

# **BEST PRACTICES GUIDE**

ON SUSTAINABILITY  
AGREEMENTS

# Competition and Sustainability

**Competition** is an essential tool for incentivising companies to promote more sustainable products or production processes.

Individual production and consumption decisions can sometimes have negative effects on sustainability, that are not offset by regulation (e.g., first-mover disadvantage).

In such cases, **collaboration between companies** can be important to foster sustainability in the many sectors of economic activity.

It is important, however, to ensure that this collaboration is not contrary to Competition Law.

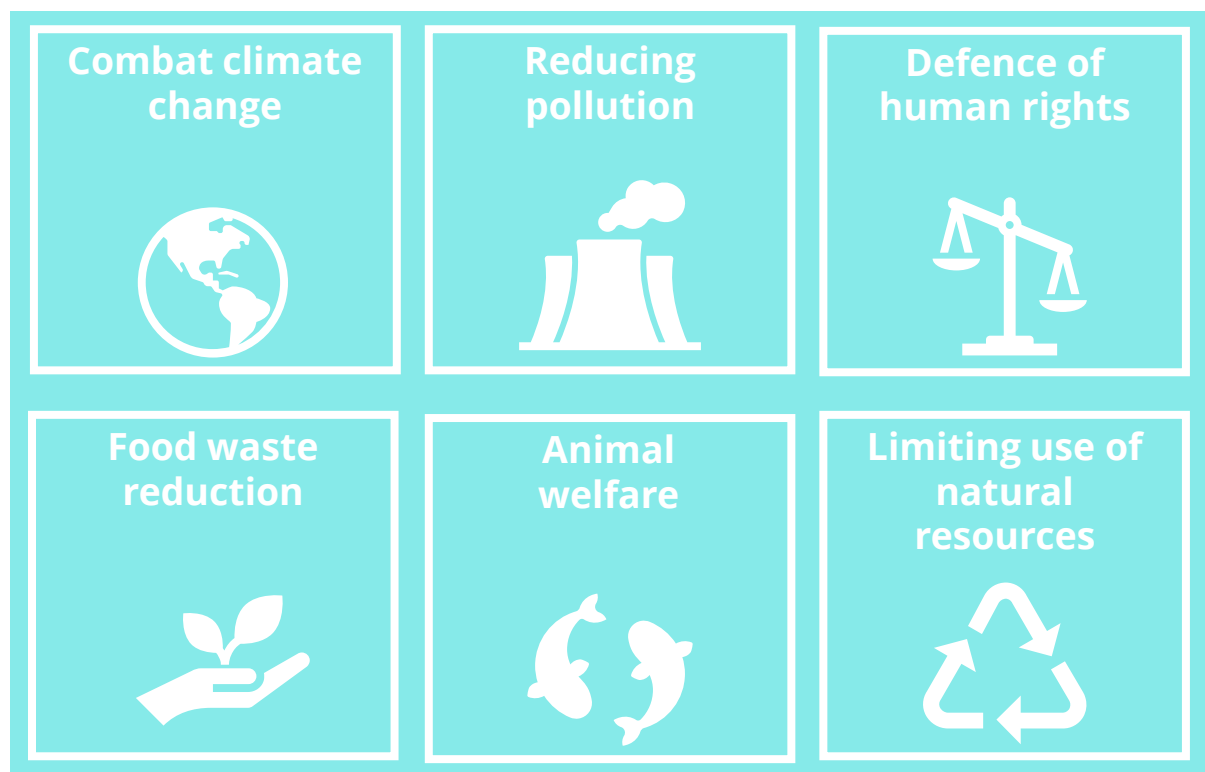
This **Best Practices** is intended to help companies avoid infringing Competition Law when establishing **agreements with sustainability purposes**, as well as providing information on exemptions, safeguards and compatibilities.

# SUSTAINABILITY AGREEMENTS BETWEEN COMPETITORS

In this Guide, «**sustainability agreements**» refers to agreements between actual or potential competitors, with a sustainability objective.

When sustainability agreements negatively affect competition, they must be assessed in accordance with Articles 9 and 10 of the Portuguese Competition Act, and Article 101 (1)(3) of the TFEU («**Competition Law**»).

The concept of sustainability encompasses activities that support **economic, environmental and social** development.



*These are some of the sustainable development goals promoted by the United Nations, adopted by OECD and the EU and identified in the Guidelines of the EC on horizontal agreements .*

# WHO IS THE GUIDE AIMED AT?

Companies and associations of companies wishing to sign **sustainability agreements between competitors**.

# AND WHAT IS ITS OBJECTIVE?

Raise awareness of **best practices** when signing sustainability agreements.

