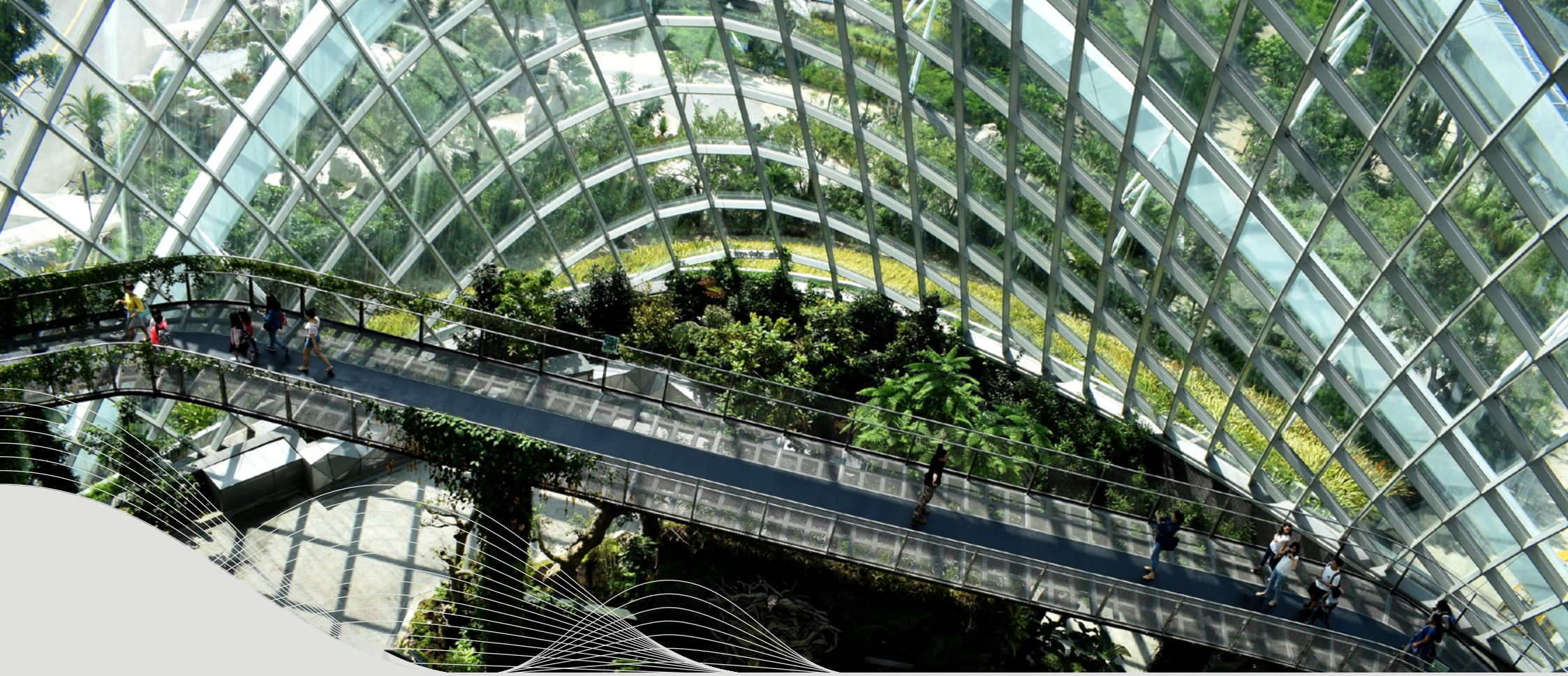


Competition and Sustainability – a comprehensive review of national and supra-national regulation

DLA PIPER

Introduction

Since the launch of the European Green Deal in 2019, sustainability goals and competition policy have become increasingly intertwined.

The European Commission opened the debate and launched several consultations on the role that competition policy must play in supporting the EU's goal of making Europe the first climate neutral continent by 2050. Competition based on the idea of a solo discipline (each company acting alone and in its own interest) is not a natural fit to the aim of jointly achieving agreed sustainability goals. But the discussions and consultations still led to the conclusion that competition law can mostly play a supportive role by allowing cooperation to these ends.

Ultimately, this has taken full shape in the promotion of sustainability via new tools, like the recast of the Commission Block Exemption Regulations on R&D and Specialization Agreements accompanied by the Commission's Guidelines on horizontal cooperation agreements. Some national competition authorities have not been idle in this area and have even taken a very progressive approach in this regard. It's probably even fair to recognise a jurisdictional competition on the best methodology to align competition law and sustainability targets.

This guide provides an overview of recent developments in the EU and in some Member States regarding the implementation of sustainability aspects into competition law. Besides legislative developments, we also look at recent decisional practice and summarise key takeaways.

