

9. SUSTAINABILITY AGREEMENTS

9.1. Introduction

515. This Chapter provides general guidance on the competitive assessment of **agreements between competitors that pursue sustainability objectives** ('sustainability agreements'). In addition to this general guidance, the Commission is committed to provide informal guidance regarding novel or unresolved questions on individual sustainability agreements through its Informal Guidance Notice³⁶⁰.
516. Sustainable development is a core principle of the Treaty on European Union and a priority objective for the Union's policies³⁶¹. The Commission has committed to implement the United Nations' sustainable development goals³⁶². 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 use³⁶³.
517. In broad terms, **sustainable development** refers to **the ability of society to consume and use the resources available 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) development³⁶⁴. The notion of **sustainability objectives** therefore includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), **reducing pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, ensuring animal welfare**, etc.³⁶⁵.
518. **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**.
519. However, one concern related to sustainable development is that **individual production and consumption decisions can have negative effects** ("negative

³⁶⁰ Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters), OJ C 381, 4.10.2022, p. 9.

³⁶¹ Article 3 TEU.

³⁶² The 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015.

³⁶³ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the regions, The European Green Deal (COM/2019/640 final).

³⁶⁴ See for example, UN Resolution 66/288 adopted by the General Assembly on 27 July 2012.

³⁶⁵ The 2030 UN Agenda for Sustainable Development identifies 17 Sustainable Development Goals (including, for example, Goal 2: End hunger, achieve food security and improved nutrition and promote sustainable agriculture; Goal 7: ensure access to affordable, reliable, sustainable and modern energy; Goal 9: build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation; Goal 13: take urgent action to combat climate change and its impacts); and 169 targets (including, for example, Target 9.1: develop quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure, to support economic development and human well-being, with a focus on affordable and equitable access for all; and Target 13.1: strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries).

externalities”), for example on the environment, that are not sufficiently taken into account by the economic operators or consumers that cause them. This type of market failure can be mitigated or cured by collective action, primarily through public policies or (sector-specific) regulation, and secondarily through cooperation agreements between undertakings that promote sustainable production or consumption.

520. Where such market failures are addressed by appropriate regulation, for example, mandatory Union pollution standards, pricing mechanisms, such as the Union’s Emissions Trading System (“ETS”), or taxes, additional measures by undertakings, for example through cooperation agreements, may be unnecessary. However, cooperation agreements may address residual market failures that are not or not fully addressed by public policies and regulation.
521. In these Guidelines, the term ‘sustainability agreement’ refers to any horizontal cooperation agreement that pursues a sustainability objective, irrespective of the form of the cooperation. Sustainability agreements will only raise competition concerns under Article 101 if they entail restrictions of competition by object or they lead to appreciable actual or likely negative effects on competition. Agreements that restrict competition cannot escape the prohibition laid down in Article 101(1) simply by referring to a sustainability objective³⁶⁶.
522. Where sustainability agreements restrict competition within the meaning of Article 101(1), they may still be compatible with Article 101 if they fulfil the four conditions of the exception provided by Article 101(3). Detailed guidance on the application of those conditions is set out in the Commission Guidelines on the application of Article 101(3)³⁶⁷.
523. Sustainability agreements are not a distinct category of horizontal cooperation agreement for the purposes of applying Article 101. Therefore, where a horizontal cooperation agreement corresponds to one of the types of horizontal agreements covered by the preceding Chapters of these Guidelines and that agreement also pursues a sustainability objective, it should be assessed on the basis of the guidance contained in the relevant preceding Chapter(s), together with the guidance provided in this Chapter.
524. This means, in practice, that an R&D or specialisation agreement that pursues a sustainability objective (for example, an agreement between competitors to develop jointly a production technology that reduces energy consumption, or an agreement to share infrastructure with a view to reducing the environmental impact of a production process), and which therefore also qualifies as a sustainability agreement, can benefit from the block exemption regulations applicable to R&D agreements or specialisation agreements, provided that the conditions of those regulations are met. If the conditions of the relevant block exemption regulation are not met, it is

³⁶⁶ See above Section 1.2.6. The Court of Justice has acknowledged that restrictions of competition emanating from agreements or decisions of associations of undertakings may fall outside the scope of Article 101(1) if they are inherent in the pursuit of a legitimate objective and proportionate thereto (see, inter alia, judgments of 21 September 1999, *Albany International*, C-67/96, EU:C:1999:430; of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98; and of 16 July 2006, *Meca-Medina and Majcen v Commission*, C-519/04 P, EU:C:2006:492).