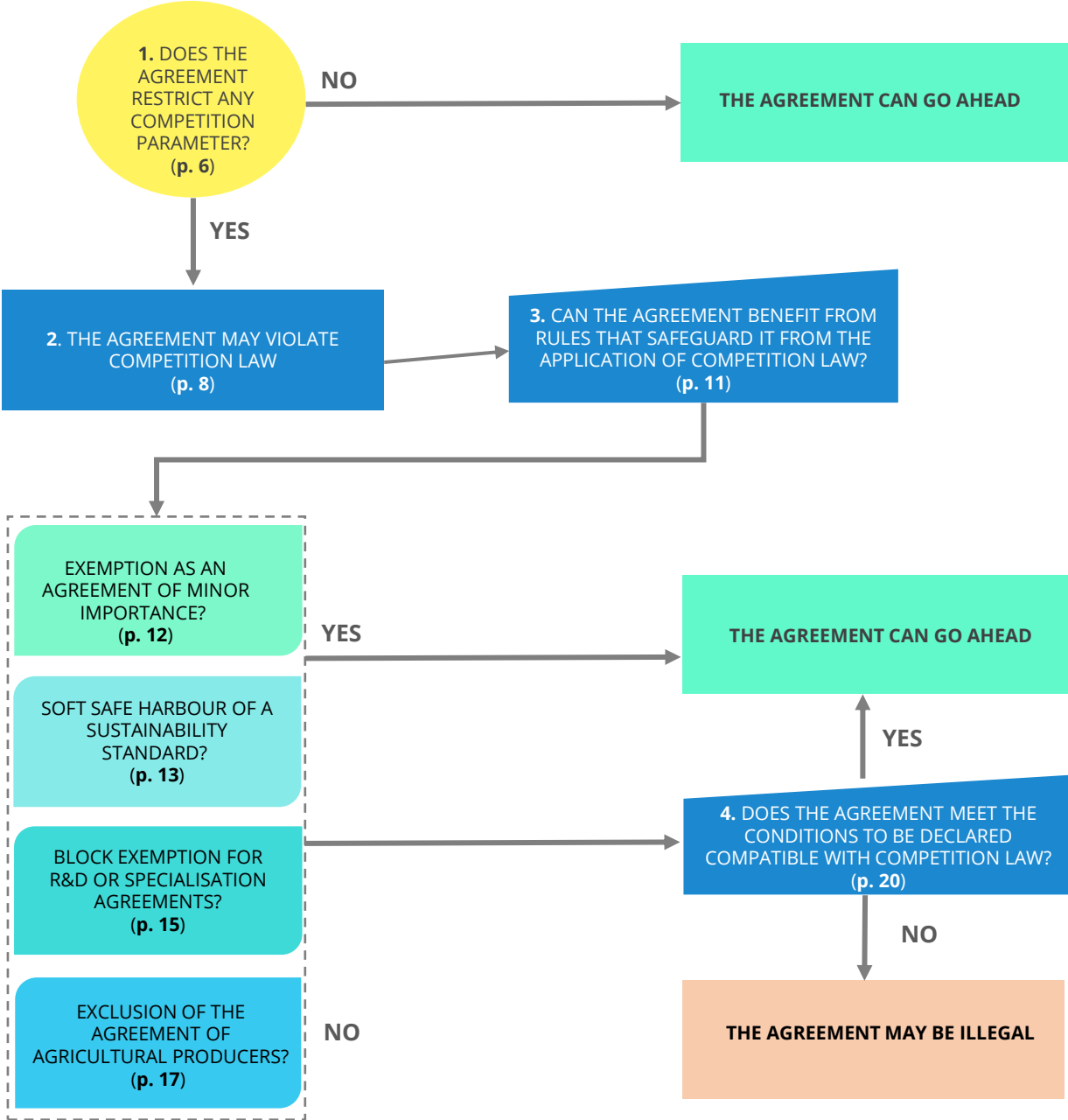
Inform about sustainability agreements **that may not be covered, be exempt or benefit from safeguards**, by Competition Law or even **be declared compatible** with Competition Law.

Inform on competition legislation and guidelines, at national and EU level, relevant to sustainability agreements\*.

Alert into the **risks** of anticompetitive agreements.

**Note (\*)**: Key-Documents (p. 30).

# HOW TO DETERMINE IF THE AGREEMENT IS COMPATIBLE WITH COMPETITION LAW?



# 1

## DOES THE AGREEMENT RESTRICT ANY COMPETITION PARAMETER?

**There are sustainability agreements that are not covered** by Competition Law, so that **can go ahead**.

But for this to happen, a sustainability agreement **must not negatively affect competition parameters**, such as:

- price,
- quantity,
- quality,
- choice or diversity,
- innovation.