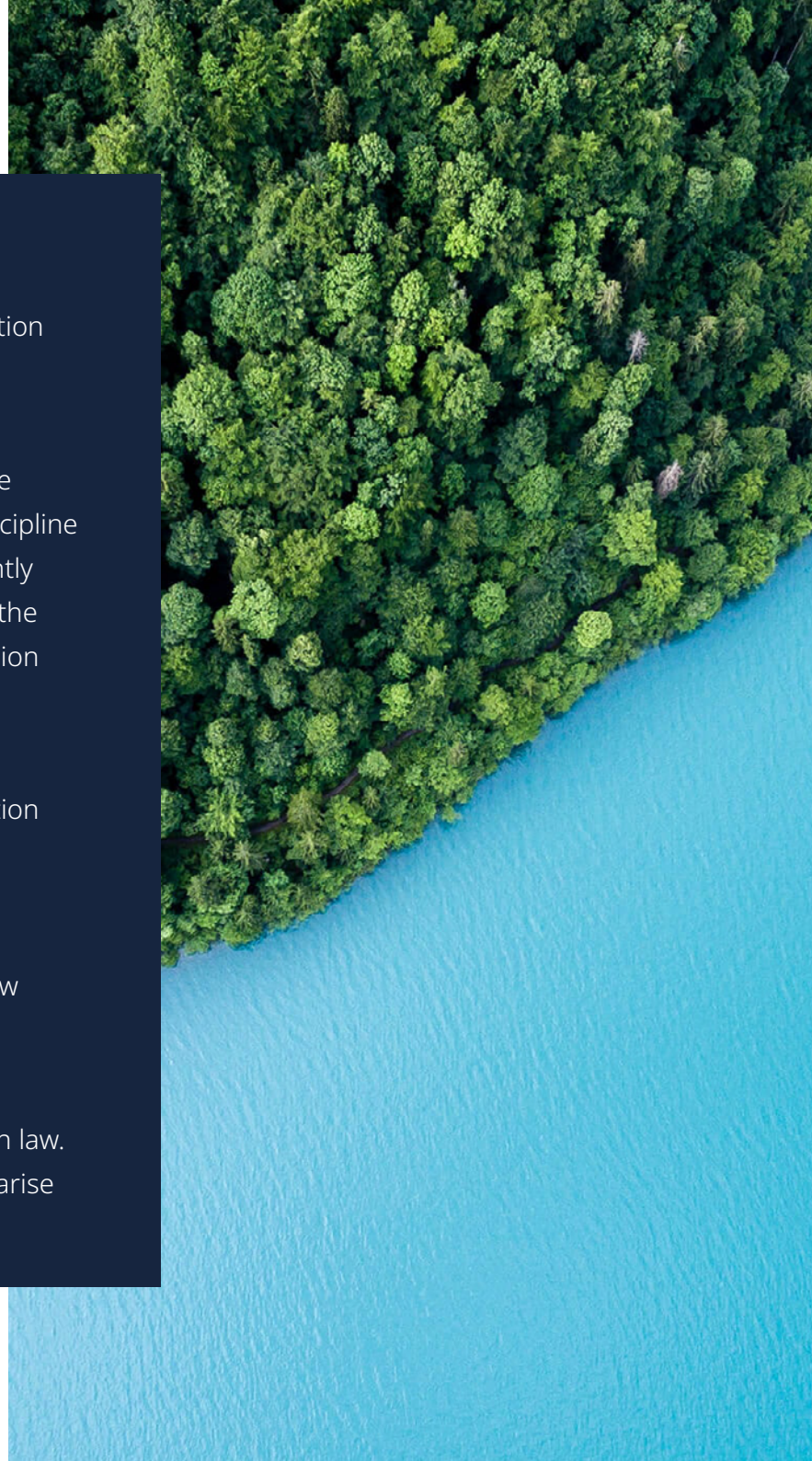
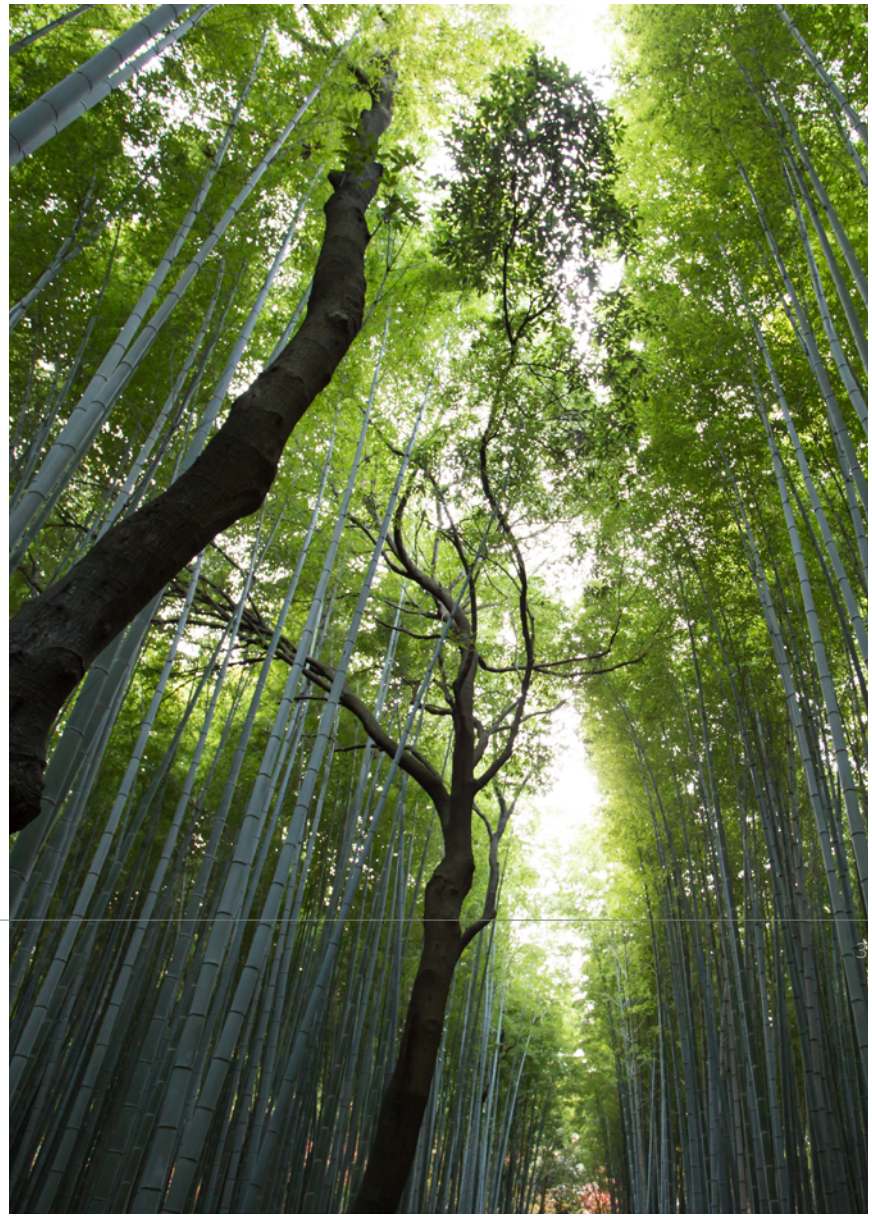


