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SUSTAINABILITY AND ANTITRUST

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Sustainability and Antitrust

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Editors' Note

By Leonardo Rocha e Silva and Miguel Del Pino[1]

As the world is facing unprecedented environmental, social, and economic challenges, there is a growing demand for cooperation and innovation to achieve sustainability goals, such as reducing greenhouse gas emissions, promoting circular economy, and ensuring social justice. However, at the same time, sustainability agreements may restrict competition. Therefore, there is a need to ensure that such cooperation and innovation does not harm competition and consumer welfare or create barriers to entry and innovation for new or smaller players. The intersection of sustainability and antitrust law is one of the most topical and complex issues that businesses, regulators, and society are facing nowadays.

It is clear that there is a correlation between sustainability and antitrust, but there is a lack of a coordinated approach by agencies around the world to translate that correlation into a common understanding of antitrust policy.

The first country to incorporate sustainability benefits into antitrust analysis was Austria, which introduced the "world's first green exemption" in antitrust law, specifically enacted to promote environmental progress as this directly relates to consumer welfare. Previously, China had enacted an Anti-monopoly Law that included a public interest exception for "serving public interests in energy conservation, environmental protection and disaster relief." After these first moves, 2023 could be defined as a "green antitrust year", with sustainability related antitrust law developments in many jurisdictions.

While these initiatives are positive, companies considering a sustainable collaboration should be very mindful of the geographical scope of such collaboration to benefit from a legal exception rule, since different antitrust authorities have different approaches. At this point, it seems that it is more trustworthy for companies to evaluate the case law, regardless of whether there are different guidelines, considering that the principles adopted in the case law will most likely be referenced in their soft law.

In this context, this issue of the Perspectives on International Antitrust Magazine provides an overview of the current state of play, the recent developments and the prospects of environmental sustainability and antitrust law in various jurisdictions. Some of the questions that the authors of this issue address, from different angles and jurisdictions, are: How can antitrust law and policy accommodate and support environmental sustainability initiatives, while maintaining its core objectives of protecting and promoting competition? How can antitrust authorities and courts balance the short-term and long-term effects of sustainability agreements, mergers, and conduct on the relevant markets and society as a whole? How can antitrust law and policy evolve and adapt to the changing realities and expectations of the green transition, while ensuring legal certainty, consistency, and transparency for businesses and consumers?

[1] Leonardo Rocha e Silva is the co-chair and Miguel Del Pino is a former Co-Chair and a member of the International Antitrust Committee of the ABA International Law Section.

The 20 articles in this issue cover a range of topics such as:

- The role of the European Commission and the national competition authorities of the EU Member States, including Germany, Spain, Greece, the Netherlands, and Portugal, in aligning competition rules with sustainability goals, as reflected in the revised Horizontal Guidelines and the national guidelines and cases on sustainability agreements and mergers.

- The approaches and challenges of integrating sustainability into antitrust law in other jurisdictions, such as Australia, Brazil, Canada, Chile, China, Colombia, India, Mexico, New Zealand, Singapore, South Africa, Argentina, and the US, highlighting the similarities and differences in the legal frameworks, the enforcement practices, and the policy debates.

- The implications and risks of sustainability cooperation and shareholder stewardship for antitrust law, especially in the context of the lawsuit filed by 11 US State Attorneys General against BlackRock, State Street Corporation, and Vanguard Group, alleging antitrust violations related to their cooperation as shareholders in coal companies to reduce coal production.

- The potential reforms and strategies for achieving a proactive global consensus among antitrust agencies on sustainability agreements, such as international forums and working groups, research and analysis, case studies and workshops, and best practices guides.

This issue demonstrates that sustainability and antitrust law are not necessarily in conflict, but can be complementary and mutually reinforcing, if applied with flexibility, proportionality, and pragmatism. Furthermore, it offers valuable insights, perspectives, and recommendations for businesses, regulators, courts, academics, and practitioners who are interested in or involved in this fascinating and important field.

We hope that this issue encourages further discussion and debate on sustainability and antitrust law and contributes to the development of a more sustainable and competitive future for all.

We thank all the outstanding authors for their excellent contributions, and the staff of the International Law Section of the American Bar Association, as well as Pilar Moreyra, Delfina O'Farrell and Eliane de Souza Lopes for their support and cooperation for the release of this International Perspectives Magazine; and invite the readers to share their feedback and comments with us and the authors.

Co-Chairs Note

By John Eichlin, Tamara Dini and Leonardo Rocha e Silva

We are pleased to introduce the winter 2025 edition of Perspective on International Antitrust. This insightful issue, edited by Leonardo Rocha e Silva and Miguel del Pino, includes articles from a broad set of jurisdictions. We would like to thank each of the authors for their valuable contributions!

The intersection of sustainability and antitrust law has become an increasingly important topic for policymakers, legal practitioners, and businesses alike. This edition seeks to explore how antitrust frameworks can adapt to the rising tide of sustainability initiatives, balancing the need for robust competition with the imperative of combatting environmental and social crises.