Even if an agreement negatively affects one of these parameters, **it can still be exempted or benefit from safeguards or be declared compatible** with Competition Law.



## EXAMPLES OF AGREEMENTS THAT DO NOT INFRINGE COMPETITION LAW

### I. Agreement to **ensure compliance with requirements or prohibitions** in legally binding international treaties, agreements or conventions

For example, an agreement to ensure prohibitions on the use of child labor; or to ensure limitations on the exploitation of certain types of tropical wood or limitations on the use of certain pollutants.

### II. Agreement to influence **internal corporate conduct**, without restricting companies' strategic decisions

For example, an agreement to eliminate single-use plastics from commercial facilities; or to not exceed a certain ambient temperature in their buildings; or to limit the volume of documents they print.

### III. Agreement to **create a database** on the sustainability of value chains, production processes or supply inputs

For example, an agreement to create a database that contains information about suppliers who: respect labor rights; use sustainable production processes; provide sustainable inputs or information about distributors who market products sustainably.

It cannot prohibit or force the purchase of suppliers, sales to distributors, involve the exchange of commercially sensitive information, or identify current or future suppliers.

### IV. Agreement for **awareness-raising campaign** on the environmental impact or other negative externalities of consumption habits


For example, an agreement regarding an industry-wide or consumer awareness campaign to raise awareness about animal welfare. It cannot involve joint advertising.

Examples based on the EC Guidelines for horizontal co-operation agreements, Chapter 9 - Sustainability agreements.

## 2

# CAN THE AGREEMENT VIOLATE COMPETITION LAW?

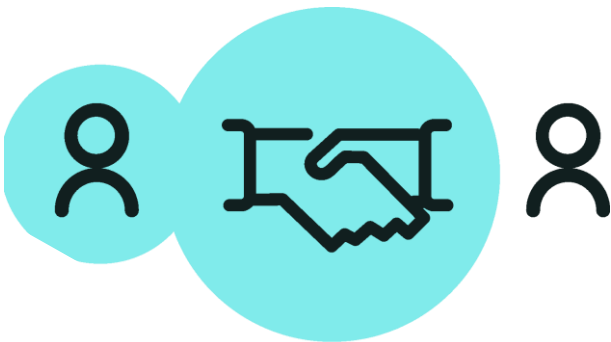
When a sustainability agreement affects at least one competition parameter, it is necessary to assess whether:

 It shows a **sufficient degree of harm to competition**, for example, if it involves price fixing, allocation of markets or customers, limitation of production or innovation, or exchange of strategic and sensitive information.

 There **are pro-competitive effects** that could call into question, with reasonable doubt, this restriction on competition.

In case of **reasonable doubt** as to the degree of harm to competition, it must be assessed whether the agreement leads to significant negative effects on competition. In particular, the following must be considered:

- the market power of the companies;
- whether the agreement limits the companies' autonomy in their strategic decisions;
- the market coverage of the agreement;
- whether commercially sensitive information is exchanged; and
- whether the agreement results in a considerable increase in prices or a significant reduction in output, variety, quality or innovation.



Sustainability agreements **cannot disguise a cartel** by simply referring to a sustainability objective.



## **AGREEMENT THAT VIOLATES COMPETITION LAW**

“ADBLUE” CASE, EUROPEAN COMMISSION (2021)

The EC has fined 5 car manufacturers for **colluding to prevent the development of technologies to reduce car pollution.**

**The companies deliberately chose to avoid competition** in the development of technologies to reduce car pollution beyond what was required by the EU.

Between 2009 and 2014, held regular technical meetings, exchanged commercially sensitive information and agreed on the sizes and ranges of AdBlue tanks and on a common understanding of the estimated average consumption of AdBlue in their vehicles.

Companies cannot evade a restriction of competition under the guise of legitimate technical co-operation.

The EC considered that the agreement between these car manufacturers constituted a **restriction of competition.**

**Source:** European Commission Decision of 08.07.2021, Case ref. AT. 40178 - Emissions from motor vehicles.

## AGREEMENT THAT VIOLATES COMPETITION LAW

### "FLOOR COVERINGS" CASE, FRANCE (2017)

The French Competition Authority fined 3 companies and one association of companies for various practices restricting competition, including a non-competition agreement concerning communication relating to the environmental performance of their products.

**Manufacturers could only report the environmental performance of their products on the basis of the average values** adopted at the association level. By refraining from reporting based on individual data, specific to each manufacturer, companies gave up competing on the merits of their respective products.

Individual information could have enlightened consumers, especially as there was growing awareness at the time of the impact of air quality on human health, as a result of emissions from PVC floor coverings.