Table of Content



I. European Union

General Principle

Agreements between undertakings that restrict competition are governed by Art. 101 of the Treaty on the Functioning of the EU (TFEU). Art. 101 TFEU provides the criteria for assessing cooperation between competitors, balancing restrictive effects with pro-competitive efficiencies generated by an agreement. If the advantages of an agreement for market and customer outweigh the disadvantages, an exemption will be made. This exemption is either subject to the EU Commission's overall discretion or can be specified through Block Exemption Regulations. For cooperation between competitors, the Horizontal Block Exemption Regulations ("HBERs") can be applicable.

Specific regulation

On 1 March 2022, the EU Commission published two draft revised HBERs on research and development and specialization agreements, which entered into force on 1 June 2023. The EU Commission has also finalized a new version of its accompanying Horizontal Guidelines. The Horizontal Guidelines include a new chapter on sustainability agreements and their assessment under competition law:

- **Sustainability agreements** are defined broadly as any type of horizontal cooperation agreement that genuinely pursues one or more sustainability objectives, irrespective of the form of cooperation.
- **Eligible sustainability objectives** include fighting climate change, the elimination of pollution, respect of human rights, fostering resilient infrastructure and innovation, reduction of food waste, shift to healthy and nutritious food and protection of animal welfare.
- Sustainability agreements will not breach EU competition law if they fall into one of **three camps**:
  - sustainability agreements that **do not raise competition concerns**, i.e., that do not affect competition parameters such as price, quantity, quality, choice, or innovation;
  - sustainability agreements that constitute a sustainability standard and fall into the scope of a "**soft safe harbour**";
  - sustainability agreements that benefit from **individual exemption**.

Contributor

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The "**soft safe harbour**" allows sustainability agreements to be exempted if they meet the following list of cumulative conditions:

- A transparent and open standardization procedure for developing a sustainability standard;
- A voluntary participation in the sustainability standard – there should be no direct or indirect obligation to participate in the standard (however, once adopted, a standard may be binding);
- Participating companies remaining free to adopt higher sustainability standards;
- No exchange of commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption, or modification of the standard;
- Effective and non-discriminatory access to the outcome of the standardization procedure; and
- The sustainability standard meets one of the two following criteria:
  - No significant increase in price or significant reduction in the choice of products because of the standard; or
  - The combined market share of the participating undertakings does not exceed 20 % on any relevant market affected by the standard.

A mechanism or monitoring system to ensure the adoption of and compliance with the standard may increase the likelihood of an exemption. However, an agreement that complies with the conditions is not automatically prevented from being subject to an individual investigation from national authorities or the EU Commission (soft safe harbour).

On the other hand, an agreement's failure to comply with the "**soft safe harbour**" is not automatically presumed to restrict competition. If the conditions are not met, an agreement may still benefit from an individual exemption if it meets four cumulative criteria:

- It generates sufficient and substantiated **efficiencies** (e.g., less pollution, waste); cooperations claiming said efficiency must illustrate it in a substantiated way;
- The benefits are **passed on** to the consumer;
- The restricting agreement is **indispensable** to achieve said efficiency; and
- The agreement does **not eliminate competition**.