³⁶⁷ Commission Guidelines on the application of Article 81(3) of the Treaty (‘Article 101(3) Guidelines’), OJ C 101, 27.4.2004, p. 97.

necessary to carry out a full assessment under Article 101, based on the guidance provided in Chapter 2 (in the case of R&D agreements) and the guidance provided in Chapter 3 (in the case of production agreements, including mobile telecommunications infrastructure sharing agreements), while for both types of agreement the guidance provided in this Chapter should also be taken into account. Similarly, an agreement between competitors to jointly purchase as an input for their production only products that have a limited environmental impact, or to purchase exclusively from suppliers that respect certain sustainability standards, should be assessed according to the guidance in Chapter 4 (Purchasing agreements)³⁶⁸, while also taking into account the guidance in this Chapter.

525. In the event of any inconsistency between the guidance provided in this Chapter and the guidance provided in the relevant preceding Chapters for the assessment of a particular sustainability agreement (Chapters 2 to 8), the parties to the agreement may rely on the guidance in the Chapter that is the more favourable to them. In view of their distinct characteristics (see paragraphs 540-544), sustainability standardisation agreements should be assessed in accordance with the guidance provided in Section 9.3³⁶⁹, whereas Chapter 7 (Standardisation agreements) only provides further background on the conditions that both Chapters have in common.

526. This Chapter is structured as follows: Section 9.2 sets out examples of sustainability agreements that are unlikely to restrict competition within the meaning 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 common sustainability agreements, namely those which set sustainability standards; Section 9.4 covers specific aspects of the assessment of sustainability agreements under Article 101(3); Section 9.5 discusses the consequences of the involvement of public authorities in the conclusion of sustainability agreements. Finally, Section 9.6 provides an assessment of hypothetical examples of sustainability agreements.

9.2. Sustainability agreements that are unlikely to raise competition concerns

527. Not all sustainability agreements between competitors fall within the scope of Article 101. Where such agreements do not negatively affect parameters of competition, such as price, quantity, quality, choice or innovation, they are not capable of raising competition law concerns. The following are examples of sustainability agreements that fall outside the scope of Article 101. These examples are illustrative and not exhaustive.

528. First, agreements that aim solely to ensure compliance with sufficiently precise requirements or prohibitions in legally binding international treaties, agreements or conventions, whether or not they have been implemented in national law (for example, compliance with fundamental social rights or prohibitions on the use of child labour, the logging of certain types of tropical wood or the use of certain pollutants) and which are not fully implemented or enforced by a signatory State, fall outside the scope of Article 101. This exclusion from Article 101 only applies if the agreement provides that the participating undertakings, their suppliers and/or their distributors must comply with such requirements or prohibitions, for example, by preventing, reducing or eliminating the production or importation into the EU of

³⁶⁸ See paragraph 284.

³⁶⁹ Since sustainability standardisation agreements are a sub-category of standardisation agreements.

products contrary to such requirements or prohibitions. Such agreements may be an appropriate measure to enable undertakings to implement their sustainability due diligence obligations under national or EU law and can also form part of wider industry cooperation schemes or multi-stakeholder initiatives to identify, mitigate and prevent adverse sustainability impacts in their value chains or their sector.

529. Second, agreements that do not concern the economic activity of undertakings, but their internal corporate conduct, will generally fall outside the scope of Article 101. Competing undertakings may seek to increase the reputation of their industry for being environmentally responsible, and for this purpose agree, for example, on measures 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 internal documents that they print.
530. Third, agreements to set up a database containing general information about suppliers that have (un)sustainable value chains (for instance, suppliers that respect labour rights or pay living wages); use (un)sustainable production processes, or supply (un)sustainable inputs, or information about distributors that market products in a(n) (un)sustainable manner, but which do not forbid or oblige the parties to purchase from such suppliers or to sell to such distributors, will in general not restrict competition and fall outside the scope of Article 101³⁷⁰. Such limited forms of exchange of information may again help undertakings to fulfil their sustainability due diligence obligations under national or EU law.
531. Fourth, 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, will also generally not restrict competition and fall outside the scope of Article 101.