This agreement may have acted as a **disincentive to improve technical performance and innovation.**

The authority considered that the **various practices of this agreement together constituted a restriction of competition.**

**Source:** Decision of *Autorité de la Concurrence*, 18.10.2017, Ref. "*Décision n.° 17-D-20 - Relative à des pratiques mises en œuvre dans le secteur des revêtements de sols résilients*".

### 3

## CAN THE AGREEMENT BENEFIT FROM RULES THAT SAFEGUARD IT FROM THE APPLICATION OF COMPETITION LAW?

EXEMPTION AS AN AGREEMENT OF MINOR IMPORTANCE?

The agreement fulfils the **conditions** for exemption as a minor or *de minimis* agreement. (p. 12)

SOFT SAFE HARBOUR OF A SUSTAINABILITY STANDARD?

The sustainability standardisation agreement meets the **conditions** to benefit from a soft safe harbour. (p. 13)

BLOCK EXEMPTION FOR R&D OR SPECIALISATION AGREEMENTS?

R&D and specialisation agreements meet the **conditions** to benefit from block exemption categories (p. 15)

EXCLUSION OF THE AGREEMENT OF AGRICULTURAL PRODUCERS?

The agreement of agricultural producers fulfill the **conditions** to benefit from exclusion (p. 17)

## WHEN CAN AN AGREEMENT BENEFIT FROM A SAFE HARBOUR AS A *DE MINIMIS* AGREEMENT?

Agreements of minor importance (or *de minimis*), can benefit from a **safe harbour** if they cumulatively fulfil a number of conditions, including:

01

**Threshold of the parties' aggregate market share: not exceeding 10%** in any of the markets affected by the agreement.

02

**Do not have the aim of preventing, restricting or distorting competition.** For example, agreements that do not contain hardcore restrictions, such as price fixing for the sale of products to third parties; limitation of production or sales; or allocation of markets or customers.

# WHEN CAN A SUSTAINABILITY STANDARDISATION AGREEMENT BENEFIT FROM A SOFT SAFE HARBOUR?

A **sustainability standardisation agreement** between competitors may, for example, involve:



The specification of requirements that producers, distributors or retailers must comply with regarding sustainability parameters;



The creation and use of a **label, logo, quality seal or brand**.

To benefit from a soft safe harbour, sustainability standards must fulfil the following **cumulative conditions**:

**1** **Transparent standard-setting process**, ensuring that all interested parties can participate.

**Non-imposition of compliance obligations on non-members.**

**2**


**3** **Freedom for the parties to apply more demanding standards** than the binding ones.


**No exchange of strategic and sensitive information**, unless it is necessary and proportionate for the standard-setting process.

**4**

**5** **Effective and non-discriminatory access** to the results of the standard-setting process, ensuring that non-members can adopt the standard at a later date.

The standard must fulfil at least one of the 2 conditions:

 The standard must not lead to a significant increase in the **price** or a significant reduction in the **quality** of the products.

 The combined market share of the parties **must not exceed 20%** in any relevant market affected by the standard.

**6**

If any of these conditions are not met, it will be necessary to assess, on a case-by-case basis, whether the sustainability standard can be compatible with Competition Law.

# EXAMPLES OF SUSTAINABILITY STANDARDISATION AGREEMENTS THAT BENEFIT FROM THE SOFT SAFE HARBOUR

## Sustainable label

An NGO and fruit traders have set up a label for tropical fruits that come from producers who do not make use of child labour.

These fruit traders remain free to trade fruits under other labels or without labels. Labelled fruit is more expensive but valued by certain consumers. The market shares of labelled fruit traders do not exceed the 20% threshold.

Participation is voluntary and non-exclusive, there is no exchange of sensitive information (e.g. prices, production volumes, margins) and there is no definition of surcharges or binding minimum prices.

**The agreement fulfils the soft safe harbour conditions and is unlikely to lead to appreciable negative effects on competition.**

## Packaging standard

An NGO and breakfast cereal producers have agreed on a standard to limit excess packaging material to a maximum of 3%. They have made their decision public.

Packaging costs fell by 10%, the wholesale price of cereals fell by 0.5%, and the retail price fell by around 0-0.5%.

The agreement allows everyone to adopt the standard without imposing an obligation to do so and does not involve the exchange of sensitive information.

The agreement does not affect competition between cereal producers on the parameters of price, quality and innovation.

**The agreement fulfils the soft safe harbour conditions and is unlikely to lead to appreciable negative effects on competition.**

Examples based on the EC Guidelines for horizontal co-operation agreements, Chapter 9 - Sustainability agreements.