For the assessment of whether benefits are **passed on to the consumers**, the Horizontal Guidelines provide that the concept of "consumers" encompasses **all direct and indirect customers** of the products covered by the agreement. Consumers receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the agreement, so that the overall effect on consumers in the relevant market is at least neutral. Therefore, the sustainability benefits that result from an agreement must accrue to the consumers of the products covered by that agreement.

Recent Cases

CASE	DECISION	KEY TAKEAWAYS
Nitrogen Oxide Exhaust Cleaning (07/2021): Four international car manufacturers allegedly conspired to withhold or limit existing exhaust cleaning technology. Over a period of five years, they exchanged information about the development of their own exhaust cleaning systems. The EU Commission concluded the agreement about the actual capabilities of these systems fell behind to what could have been possible with the existing technology at that time.	• The agreement removed uncertainty about future market conduct of competitors by artificially restricting development. • The agreement led to exchange about commercially sensitive information regarding the systems.	This is the first cartel case based on the restriction of technical development and not on price fixing, market sharing or output limitation. The EU Commission considered that the cartel members deliberately reduced innovation and competition on the technical features of the cars by agreeing not to compete on exploiting the technology's full potential above the minimum standards required by EU law.

Comment

With the revised HBERs and the revised Horizontal Guidelines the Commission will have to reconcile the facilitation of forms of cooperation between competitors aiming at tackling climate change on the one hand and the preservation of a competitive environment on the other hand. Agreements and information exchange relating to the improvement of sustainability may therefore come under scrutiny.

II. Austria

General Principle

Restrictions, preventions, or distortions of competition are prohibited under Section 1 (1) of the Austrian Cartel Act. An exemption is set out in section 2 (1) of the Austrian Cartel Act. This exemption states that restrictions of competition which contribute to improving the production of goods or promote technical or economic progress (efficiency gains) while allowing consumers a fair share of the resulting benefit (consumer participation), are exempted, provided that the agreement is indispensable to attain those objectives and that competition in respect of the products in question is not eliminated.

Specific regulation

In 2021, the Austrian Cartel Act underwent a remarkable change by introducing a **new exemption** in section 2 (1) of the Austrian Cartel Act: It is automatically presumed that the prerequisite of the consumer participation is fulfilled, in case the efficiency gains resulting from a cooperation, agreement or concerted practice, contribute significantly to an ecologically sustainable or climate-neutral economy.

Sustainability cooperations, however, remain justifiable under the exemptions of sections 1 and 2 of the Austrian Cartel Act, as well as Article 101 TFEU. As long as these are met, a justification under the new exemption is not necessary (in particular in cases where consumer participation can be established, while ecological benefits may be absent).

In September 2022, following the initiative of the Austrian legislator, the Austrian Federal Competition Authority ("ACA") published non-binding guidelines regarding the practical application of the sustainability exemption. These guidelines aim at facilitating companies' self-evaluation regarding possible sustainability cooperations which are purely national in nature (Note: if there is a community-dimension, EU competition law is applicable).

The guidelines set out examples for behaviours which typically do not violate the cartel prohibition:

- cooperations which only concern internal codes of conduct;
- cooperations between competitors aiming at creating a common database of suppliers using sustainable production processes or distributors using sustainable distribution channels, provided that the list is of open nature and the participating companies are not obliged to purchase or distribute via those suppliers or distributors;

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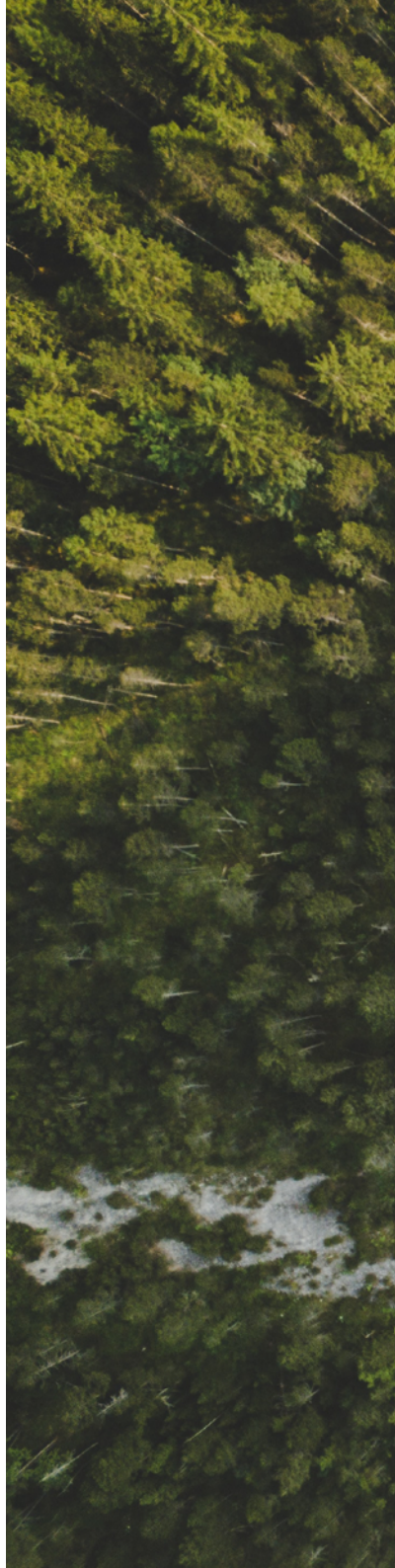