Featuring perspectives from 20 different countries, this collection of articles provides a comprehensive, cross-jurisdictional view of how sustainability is shaping antitrust enforcement and regulatory approaches around the globe. From the European Union's Green Deal to antitrust concerns in emerging markets, the contributions highlight the diverse ways in which different regimes are navigating the tension between fostering competition and promoting sustainable practices.

As businesses and governments strive to meet international climate targets and implement social responsibility measures, the role of antitrust law in facilitating or hindering progress is becoming more pronounced. Our hope is that these articles are not only informative but also inspire further discussion on how competition laws can evolve to support the global shift towards a more sustainable future.

We are grateful to all the contributors for sharing their insights and expertise, offering a truly global perspective on a topic that will shape the future of both competition policy and environmental stewardship.

A final comment about our Committee, the International Antitrust Committee of Section of International Law of the American Bar Association: The International Antitrust Law Committee, through live programs, teleconferences, publications, and policy comments, provides a forum for members to learn about and share competition law developments, influence international competition law and policy, and connect with an interesting, diverse and fun group of professionals from all corners of the globe.

European Union

EU Encourages Competitor Collaboration For Sustainability: Key Considerations For Businesses

By Gabriela da Costa, Niall Lavery, Aurelija Grubytė, Nikolaos Peristerakis, Dr. Annette Mutschler-Siebert and Alexander Rospet of K&L Gates

INTRODUCTION

In June 2023, the European Commission adopted long-awaited revised guidelines on horizontal cooperation between competitors (the 'Horizontal Guidelines'), including a brand-new chapter (Chapter 9) dedicated to sustainability agreements (the 'Sustainability Guidelines')[349]. The Sustainability Guidelines clarify how EU competition rules apply to sustainability agreements, addressing longstanding uncertainties about whether and how competitors can collaborate in the EU to achieve sustainability objectives without infringing the antitrust rules. The new Guidelines present significant opportunities for industry players to jointly tackle major sustainability challenges which are not feasible to overcome at all, or as quickly or affordably, acting alone.

This article examines key features of the EU regime and why market adoption may be slower than the Commission hoped. We also highlight considerations for international businesses collaborating on sustainability initiatives that could impact markets outside of the EU (notably the USA) to ensure appropriate structuring and risk management.

BACKGROUND TO THE EU'S SUSTAINABILITY GUIDELINES

The new Sustainability Guidelines emerge against the backdrop of growing global challenges, including climate change, natural resource depletion, biodiversity loss, and social inequality. The European Union has reaffirmed its commitment to addressing these issues through the European Green Deal introduced in 2019,[350] with the aim of being the world's first climate-neutral continent by 2050, as well as the pursuit of the United Nations Sustainable Development Goals (SDGs).

Acknowledging that these urgent and ambitious goals may require collective action – but that businesses may be reluctant to work together for fear of breaching competition laws – the new Chapter reflects the Commission's commitment that EU law should not stand in the way of legitimate collaborations that aim to achieve sustainability objectives.

The Guidelines recognize that horizontal cooperation can be a means of overcoming market failures not adequately addressed by public policies and regulation. They also acknowledge that cooperation can help to address inertia resulting from "first-mover

[349] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements

[350] The European Green Deal

disadvantage" fears, where early sustainability adopters bear higher costs and risk free-riding by their competitors.

WHAT AGREEMENTS ARE COVERED BY THE SUSTAINABILITY GUIDELINES?

The Sustainability Guidelines define a 'sustainability agreement' as any horizontal cooperation agreement (i.e. agreement between competitors) that pursues a "sustainability objective", irrespective of the form of the cooperation.

With sustainable development a core principle of the Treaty on European Union and a priority objective for the EU's policies, the Sustainability Guidelines provide a broad and inclusive definition of "sustainability objectives" which aligns with the SDGs. These include a wide range of environmental, social and economic objectives such as, among others, addressing climate change (for instance, through the reduction of greenhouse gas emissions), reducing pollution, limiting the use of natural resources, promoting circular economy models, upholding human rights, ensuring a living income and better working conditions, fostering resilient infrastructure and innovation (e.g. measures to adapt to climate-related risks), public health and consumer welfare objectives (such as reducing food waste and facilitating a shift to healthy eating), ensuring animal welfare, and so on.

The breadth of these examples, beyond traditional environmental goals, reflects the European Commission's intention to encourage businesses to consider diverse impacts and contributions toward sustainable development holistically and the positive role that industry collaboration can play in meeting the EU's policy targets in these areas.

HOW IS ANTITRUST COMPATIBILITY OF A SUSTAINABILITY AGREEMENT TO BE ASSESSED?

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between competitors that restrict competition, either "by object" or "by effect", unless they qualify for exemption under Article 101(3).

The Sustainability Guidelines provide detailed guidance for companies to self-assess how to structure and implement sustainability agreements to avoid falling foul of this prohibition.

1. Sustainability agreements that are unlikely to raise competition concerns

The Sustainability Guidelines recognize that not all sustainability agreements between competitors fall within the scope of the Article 101 prohibition. Where such agreements do not negatively affect parameters of competition, such as price, quantity, quality, choice or innovation, the Commission takes the view that they are not capable of raising competition law concerns.