# WHICH AGREEMENTS CAN BENEFIT FROM A BLOCK EXEMPTION?

Research and development (R&D) and specialisation agreements with a sustainability objective can benefit from an exemption from the application of Competition Law (the Block Exemption Regulations - BER) **if they meet, among other conditions\*, the following cumulative ones:**

01

## Market share thresholds:

- **Joint R&D agreements or against remuneration**, with joint exploitation: combined share  $\leq$  **25%**;
- **Specialisation agreements**, where the products of the specialisation are final products: combined share  $\leq$  **20%**;
- **Specialisation agreements**, where the products of the specialisation are intermediate products: **(i)** combined share  $\leq$  **20%** in the markets of the products of the specialisation; **(ii)** combined share  $\leq$  **20%** in the downstream markets.

02

**Do not have as their object hardcore restrictions.** E.g. price fixing, limitation of production or sales, or allocation of markets or customers. There are exceptions to these restrictions.

03

**No elimination of competition following its application.** The EC and the AdC have a review mechanism that allows them to withdraw the benefit of the exemption in individual cases with effects after this decision. This mechanism can be activated if the agreement restricts competition and is not compatible with Competition Law. For example, due to:

- **R&D agreements:** granting an exclusive license to one of the parties for production; refusal to grant licenses of R&D results to third parties.
- **Specialization agreements:** existing links between the parties and other market participants.

If none of these or other BER conditions are not met, it will be necessary to assess whether the agreement restricts competition and, if so, whether it can be compatible with Competition Law.

**Note (\*):** For more information, see BER R&D and BER Specialization (Key Documents, p. 30).



# EXAMPLES OF RESEARCH AND DEVELOPMENT AND SPECIALISATION AGREEMENTS

## Cooperation in R&D and the environment

A group of competing companies that manufacture components for motor vehicles, with a combined share of 35%, set up a **joint venture to improve the environmental performance of a component to emit less CO<sub>2</sub>**.

**The cooperation cannot benefit from the block exemption** because the joint market share exceeds the 25% threshold.

The agreement is unlikely to restrict competition, e.g., because (i) there are 3 other manufacturers with a history of innovation; (ii) the component has a short life cycle; and (iii) the companies continue to produce components independently.

**The agreement may be compatible with Competition Law.** The development of an improved version of the component constitutes an objective efficiency gain that is likely to be passed on to consumers. The pooling of R&D efforts is likely to be indispensable to achieving this efficiency.

A group of competing companies, with a combined share of 10%, enter into an **agreement to share infrastructures in order to reduce the environmental impact of a joint production process for intermediate products**.

**If it does not** involve price fixing, market or customer allocation or the limitation of production or innovation, the **cooperation may benefit from the block exemption** because the combined market share of the intermediate products does not exceed the 20% threshold.

## Cooperation in specialisation and the environment

# WHEN CAN AGREEMENTS OF AGRICULTURAL PRODUCERS BE EXCLUDED FROM COMPETITION LAW?

**Agreements of agricultural producers with a sustainability goal** may benefit from an **exclusion** from Competition Law (Article 210a of the CMO Regulation - Common Organisation of Agricultural Markets). This exclusion applies to vertical and/or horizontal agreements.

To this end, the agreement must respect the following **cumulative conditions**:

1

**Include at least one agricultural producer** (e.g. individual or a producer organisation).

2

**Include agricultural products** from Annex I of the TFEU and be related to their production or trade.

3

**Contribute to at least one of the following sustainability objectives:**

- i. **Environmental protection**
- ii. **Production of agricultural products** with pesticide reduction and risk management, or reduction of the danger of antimicrobial resistance.
- iii. **Animal health and animal welfare.**

4

**Applying a higher sustainability standard** than that required by EU or national law.

5

**Be indispensable for achieving the sustainability objective** (it must not be possible for the parties to achieve it individually).

6

**Do not eliminate competition after its application.** The EC and the AdC may decide to modify, terminate or prevent its application in order to avoid eliminating competition, with effects after this decision. For example, if it leads to the exclusion of competing products that can satisfy a substantial part of the demand.

If any of these conditions are not met, the agreement may still benefit from other standards (block exemption or demonstration of efficiency gains, that make it compatible with Competition Law).

**Note (\*):** only agricultural products listed in Annex I of the TFEU are considered.

# WHEN CAN AGREEMENTS OF AGRICULTURAL PRODUCERS BE EXCLUDED FROM COMPETITION LAW?

## EXAMPLES

Pear producers and a group of wholesalers have reached an agreement to eliminate the use of chemical treatments, but this results in a greater risk of the pears becoming tainted and therefore greater food waste,

In order to ensure the good condition of pears, wholesalers need to adapt storage conditions.