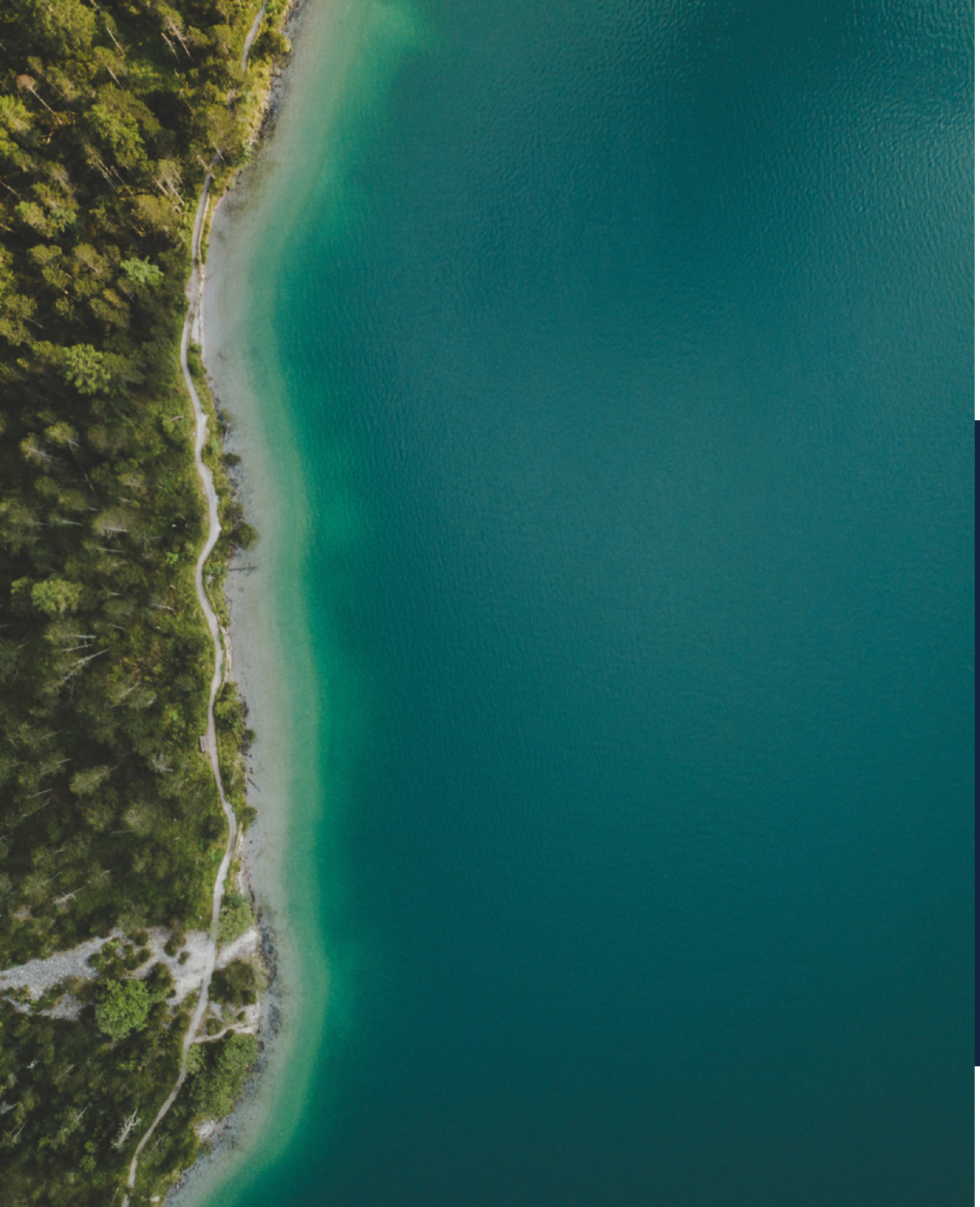

- cooperations between competitors which concern the organisations of industry-wide awareness campaigns provided that they do not lead to the joint promotion of certain products; and
- cooperations between competitors for standardization purposes provided that they are of open nature, non-exclusive character and the participation is voluntary.

Recent cases

In view of the rather recent implementation of the provision, no relevant case law or experience reports for the Austrian market exist yet.

Comment

The guidelines of the ACA explicitly name aspects that are to be considered as "contributing significantly to an ecologically sustainable and climate-neutral economy," for example climate protection, transition to a circular economy or protection or restoration of biodiversity and ecosystems. Efficiency gains need to fulfill a sustainability aspect to be considered as ecologically sustainable. If this is the case, it is presumed that the efficiency gains contribute to the public good, even if generated outside of Austria.

The legislator's aim is to keep applying the general requirements of the de-minimis exemptions while eliminating the prerequisite of direct consumer participation. This means that, in light of the urgent need for action regarding climate protection, consumer participation does not need to occur on the relevant market and can also benefit future generations.

