrumona, and two supermarket chains to eliminate the use of plastic handles on all of their soft drink and water multipacks.

Companies should carefully assess their cooperation initiatives under the Guidelines, before approaching the EC. While approaching the EC for informal guidance may provide welcome legal certainty, it also carries the risk that disclosures may attract the EC's attention and lead to further investigation or even possible enforcement action. Thus, companies may need to provide evidence as to the potential anticompetitive effects and consumer benefits that could result from a proposed cooperation in the context of the informal guidance review.

Conclusions

Agreements that restrict competition cannot escape cartel prohibition simply by referring to a sustainability objective. At the same time, sustainability initiatives between competitors that do not negatively affect parameters of competition such as price, quantity, quality, customer choice, or innovation do not raise antitrust concerns.

Where a sustainability agreement affects one or more parameters of competition, it may nevertheless benefit from a "soft safe harbor" if it is unlikely that the agreement will significantly harm competition.

If a competitively restrictive sustainability agreement does not qualify for safe harbor, it may be difficult to demonstrate that its benefits for consumers sufficiently outweigh its restrictive effects if they do not directly benefit the customers of the products or services concerned.

Notes

* The authors, attorneys with Crowell & Moring LLP, may be contacted at kbourgeois@crowell.com, kstas@crowell.com, and bgeisel@crowell.com, respectively.

1. *See* European Green Deal, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en.

2. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01).