Sustainability improvements concern both the production and trade of agricultural products.

**The agreement may benefit from the exclusion, including changes to wholesalers' storage.**

**Agreement covered by the exclusion**

**Agreement not covered by the exclusion**

60% of turkey meat producers agree to adopt an animal welfare standard that goes beyond the mandatory legislation.

Producers agree with buyers on a price increase of 150% compared to non-sustainable turkey meat, to cover the additional costs.

Later, other producers adhere to the agreement. Barriers to the import of turkey meat limit the amount of imported non-sustainable turkey meat on the market.

As a result, non-sustainable turkey meat is no longer available and between 45% and 50% of consumers are no longer able to buy any turkey meat.

**The agreement does not benefit from exclusion because it may constitute an elimination of competition.**

Examples based on the EC Guidelines on the exclusion from Article 101 TFEU for sustainability agreements of agricultural producers pursuant to Article 210a of CMO Regulation.

## AN AGREEMENT BETWEEN AGRICULTURAL PRODUCERS THAT VIOLATES COMPETITION LAW

CASE "AGRARDIALOG MILCH" - GERMANY (2022)

The German competition authority analysed an agreement between an association of milk producers and its members to introduce standardised surcharges on the basic price of milk, aimed at covering average production costs and increasing and stabilising prices.

The authority decided that the agreement **did not benefit from the exemption** (Article 210-A of the CMO Regulation), namely because it did not include sustainability standards higher than national or EU legislation.

The authority **concluded that the agreement restricted competition** because it could increase the prices of milk and dairy products for consumers.

**It also concluded that the agreement did not lead to efficiency gains** and that the economic interest in achieving a higher level of income for milk producers cannot, on its own, justify an exception from competition rules.

**Source:** Decision by the *Bundeskartellamt*, of 10.01.2022, Ref. Case B2-87/21, "*Financing concept for a market-compliant and fair distribution of risks and burdens associated with agricultural transformation processes for milk producers*".

# 4

## WHEN CAN AN AGREEMENT RESTRICTING COMPETITION BE COMPATIBLE WITH COMPETITION LAW?

A sustainability agreement that restricts competition can be **justified and declared compatible with Competition Law**.

For that purpose, the parties must demonstrate that four **cumulative conditions** are met.

The burden of proof for the fulfilment of the four cumulative conditions lies with the parties to the sustainability agreement.

01

Proven the **efficiency gains** of the sustainability agreement?

02

Proven the **indispensability** of the sustainability agreement?

03

Proven the **pass-on** of the efficiency gains **to consumers**?

04

Proven the **no elimination of competition**?

# AGREEMENTS RESTRICTING COMPETITION CAN BE COMPATIBLE WITH COMPETITION LAW

01

## Proven the efficiency gains of the sustainability agreement?

An efficiency gain may, for example, consist of reducing CO<sub>2</sub> or reducing water contamination in a production process; or in the introduction of more sustainable products.

These efficiency gains must be proven, objective, concrete and verifiable and outweigh harm to competition.

02

## Proven the indispensability of the sustainability agreement?

The agreement must be indispensable to obtain the benefits. For example, it may be necessary to overcome investment difficulties in creating, exploiting and monitoring a label, as well as to overcome first-mover disadvantage.

If these benefits can be achieved without the agreement, then collaboration will not be indispensable.

03

## Proven the pass-on of the efficiency gains on consumers?

Affected consumers should receive a fair share of the benefits, such that the overall effect is at least neutral. These benefits can be:

- A. Individual use value benefits
- B. Individual non-use value benefits
- C. Collective benefits for the society in general

Efficiency gains in related markets can only be accepted:

- If the group of consumers affected and the one benefiting from the efficiency gains are substantially the same;
- If they are significant enough to compensate the affected consumers; and
- If the share of the collective benefits that accrue to the affected consumers is greater than the harm suffered by those consumers.

Duly discounted future benefits are allowed.

04

## Proven the no elimination of competition?

Even if the agreement restricting competition covers the entire sector, competition **must remain in at least one parameter of competition** (price, quantity, quality, variety or innovation).

# EXAMPLES OF THE PASS-ON OF DIFFERENT TYPES OF BENEFITS ON CONSUMERS

These benefits result from a **direct experience** of consuming/using the product. For example:

Vegetables with organic fertilisers can taste better or be healthier than non-organic products. This **increase in quality** can be valued by consumers and compensate for an increase in price.

Individual use value benefits

These benefits result from consumers' **indirect appreciation** of the impact of their sustainable consumption on others. For example:

Consumers may opt for an ecological detergent because it **contaminates the water less**, not because it cleans better or is cheaper; or buy shoes made from recyclable materials because **they contaminate the environment less** and not because they are cheaper.