Since the implementation of the Austrian Cartel Act 2005, the sustainability exemption marks the first time that EU and Austrian competition law are not identical (except for the area exemptions in section 2(2) of the Austrian Cartel Act). In cases where a cooperation has a community dimension, i.e., is likely to affect economic transactions between member states, Austrian competition law, and hence the sustainability exemption, is not applicable. In such cases, a parallel application of national and EU competition law will not lead to different outcomes.

III. France

General Principle

In French Competition Law, agreements between companies are governed by Article L. 420-1 of the French Commercial Code. Article L. 420-4 of the French Commercial Code provides an exemption for certain practices that produce general efficiency gains.

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Specific regulation

There are no specific sustainability related guidelines to this date. The French Competition Authority (FCA) intends to publish guidelines on horizontal cooperation that are expected to specify which practices are to profit from the exemption based on their positive effect on sustainable development.

New fines notices established the environmental criterion as a new parameter for assessing the seriousness of the practice.

Recent Cases

CASE	DECISION	KEY TAKEAWAYS
Flooring Sector (2017): The main manufacturers of flooring in France agreed not to compete on the merits of their respective products with regard to environmental criteria.	• Any agreement that has a negative impact on sustainable development should be considered "particularly serious."	Environmental criteria are considered important for the choice of retail customers. Agreements which restrain competition regarding such criteria are harmful to the market.
Road Haulage Sector (2021): Several organisations joined forces to boycott or encourage haulers to boycott new intermediation platforms that offered optimisation services. These services reduced empty returns, and thereby CO_2 emissions.	• This agreement *inter alia* blocks the development of the haulage sector towards being less pollutant and carbon intensive. This negative effect on efficiencies is taken into consideration regarding the calculation of the fine.	The fact that a practice hinders the improvement of the environmental efficiency of a sector can be taken into account in the calculation of a penalty imposed.

Comment

In line with the position adopted in recent years, the FCA intends to maintain its commitment to support sustainable development through its control of anti-competitive practices and mergers. On the business side, there is currently no indication as to whether an agreement between companies can be exempted based on the environmental considerations it would entail. Companies have to wait for the FCA to publish its guidance on horizontal sustainability agreements announced in its roadmap for 2023-2024.

IV. Germany

General Principle

In Germany, restraints of competition are generally prohibited under Section 1 of the German Federal Cartel Act (GWB). Section 2 GWB provides for an exemption from this cartel prohibition for cooperation that leads to efficiency gains and allows consumers a fair share of the resulting benefit, provided the cooperation is indispensable for attaining these benefits.

Specific regulation

So far, neither the German legislator has taken action with regard to special sustainability rules within antitrust laws, nor has the Federal Cartel Office (FCO) published general guidance on how to take sustainability aspects into account in assessing cooperation between undertakings. The FCO's president states the FCO will not publish guidance on this topic but will rather await new provisions to be adopted by the German legislator, which the FCO will then apply. For the time being, the FCO opts for a case-by-case approach when assessing cooperation between undertakings regarding sustainability.

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Recent Cases

CASE

Living wages for bananas (January 2022):

Initiative of the German Society for International Cooperation (GIZ) GmbH and the German retail sector introducing pilot measures to promote living wages across the supply chain of house brand bananas by increasing the share of bananas produced according to living wage standards from an initial 7% in 2023 to 50% in 2025.

DECISION

- Voluntary self-commitment agreed between the participants constitutes coordinated conduct according to Section 1 GWB on a horizontal and vertical level.
- Agreement does not demand standardisation of wages in the producer countries nor establish a compensation or redistribution mechanism.

KEY TAKEAWAYS

In recognising the improvement of living wages as an acceptable sustainability goal, the FCO applied a broad definition of sustainability in the sense of "ESG" in this case which is not limited to purely environmental aspects.

CASE	DECISION	KEY TAKEAWAYS
Increasing animal welfare in cattle fattening industry – "Initiative Tierwohl" (January 2022): Project based on an agreement between the agricultural, meat production and food retail sectors aiming at compensating livestock owners for improving the conditions in which animals are kept. The initiative is mainly financed by the country's four largest food retailers. The central element of the program was the introduction of a label for products that meet certain animal welfare criteria and the introduction of a so-called **animal welfare payment** (obligating payment) to compensate related additional costs for producers. As of May 2023, the payment is no longer obligatory, but voluntary. **Update**: As of 2024 the fixed surcharge "animal welfare payment" will be substituted by a voluntary payment to meet competition concerns of the FCO. The FCO now considers the initiative well established as several imitators and equivalents exist.	• The agreement on paying a standard premium to producers was tolerated for a transitional period due to the project's pioneering nature.	The FCO will be more inclined to consider coordination between undertakings to be compatible with competition law if they have a pilot character. Consequently, the FCO accepts such agreements only for a limited period, after which the agreement will be re-evaluated.
Agricultural dialogue on milk: Agricultural policy project "Agrardialog Milch" proposed an agreed surcharge to the advantage of raw milk producers in the form of a jointly agreed, binding, index-based price mark-up or price stabilization mechanism.	• Agreement violates competition law as surcharge would have been passed along the supply chain all the way down to the consumer. • No sufficient consumer benefit. • Sustainability does not play a role in the proposed financing model. • Proposed model primarily serves interest in a higher income for the milk producers.	Article 210a CMO, although providing for a surprisingly broad sustainability exemption in the agricultural sector, still excludes exemptions for mere price fixing agreements.