9.3. Assessment of sustainability agreements under Article 101(1)

9.3.1. General principles

532. Where sustainability agreements negatively affect one or more parameters of competition, they have to be assessed under Article 101(1).
533. Where a cooperation agreement between competitors (whether or not it is covered by any of the preceding Chapters of these Guidelines) pursues a sustainability objective, this must be taken into account for the purpose of determining whether the agreement restricts competition by object within the meaning of Article 101(1)³⁷¹.
534. Where the parties to an agreement substantiate that the main object of an agreement is the pursuit of a sustainability objective, and where this casts reasonable doubt on whether the agreement reveals by its very nature, having regard to the content of its provisions, its objectives, and the economic and legal context, a sufficient degree of harm to competition to be considered a by object restriction,³⁷² the agreement's

³⁷⁰ As long as the database does not reduce uncertainty regarding recent or future actions of competitors in the market, it will not amount to an exchange of commercially sensitive information. In other words, the undertakings contributing to the database should not identify who are their current or future suppliers.

³⁷¹ See paragraphs 23 and 28.

³⁷² In principle, the evidence demonstrating the pursuit of a sustainability objective should be such as to justify a reasonable doubt as to the anti-competitive object of the agreement. The pursuit of the

effects on competition will have to be assessed. This is not the case where the agreement is used to disguise a by object restriction of competition such as price fixing, market sharing or customer allocation, or limitation of output or innovation.

535. Any effects assessment is carried out according to the principles set out in Section 1.2.5 and in the Sections on “Restrictive effects on competition” of the preceding Chapter of these Guidelines corresponding to the particular type of horizontal agreement³⁷³. The following factors should in particular be taken into account when assessing the effects of a sustainability agreement: 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.
536. Sustainability agreements that restrict competition within the meaning of Article 101(1), either by object or by effect, can still benefit from the exception provided by Article 101(3) if the parties are able to demonstrate that the four cumulative conditions of that provision are fulfilled (see Section 9.4).
- 9.3.2. *Sustainability standardisation agreements* efficiency gains, indispensability, consumer benefits, no elimination of competition
537. Sustainability standardisation agreements are a sub-category of sustainability agreements. Their compliance with Article 101 is to be assessed according to the following principles.
- 9.3.2.1. Definition and characteristics
538. In order to contribute to sustainable development, competitors may wish to agree to phase out, withdraw, or, in some cases, replace non-sustainable products (for example, plastics or fossil fuels, such as oil and coal) and processes (for example, coal-fired steel production) with sustainable ones. Competitors may also wish to agree to harmonise packaging materials in order to facilitate recycling or harmonise packaging sizes (and hence product content) to reduce waste. They may wish to agree to purchase only production inputs that have been manufactured in a sustainable manner. Similarly, they may wish to agree on certain standards to improve animal welfare (e.g. standards to provide animals with more space and better living conditions). For these purposes, competitors may agree to adopt and comply with certain sustainability standards. In this Chapter, such agreements are referred to as ‘sustainability standardisation agreements’ or ‘sustainability standards’. However, for the purposes of these Guidelines, agreements between competitors that limit the participating undertakings’ output of the products concerned by the agreement do not qualify as sustainability standardisation agreements.
539. Sustainability standardisation agreements are used to specify requirements that producers, processors, distributors, retailers or service providers in a supply chain have to meet in relation to a wide range of sustainability metrics, such as the

sustainability objective should not however be uncertain. See by analogy judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paras 107-108.

³⁷³ See also paragraphs 24-27 of the Article 101(3) Guidelines.

environmental impacts of production³⁷⁴. Sustainability standardisation agreements usually provide rules, guidelines or characteristics for products and processes in relation to such sustainability metrics and are sometimes referred to as sustainability systems. They are often private initiatives and can range from codes of conduct adopted by undertakings, to standards driven by civil society organisations and multi-stakeholder initiatives that involve undertakings across the value chain³⁷⁵. These Guidelines only cover sustainability standards developed by competitors or in which competitors participate, including quality marks or labels.

