

# e-Competitions

Antitrust Case Laws e-Bulletin

Preview

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## The EU Commission publishes a Competition Policy Brief on how the rules can complement environmental and climate policies more effectively

**AGREEMENT (NOTION), ENVIRONMENT, EUROPEAN UNION, ENVIRONMENTAL PROTECTION, COMPETITION POLICY, GENERAL ANTITRUST**

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e-Competitions News Issue Preview

On 10 September 2021, the European Commission *published* <sup>1</sup> a Competition Policy Brief ("Policy Brief") on how EU competition rules can complement environmental and climate policies more effectively. The Policy Brief recognises that further guidance is needed on the application of competition law to sustainability initiatives. Similarly, national competition authorities (most notably in the Netherlands, Greece and Austria) have taken steps to clarify the application of competition rules to sustainability agreements.

### Key takeaways

The European Commission is expected to provide further guidance on the application of Article 101 TFEU to sustainability agreements in the future - both in the revised guidelines and on individual cases. National initiatives in Austria, the Netherlands and Greece have paved the way for more flexibility in the assessment of sustainability initiatives and, in particular, for the consideration of environmental benefits for the society as a whole. The European Commission does not appear to be ready to go as far in its assessment of efficiencies under Article 101(3) TFEU. Both the European Commission and national authorities have made clear that sustainability agreements must not be a cover for a cartel.

### Background

In December 2019, the European Commission *presented* <sup>2</sup> the European Green Deal which commits to climate neutrality by 2050.

Acknowledging the need for a "green" competition policy, the European Commission published a *call for contributions* <sup>1</sup> in October 2020 and held a conference in February 2021 which focused on how EU competition rules can support environmental and climate policies.

In September 2021, the European Commission published a Policy Brief which provides examples of policy reform across State aid, antitrust and merger control. One theme which emerged from the responses to the call for contributions is a need for greater clarity on how the pursuit of sustainability objectives affects antitrust assessment. The European Commission has confirmed that it will provide this guidance in its updated guidelines on horizontal cooperation and vertical agreements. In particular, it has identified a number of areas for clarification with respect to assessments under Articles 101(1) and 101(3) TFEU.

In providing this guidance, the European Commission is likely to consider national initiatives designed to offer more flexibility in relation to sustainability agreements. Most notably:

- the Dutch Competition Authority ("ACM") published its *draft Guidelines on sustainability agreements* <sup>2</sup> in January 2021;
- the Hellenic Competition Commission ("HCC") published a draft staff *discussion paper* <sup>3</sup> on sustainability issues and competition law in 2020 and launched a *public consultation* <sup>4</sup> on a sandbox for sustainable development in
- the Greek market in July 2021; and
- the Austrian legislator *introduced* <sup>5</sup> an express exemption from the prohibition of restrictive agreements where they substantially contribute to an ecologically sustainable or climate-neutral economy in September 2021.

## **The need for clarity on sustainability agreements falling outside Article 101(1) TFEU**

In its Policy Brief, the European Commission acknowledges that it is important to provide concrete examples of how companies can engage in sustainability initiatives without restricting competition.

When revising its guidelines, the European Commission may draw inspiration from the ACM draft guidelines in particular, which propose creating a safe harbour for the following categories of agreements:

- non-binding sustainability targets (e.g. regarding the reduction of CO2 emissions), provided individual undertakings can set their own contributions to these targets and the means to reach them;
- open and voluntary green standards, provided the participation criteria are transparent and access is granted based on reasonable and non-discriminatory terms;
- agreements aimed at improving product quality or replacing products which are produced in a less sustainable manner, provided they do not appreciably affect price and/or product diversity;
- joint initiatives to create new products where required in order to acquire sufficient production resources (including know-how) or to achieve sufficient scale; and

- agreements whose sole purpose is to comply with national or international standards (e.g. relating to the protection of natural resources).