CASE	DECISION	KEY TAKEAWAYS
Increasing animal welfare in milk production (March 2022): Proposal by a cross-industry alliance of companies and associations from the agricultural sector as well as dairies and food retailers, which aimed to promote the quality of life of cows by providing financial support to farmers. The core element of the initiative was to introduce a label for products which fulfil animal welfare criteria set by the QM+ program as well as the financing of additional costs incurred through an "animal welfare surcharge" payable to farmers.	• Introduction of the animal welfare surcharge is in line with competition law. • FCO stressed pilot character of the project and limited its acceptance decision until 2024. • FCO found that after this first phase it would have to be reassessed to what extent additional competition elements could be introduced into the initiative.	FCO will be more inclined to consider coordination between undertakings to be compatible with competition law if they have a pilot character (cf. above).
Forum Nachhaltiger Kakao – Initiative for sustainable cocoa (June 2023): Joint initiative of representatives of public authorities, companies of the cocoa and chocolate industry, German retail grocery trade and international NGOs with the objective to help cocoa farmers in Ghana and Côte d'Ivoire earn a living income by encouraging its members to voluntarily commit themselves to individualised minimum prices, quotas and premium systems. However, the initiative does not rely on fixed premiums, but refers to the reference prices established in development aid research.	• For lack of indications that the initiative would incur clear risk of competition restraint (voluntary commitments) the FCO refrained from a detailed examination. • The Initiative does not rely on a system of fixed premiums and information on individual commitments are only published with the names of the producers and regions involved anonymized.	The exemption provided in Art. 210 CMO is not applicable in this case as it specifically applies to environmental and sustainability objectives but not humanitarian ones.

Comment

The FCO's recent decisions hardly contain any new guidance specifically concerning sustainability agreements. So, competitors intending to restrict competition beyond the well-established legal framework have to rely on traditional competition rules and exemptions and their requirements. The German Federal Ministry of Economics and Climate Protection (BMWK) has set itself the goal to increase legal certainty with regard to sustainability aspects in competition law. The anticipated 12th amendment of the GWB focusing on consumer protection and sustainability is expected to come into force in 2024. As a starting point, an expert opinion on compatibility options of antitrust and sustainability has been commissioned and already been published. For the time being, Germany is lagging behind other EU Member States in providing a specific framework for sustainability-related cooperation.

V. Netherlands

General Principle

In the Netherlands, restraints of competition are generally prohibited under Art. 6(1) of the Dutch Competition Act ('MW'). Art. 6(3) MW allows exceptions for anti-competitive agreements that yield efficiencies if certain criteria are met.

Specific regulation

In 2021, the Authority for Consumers and Markets ("ACM") published draft guidelines on sustainability agreements (the "Sustainability Guidelines"), which lay down guidance for undertakings to do a self-assessment to check which possibilities exist for them to conclude sustainability agreements within the boundaries of competition law. More specifically, the guidelines map two main routes for a self-assessment whether an agreement is compatible with competition law:

- how certain agreements without any hardcore restrictions on competition would not violate Art. 101 (1) TFEU (or Art. 6 (1) MW); and
- under which conditions agreements that do fall into the scope of Art. 101 (1) might be exempted because of the sustainability benefits they provide under Art. 101 (3) (or Art. 6 (3) MW).

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Noteworthy is the interpretation of the benefits to the Customer: if a project contributes to the climate goals of the Paris Agreement, the **benefits to all of society can be weighed** in the equation as opposed to only benefits to consumers.

Furthermore, the ACM has introduced good faith protection for sustainability agreements if:

i. the agreement has been discussed with the ACM in advance and the ACM has not identified any major concerns; or

ii. the Sustainability Guidelines have been followed in good faith and the agreement in question has been published.

If these requirements are met, the ACM will not impose fines on the parties to a sustainability agreement, even if the agreement turns out to be anti-competitive.

Recent Cases

CASE	DECISION	KEY TAKEAWAYS
Joint Purchasing Obligation for Green Energy (02/2022): An Agreement between a Dutch wind farm and the Dutch Association for Users of Energies and Water (VEMW) stating that Members of the VEMW are obliged to purchase electricity for several years in exchange for a fixed rate.	• The ACM made clear that if there are enough possibilities for developers of wind farms to buy and sell green energy somewhere else, there was no violation of the competition rules.	The main benefit of this agreement has been security to the investors of the wind farm. Achieving certain sustainability goals has not been put above customers interests in this case and stems rather from the small effect to competition that this agreement has.
CO2 Reduction trough regional Grid-Operators (02/2022): Introduction of a Price for CO2 to make investments into low-carbon technologies more attractive. This agreement would ultimately lead to higher prices for CO2 but is also an incentive for fighting emissions.	• The agreement was found to be exempt from the prohibition under competition law. Even though the collaboration would lead to higher prices for CO2, the benefits would outweigh the costs and a fair share of the benefits would come to consumers. The collaboration would be necessary to gain the benefits with enough residual competition remaining.	This agreement led directly to higher costs for the customer. The ACM recognised that there are benefits outside of pricing that are able to outweigh costs – the customer is compensated through societal benefits. Enough residual competition is believed to remain.