540. Sustainability standardisation agreements have similarities with the standardisation agreements addressed in Chapter 7, and the guidance provided in that Chapter contains further explanations of some of the conditions set out in Section 9.3.2.4. However, sustainability standardisation agreements also have specific features.
541. First, the adoption of a sustainability standard may lead to the creation of a label, logo or brand name for products that meet certain minimum requirements. The use of such labels, logos or brand names in principle obliges the adopters to comply with those requirements and if they cease to do so, they lose the right to use the label, logo or brand name.
542. Second, the cost of adhering to and complying with a sustainability standard can be high, particularly if this requires changes to existing production or distribution processes. 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.
543. Third, unlike technical standards, which ensure interoperability and encourage competition between technologies developed by different undertakings in the standard development process, questions of interoperability and compatibility between technologies are generally less relevant for sustainability standards.
544. Fourth, many sustainability standards are process-, management- or performance-based. This means that, unlike many technical standards, sustainability standards often simply specify a goal to be met, without imposing a specific technology or production method to achieve that goal. Adopters of such sustainability standards may commit to the target but remain free to decide on the use of a particular technology or production method to attain the target.

9.3.2.2. Main competition concerns

545. Sustainability standardisation agreements often have positive effects on competition. They may contribute to sustainable development by enabling the development of new products or markets, increasing product quality or improving conditions of supply or distribution. 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.

³⁷⁴ See for example, United Nations Forum on Sustainability Standards, <https://unfss.org/home/objective-of-unfss>.

³⁷⁵ See, for example, United Nations Conference on Trade and Development, Framework for the Voluntary Sustainability Standards (VSS) Assessment Toolkit, https://unctad.org/system/files/official-document/ditctabinf2020d5_en.pdf.

546. In some circumstances, however, sustainability standards may restrict competition. This can occur in three ways in particular: through price coordination, foreclosure of alternative standards, and the exclusion of, or discrimination against certain competitors³⁷⁶.

9.3.2.3. Restriction of competition by object

547. Sustainability standards that are used to disguise price fixing, market or customer allocation, limitations of output or limitations of quality or innovation restrict competition by object.

548. In particular, an agreement between competitors on how to pass on to customers increased costs resulting from the adoption of a sustainability standard in the form of increased sale prices or to fix the prices of products incorporating the standard restricts competition by object. Similarly, an agreement between the parties to a sustainability standard to put pressure directly on competing third parties to refrain from marketing products that do not comply with the standard restricts competition by object. The same applies to agreements between competitors to limit technological development to the minimum sustainability standards required by law, instead of cooperating to achieve more ambitious environmental goals³⁷⁷.

9.3.2.4. Restrictive effects on competition

(a) Soft safe harbour

549. Sustainability standardisation agreements are unlikely to produce appreciable negative effects on competition as long as the following six cumulative conditions are met³⁷⁸:

*First, the procedure 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*³⁷⁹.

*Second, the sustainability standard must not impose on undertakings that do not wish to participate in the standard any direct or indirect obligation to comply with the standard*³⁸⁰.

Third, in order to ensure compliance with the standard, binding requirements can be imposed on the participating undertakings, but they must remain free to apply higher sustainability standards.

*Fourth, the 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.*³⁸¹

³⁷⁶ See paragraphs 442-444 for a more detailed description of the main ways in which standardisation agreements may restrict competition.

³⁷⁷ Commission Decision in Case AT.40178, *Car Emissions* of 8 July 2021.

³⁷⁸ As indicated in paragraph 538, agreements between competitors that limit the participating undertakings' output of the products concerned do not qualify as sustainability standardisation agreements. Such agreements therefore require an individual assessment under Article 101.

³⁷⁹ See paragraph 453 for an explanation of the concept of "transparency" in the standard-setting process.

³⁸⁰ See paragraph 464. In other words, undertakings that do not wish to participate in the standard should not be hindered from continuing to supply the market and consumers with products that meet legal requirements but do not meet the additional requirements created by the new sustainability standard.

³⁸¹ See Section 6.1 on information exchange and in particular paragraph 369.

Fifth, effective and non-discriminatory access to the outcome of the standard-setting process must be ensured. This includes allowing effective and non-discriminatory access to the requirements and conditions for using the agreed label, logo or brand name, and allowing undertakings that have not participated in the process of developing the standard to adopt the standard at a later stage³⁸².