Individual non-use value benefits

Consumers of more expensive but less polluting fuels are citizens who benefit from **cleaner air**.

There is an **overlap between consumers and citizens**. Cleaner air can be a collective benefit if it offsets the detriment to consumers (e.g. higher prices).

Collective benefits that can be accepted

Consumers of more expensive sustainable cotton clothing, but grown with **less fertiliser and water**, do not enjoy these environmental benefits, as they only occur in the soil, in the area where the cotton is grown. There is **no overlap between the consumers of the garments and the beneficiaries of the environmental gains**.

Collective benefits that cannot be accepted

The **demonstration of benefits** can be done using various methodologies, which can contribute to its substantiation. For example, methodologies that incorporate results from consumer willingness-to-pay surveys, reports from public authorities or recognized academic organizations.

Examples based on the EC Guidelines for horizontal co-operation agreements, Chapter 9 - Sustainability agreements.



## AN EXAMPLE OF A RESTRICTIVE AGREEMENT COMPATIBLE WITH COMPETITION LAW

Almost all manufacturers of washing machines for domestic use have agreed to eliminate from the market, within 2 years, the least efficient machines in classes F to H. These machines account for 35% of sales and have lower costs and prices.

The range of choice available will be smaller and the average price will rise, but it will result in environmental gains in terms of reduced electricity and water consumption.

Studies show that most consumers would recoup the price increase in fewer years than the average life expectancy of machines in classes A to E (via lower water and electricity consumption). Before the agreement, the sector tried to divert demand from classes F to H to classes A to E through **advertising campaigns, but without success.**

The agreement has negative effects on competition, but it **may be compatible with Competition Law:**

1. The average washing machine becomes **more efficient** in terms of energy and water consumption;
2. This efficiency **could not be achieved with a less restrictive agreement** (e.g. advertising campaign);
3. **Consumers obtain a net benefit** (individual use value benefits and collective environmental benefits); and
4. **Competition is not eliminated.** The agreement affects the classes available, and there is competition on other parameters (e.g. price, innovation).

Examples based on the EC Guidelines for horizontal co-operation agreements, Chapter 9 - Sustainability agreements

## **AGREEMENT NOT COMPATIBLE WITH COMPETITION LAW**

### **“CHICKEN OF TOMORROW” CASE - NETHERLANDS (2013)**

In 2013, producers and retailers in the Netherlands agreed to replace meat from ‘broiler chickens’ with meat from chickens raised under better animal welfare conditions. They accounted for 95% of the chicken meat sold in the Netherlands.

The Dutch Competition Authority **concluded that the agreement restricted competition** by leading to higher prices and less choice for consumers.

It also concluded that **the agreement did not generate efficiency gains** and did not lead to net benefits for consumers. The value of the willingness to pay for improved animal welfare conditions was lower than the increase in retail prices. The agreement was not indispensable, as it would have been possible to implement alternative measures, e.g. consumer information campaigns on animal welfare.

**Source:** Decision by the ACM, of 26.01.2015, Ref.: ACM/DM/2014/206028, "ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'".

## WHAT ARE THE IMPLICATIONS OF THE PARTICIPATION OF PUBLIC AUTHORITIES IN THE CONCLUSION OF SUSTAINABILITY AGREEMENTS?

Co-operation between companies and associations of companies with a sustainability objective can be promoted by **public, national or local authorities**, with a view to accelerating a sustainable economy.

However, if public authorities:

01

**Participate in or are merely aware of** the existence of such an agreement: this **does not in itself exclude** the application of Competition Law.

02

Merely **encourage or facilitate** the conclusion of such an agreement, without depriving companies and associations of companies of their autonomy: such an agreement **remains subject** to the application of Competition Law.

03

**Oblige or force** the parties to enter into an agreement in breach of Competition Law: they **will not be held liable**.

# WHAT SHOULD YOU TAKE INTO ACCOUNT WHEN EXPLORING OR INITIATING A SUSTAINABILITY AGREEMENT?

## CHECKLIST

Assess whether the agreement is **necessary to achieve the desired sustainability objectives** (can the company or association of companies do it alone?).

Check whether the agreement negatively affects a **competition parameter** (e.g., price, quantity, quality, choice or innovation).

Check whether the agreement involves **price fixing, allocation of markets or customers, or limitation of output or innovation.**

Ensure that **exchanges of information** do not go beyond what is strictly necessary to pursue the objective of sustainability.

Estimate the **market shares involved** in the agreement and the characteristics of the market.

Assess the possibility of the agreement **benefiting from exemptions or other safeguards**, as well as its competitive risk.