CASE	DECISION	KEY TAKEAWAYS
Storage of CO2 (06/2022): Shell and Total Energies cooperated on an initiative to store CO2 in old gas fields/sell storage capacity. Because of the high investments that had to be made, Shell and Total cooperated on an offer and determination of the storage price. This joint initiative concerned 20 % of the capacity of the pipeline.	• Even though both companies are competitors, according to the ACM's reasoning the collaboration was necessary to successfully launch the project. The ACM took special notice of the environmental benefits towards not only the costumers of both firms, but also towards the climate accord of Paris, which outweighed the negative effects on competition. A key factor was also that the remaining 80% capacity of the pipeline remained open to competition.	The ACM recognises societal benefits next to benefits for customers to legitimise an agreement that would otherwise be considered harmful to competition.
Curbing of illegal pesticides (09/2022): Hundreds of garden centres decided on testing plants supplied to them for the use of illegal pesticides by the suppliers. Suppliers which turn out to use illegal pesticides would be banned by all participants in the initiative.	• The ACM did not find any competition concerns because of the open and transparent nature of the procedure that was foreseen before the banning.	As long as the criteria are transparent, the joint curbing of suppliers that do not comply with certain (sustainability) criteria does not amount to unlawful boycotting.

Comment

The ACM has been known to set the pace in Europe when it comes to allowing sustainability agreements under competition law with sustainability having been one of their core focus areas over the past couple of years. Its (draft) Sustainability Guidelines were the first of their kind – and still one of few – in Europe, and the ACM has backed these guidelines by regularly affirming sustainable initiatives in its decisional practice.

In the Netherlands, the proposed legislative Bill *Room for sustainability initiatives* is still being debated in parliament after having been initiated in 2019 and subsequently in and out of parliament following the changes in government. The aim of the proposed act is to help parties in realising sustainability initiatives by allowing them to have their initiatives transposed into regulations.

VI. United Kingdom

General Principle

Agreements between businesses are governed by Chapter I of the Competition Act 1998. If an agreement is indispensable to the achievement of consumer benefits, it may be permitted even though being otherwise anti-competitive..

Specific regulation

The UK Competition Authority ("CMA") has published a set of guidelines regarding sustainability agreements, *Environmental sustainability agreements and competition law (2021)* ("Draft Sustainability Guidance 2021"). It also gave recommendations to the former Department for Business, Energy and Industrial Strategy (BEIS) in 2022, as to how UK competition laws can accommodate sustainability agreements. Currently, the CMA analyses feedback gained through a public consultation (ended in March 2023) on its draft *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements* ("Draft Guidance on Horizontal Agreements"), which is going to replace the HBERs in the UK – there will be no retainment of EU law in the future.

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Guidance	Key takeaways
Draft Sustainability Guidance 2021	• Standard-setting agreements (environmental, quality) must be fair, reasonable, non-discriminatory and accessible to all competitors on the market on which they operate; standards should not be binding or prohibit exceeding them. • Serious, "by object" infringements: price-fixing, output limitation, market- and customer-sharing as well as bid-rigging are almost always incompatible with competition rules (no green-washing of illegal anti-competitive behaviour). • Exchange of competitively sensitive information may be acceptable if contributing to aggregated, market-wide statistics collected by third parties to display general market behaviour.
The Advice to the Government	• Published as a reaction to the request for clearer guidance. • Guidance on concept of "fair share" of benefits and efficiencies for consumers: Benefits seen by a **group of consumers wider than just those adversely affected by the restriction** of competition can be **taken into account** in the "fair share" assessment, as **the consumers that are directly affected can still capitalise on these wider societal benefits**. Effectively extend sustainability agreements far beyond European provisions.
Draft Guidance on Horizontal Agreements	• Covers a variety of interactions and agreements between direct competitors, e.g., production agreements, bidding consortia, purchaser agreements, information exchange, standardisation agreements and standard terms and conditions set by trade associations. • Joint distribution agreements can help attain sustainability benefits and production agreements can bring efficiencies through the development of new sustainable products.

Comment

Further consultation and guidance can be expected on when sustainability agreements will not restrict competition or benefit from an exemption, the concept of sustainability "benefits" and what constitutes a "fair share" of those benefits for consumers. In terms of sustainability benefits, the CMA indicates it will depart from traditional thinking with respect to its approach to climate change – which it recognises as a significant threat of public concern – and that it will adopt the wider approach to consumer benefits explained above. In March 2022, the CMA established a sustainability taskforce to be its focal point on policy issues and lead the engagement with relevant stakeholders and develop formal guidance. The CMA is also open to providing assurances to businesses on the circumstances in which the competition law prohibition will not apply to their collaborative initiatives, or on the interpretation of its guidance where it does. Notably, the CMA is keen to use this process as a way to understand its options and the solutions to the concerns and risks faced by the business community. The CMA is aware of the need for clear guidance and is prioritising the input of businesses in helping to formulate its guidance and approach.

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