Sixth, the sustainability standard must satisfy at least one of the following two conditions:

- (a) The standard must not lead to a significant increase in the price³⁸³ or a significant reduction in the quality of the products concerned;*
- (b) The combined market share of the participating undertakings³⁸⁴ must not exceed 20 % on any relevant market affected by the standard³⁸⁵.*

550. These conditions ensure that the sustainability standard does not lead to an appreciable restriction of competition (for example, by eliminating less expensive product variants from the market). Moreover, the conditions ensure that the standard does not foreclose alternative standards, or exclude or discriminate against other undertakings, and they ensure effective access to the standard. The condition not to exchange unnecessary commercially sensitive information ensures that information exchanges are limited to what is necessary and proportionate to the standard-setting procedure and that they are not used to facilitate collusion or restrict competition between the parties.
551. As mentioned in paragraph 542, sustainability standards often lead to price increases. However, where the standard is adopted by undertakings representing a significant share of the market, it may allow undertakings to preserve the previous price level or to apply only an insignificant price increase. This will be particularly relevant where the product covered by the sustainability standard represents only a small input cost for the product.
552. Failure to comply with one or more of the conditions of the soft safe harbour does not create a presumption that the sustainability standardisation agreement restricts competition within the meaning of Article 101(1). However, if one or more of these conditions are not met, it is necessary to carry out an individual assessment of the agreement under Article 101. There are different models for standard setting, and undertakings are free to agree rules and procedures that do not infringe the competition rules, even though they may differ from those described in paragraph 549 above.
553. A sustainability standardisation agreement is more likely to promote the attainment of a sustainability objective if it provides for a mechanism or monitoring system to

³⁸² See paragraph 465 and following in Section 7.3.3.2 on the conditions for access to the standard.

³⁸³ The significance of the price increase will depend on the characteristics of the product and of the relevant market.

³⁸⁴ The combined market share of the participating undertakings refers to the market share of the undertakings' products in general in the relevant markets affected by the standard and is not limited to the products that are specifically covered by the sustainability standardisation agreement.

³⁸⁵ The soft safe harbour does not prevent the Commission or a national competition authority from intervening in individual cases where a sustainability standardisation agreement would result in an appreciable restriction of competition in the market, for example, due to the cumulative effect of sustainability standardisation agreements entered into by different undertakings resulting in a significant price increase or a significant reduction in quality.

ensure that undertakings adopting the sustainability standard comply with the requirements of the standard³⁸⁶.

(b) Assessment under Article 101(1) outside the soft safe harbour

554. To assess the effects of sustainability standardisation agreements that do not fulfil the conditions of the soft safe harbour, the factors listed in paragraph 549 should be taken into account as well as the ability for third parties to participate in the agreement.

555. The sustainability standard may still lack appreciable anti-competitive effects because there exists sufficient competition from alternative sustainability labels or standards and/or from products produced and distributed outside any sustainability label or standard. Even if the market coverage of the sustainability standardisation agreement is significant, the constraint exerted by potential competition may still be sufficient, in particular in cases where the sustainability standardisation agreement is limited to establishing a label, leaving the participating firms free to also operate outside the label. In that case, consumers have the choice of buying products that bear the label or other products, possibly produced by the same undertakings, that do not comply with the label, and hence competition is unlikely to be restricted³⁸⁷. In cases where a sustainability standardisation agreement is likely to lead to a significant increase in price or reduction in output, product variety, quality or innovation, the agreement may nonetheless fulfil the conditions of Article 101(3)

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potential competition

9.4. Assessment of sustainability agreements under Article 101(3)

556. A sustainability agreement that restricts competition within the meaning of Article 101(1) can benefit from the exception provided by Article 101(3) if the parties to the agreement are able to show that the four cumulative conditions of that provision are satisfied.

9.4.1. Efficiency gains

557. The first condition of Article 101(3) requires that the agreement 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, 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 innovation³⁸⁸. It therefore allows for a broad range of sustainability benefits resulting from the use of particular ingredients, technologies and production processes to be taken into account.

558. Examples of efficiencies that can be generated by sustainability agreements include the use of less polluting production or distribution technologies, improved conditions

³⁸⁶ The presence of such a monitoring and enforcement system to ensure compliance with the sustainability standard is a factor that will be taken into account when assessing whether an agreement has as its main object the pursuit of a sustainability objective as per paragraph 534.

³⁸⁷ Agreements between competitors that do not contain restrictions of competition by object may also benefit from the *De Minimis* Notice where the aggregate market share of the parties to the agreement does not exceed 10 % on any relevant market affected by the agreement – see paragraph 41.

³⁸⁸ See also paragraphs 48-72 of the Article 101(3) Guidelines. In particular, paragraph 70 states that “By cooperating, undertakings may be able to create efficiencies that would not have been possible without the restrictive agreement or would have been possible only with substantial delay or at higher cost”.