## How can green efficiencies be taken into account under Article 101(3) TFEU?

The Policy Brief acknowledges that it will be useful to clarify how sustainability benefits can be taken into account in the assessment of Article 101(3) TFEU and in particular:

- that sustainability benefits can be assessed as qualitative efficiencies (e.g. replacing plastic with wood in toys or using recycled materials for clothing may result in increased quality or longevity), as well as potentially offering cost efficiencies (e.g. reducing plastic packaging may reduce the cost for materials, transport and storage);
- that sustainability benefits do not need to be direct or immediately noticeable product quality improvements or cost savings, provided the users appreciate them and are willing to pay a higher price for this reason alone;
- to what extent "out-of-market" efficiencies (e.g. the societal benefits accrued by carbon emission reduction) can be taken into account;
- when and how market failures prevent the free market from generating benefits and thus necessitate a joint-initiative (e.g. to remove a first mover disadvantage and nudge consumers towards more expensive sustainable products); and
- when existing environmental regulation sufficiently incentivises companies to produce products sustainably, obviating the need for cooperation.

As regards "*out-of-market*" efficiencies, the Policy Brief states that the assessment of the anti-competitive effects and benefits of a practice should, in principle, be made within the confines of the same relevant market. This reflects the anchored "consumer welfare standard" according to which restricting competition for a product can only be justified if the users of that product are not, on balance, worse off. However, the Policy Brief acknowledges that "benefits achieved on separate markets can possibly be taken into account" provided that:

- "*the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same*"; and
- the benefits "*fully compensate*" the harmed consumers (the latter being part of society).

The approach taken by the European Commission to "out of market" efficiencies noticeably diverges from positions taken at national level.

Most notably, the Austrian legislator recently amended Austrian competition rules to explicitly provide that the harm to consumers will be considered as offset where the benefit "contributes significantly to an environmentally sustainable or climate-neutral economy". This includes climate protection measures, the sustainable use of natural resources or measures directed at saving or restoring ecosystems and biodiversity. Although the Austrian Competition Authority has not yet issued its guidelines, the preparatory works for the legislative amendment interestingly provide that:

- environmental benefits for society as a whole are sufficient (and therefore do not need to be granted to consumers on the relevant market);
- future environmental benefits can be taken into account; and
- a "significant contribution" to an environmental, sustainable and climate neutral economy can be evidenced based on models that calculate the costs of environmental impacts on society. A precise calculation of the environmental benefits may, however, not be required where the harm to competition is minimal compared to the material contribution to environmental objectives.

In its draft guidelines, the ACM adopts a similar position with respect to environmental-damage agreements (i.e. agreements which aim to improve production processes that cause harm to humans, the environment and nature). It provides that these agreements should be allowed where (i) the benefits to society as a whole are equal to or greater than the disadvantages to users and (ii) these benefits support an international or national standard binding upon the government (e.g. the Paris climate agreement).

The ACM and HCC also jointly commissioned a *Technical Report on Sustainability and Competition* <sup>28</sup> on the quantification of sustainability benefits. The Technical Report "*spotlights the forms of quantitative analysis that can be used in competition assessments to account for broader social benefits, including benefits for future generations*". This leading expert report is likely to be taken into account by both the European Commission and other national competition authorities.

## Future guidance

In addition to the new guidelines on horizontal cooperation and vertical restraints (due to be published by the end of 2022), the Policy Brief states that the European Commission will consider:

- requests for individual guidance letters in relation to sustainability initiatives raising novel issues; and
- adopting decisions - pursuant to Article 10 of Regulation 1/2003 - finding that competition rules are not applicable to certain sustainability initiatives.

The HCC has also *proposed* <sup>29</sup> the creation of a "sandbox" for sustainability and competition in the Greek market. The "sandbox" would take the form of a digital platform and provide a supervised environment for businesses active in certain sectors to liaise with the authority about proposed sustainability initiatives.

## Conclusion

The draft revised guidelines on horizontal cooperation are expected to provide more concrete guidance on how companies can cooperate to achieve environmental goals without breaching EU competition rules. While the European Commission may draw inspiration from national initiatives, the Policy Brief suggests that the institution may take a different approach to some national authorities in relation to key aspects of the antitrust assessment (in particular, the concept of "green" efficiencies).

Both the European Commission and national competition authorities have made clear that sustainability initiatives cannot be used as a cover for cartels. This was very recently stated by the Commission when issuing its decision fining car manufacturers for agreeing to limit the development of the full potential of clean emission technology (see our *September 2021 newsletter* <#>).