Evaluate whether the agreement can **generate efficiency gains, benefits for consumers and does not fully eliminate competition.**

Evaluate the **self-assessment exercise of the compatibility** of the agreement with competition law at national and EU level.

**PUBLIC  
PROCUREMENT AS  
AN INSTRUMENT  
OF SUSTAINABILITY**

**The National Strategy for Green Public Procurement 2030**

reinforces the inclusion of **ecological criteria** in public purchases of products, services and public works contracts.

In the context of public procurement, including green public procurement, companies can form a joint bidding **consortium** and submit a joint bid in a public procurement procedure.

A consortium between competitors (actual or potential) that **could compete individually** will be, in principle, restrictive to competition.

Such an agreement could be considered lawful under Competition Law if it results in **efficiency gains that outweigh the negative effects**.

Participating jointly does not mean authorisation to carry out a collusive scheme. Such behaviour violates Competition Law at national and EU level.

See Resolutions of the Council of Ministers No. 132/2023 and No. 132/2023 [National Strategy for Green Public Procurement 2030]

## WHAT TO CONSIDER WHEN EXPLORING A CONSORTIUM IN A PUBLIC PROCUREMENT PROCEDURE?

### CHECKLIST

- Assess whether your company has the **capacity to compete alone** before considering developing a consortium in a public procurement procedure.
- Assess whether the parties are **strictly necessary** to carry out the contract.
- Ensure that **exchanges of information** do not go beyond what is strictly necessary and that these exchanges only take place after the consortium has been formed.
- If the parties that are part of the consortium are actual or potential competitors, it is important to ensure that the consortium results **in efficiency gains for the contracting authority** and that the restrictions of competition are offset.
- Ensure that the collaboration within the consortium agreement is limited to the **contract you teamed up to carry out**.
- Evaluate the **self-assessment exercise of the consortium's compatibility** with Competition Law at national and EU level.

## CONSEQUENCES OF AGREEMENTS BETWEEN COMPETITORS THAT INFRINGE COMPETITION LAW

Sustainability agreements that restrict competition and are not compatible with Competition Law, are null and void and subject to fines.

These agreements may be punished with an applicable fine:

- To companies and associations of infringing companies, up to 10% of their revenue.
- To the respective directors and managers, and heads of governing and supervisory bodies, respectively, up to 10% of their annual remuneration.

These anti-competitive agreements are still subject to compensation under the scope of civil liability.

## HELP THE AdC TO AVOID BEHAVIORS HARMFUL TO COMPETITION AND SUSTAINABILITY

C

If you suspect of any anti-competitive agreements between companies, contact the Competition Authority (AdC). The report can be made anonymously:

<https://www.concorrenca.pt/en/faq/how-can-i-report-anti-competitive-practices>

A request for clemency (special regime of dismissal or reduction of fine) may be filed:

<https://clemencia.concorrenca.pt/>



# KEY-DOCUMENTS

## National legislation

- [Law No. 19/2012](#), amended by Law No. 17/2022 [Portuguese Competition Act] (In PT)
- [AdC Guidelines on Case Instruction concerning the application of Articles 9 to 12 of the Portuguese Competition Act and of Articles 101 and 102 of the TFEU \(2023\)](#) (In PT)

## European legislation

- [Treaty on the Functioning of the European Union \[TFEU\]](#)
- [Commission Regulation \(EU\) No. 2023/1066](#) on the application of Article 101(3) of the TFEU to certain categories of research and development agreements [R&D BER]
- [Commission Regulation \(EU\) No. 2023/1067](#) on the application of Article 101(3) of the TFEU to certain categories of specialisation agreements [Specialisation BER]
- [Regulation \(EU\) No. 1308/2013](#) of the European Parliament and of the Council, establishing a common organisation of the markets in agricultural products, amended by Regulation (EU) No. 2024/1143 [CMO Regulation]
- [Commission Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements \(2023/C 259/01\)](#)
- [Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101\(1\) of the TFEU \(2014/C 291/01\)](#)
- [Commission Guidelines on the effect on trade concept contained in Articles 101 and 102 of the Treaty on the TFEU \(2004/C 101/07\)](#)
- [Commission Guidelines on the application of Article 101\(3\) TFEU \(2004/C 101/08\)](#)
- [Commission Guidelines on the exclusion from Article 101 of the TFEU for sustainability agreements of agricultural producers \(horizontal and verticals\) pursuant to Article 210a of Regulation \(EU\) No. 1308/2013 \(C\(2023\) 8306 final\)](#)
- [Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the TFEU that arise in individual cases \(guidance letters\) \(C\(2022\) 6925 final\)](#)

With **competition**, everybody wins.