The following non-exhaustive illustrative examples are provided of agreements that will be regarded as falling outside the outside the scope of Article 101:

- ***Agreements imposing restrictions solely aimed at ensuring compliance with legally binding international treaties, agreements, or conventions*** that impose mandatory obligations on the parties (for example, compliance with fundamental social rights or prohibitions on the use of child labor, deforestation, use of certain pollutants, and production or importation into the EU of products contrary to legal requirements). The Guidelines note that such agreements may be an appropriate measure to enable companies 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.

  With companies coming under increasing obligations in the EU, such as the Corporate Sustainability Reporting Directive (CSRD) adopted in November 2022 and the Corporate Sustainability Due Diligence Directive (CSDDD) adopted in May 2024 (among others), the Guidelines present a significant opportunity for industry players to seek to meet their legal obligations more quickly and affordably than is possible alone.

- ***Agreements that do not concern the economic activity of competitors but only their internal conduct***. For example, competitors may seek to improve their industry's environmental reputation by agreeing to eliminate single-use plastics or reduce energy usage at their business premises.

- ***Agreements to set up a database containing general information about suppliers that have (un)sustainable value chains, provided the agreement does not forbid or oblige the parties to deal/not deal with such suppliers/distributors***. For example, a database can be set up identifying suppliers that respect labor rights or pay living wages, use (un)sustainable production processes, or supply (un)sustainable inputs, or naming distributors that market products in a(n) (un)sustainable manner. The Commission recognizes that such limited forms of exchange of information may again help undertakings to fulfil their sustainability due diligence obligations under national or EU law.

- ***Agreements between competitors relating to the organization of industry-wide awareness campaigns***, or campaigns raising customers' awareness of the environmental impact or other negative externalities of their consumption. These will not trigger Article 101 provided they do not amount to joint advertising of specific products.

The Sustainability Guidelines thus provide substantial opportunity for companies to collaborate with their competitors in many was with low legal risk to address common sustainability challenges. To avail themselves of these opportunities

without triggering antitrust risk, parties to a potential sustainability agreement should ensure that appropriate protocols are put in place to prevent the exchange of competitively sensitive information between the parties, which would remove the collaboration from this low-risk category. These can include training members in competition law compliance, ensuring data collection and aggregation by an independent third party, document creation and meeting protocols, review of meeting agendas and supervision by competition counsel, and so forth.

2. **Assessment of sustainability agreements that do fall within Article 101(1)**

Where sustainability agreements negatively affect one or more parameters of competition, they have to be assessed under Article 101(1) TFEU. Specifically, it needs to be assessed whether they might amount to a restriction of competition "by object" or "by effect".

a. **Sustainability agreements restricting competition by object**

Certain agreements and practices between competitors (such as price fixing, market or customer allocation, limitations of output, limitations of quality or innovation, group boycotts or competitive information exchanges) are generally considered "by object" restrictions under EU competition law. These kinds of restrictions are typically, by their very nature, considered inherently harmful to competition, such that the harm is presumed and it is not necessary for the Commission to prove their anti-competitive effects to find an infringement of Article 101(1) TFEU.

The Sustainability Guidelines warn that agreements that restrict competition cannot escape the prohibition laid down in Article 101(1) simply by referring to a sustainability objective, and that a "sustainability agreement" used to disguise anti-competitive restrictions of the above nature will amount to a by object restriction attracting high antitrust risk. Examples include agreements with the object of:

- fixing, raising, or stabilizing prices for eco-friendly products or products meeting a sustainability standard, claiming this offsets the higher costs of production;
- restricting sales of certain environmentally harmful or sustainable products to specific regions or consumer segments;
- agreeing how to pass increased costs resulting from the adoption of a sustainability standard onto customers;
- limiting technological development to the minimum sustainability standards required by law, instead of cooperating to achieve more ambitious environmental goals;
- intentionally foreclosing firms from the market (e.g. agreeing not to deal with suppliers not using specific sustainability processes); and
- exchanging competitively sensitive information which is not necessary for the achievement of the sustainability objective.

However, the Sustainability Guidelines provide that where the parties to an agreement substantiate that the main object of the 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, the agreement's *effects* on competition will have to be assessed. In other words, whereas in a non- sustainability context an object restriction might automatically be presumed in the presence of an agreement on pricing (etc.), the Commission is obliged to dig deeper and demonstrate sufficiently adverse effects where an agreement on its face pursues a legitimate sustainability goal.

b. **Agreements Restricting Competition by Effect**

Agreements that do not inherently restrict competition (i.e., not by object) may still infringe Article 101(1) TFEU if they produce significant restrictive effects on competition. The assessment focuses on whether the agreement negatively impacts competitive dynamics to an appreciable extent, such as reducing consumer choice, increasing prices, or stifling innovation. However, in such cases, the restriction is not presumed; a detailed effects-based analysis is required considering factors such as:

- The nature and structure of the market (e.g. number of competitors, concentration, market shares, barriers to entry, and market dynamics) - agreements in highly concentrated markets are more likely to have appreciable anti-competitive effects;
- Whether the parties have market power;
- Market coverage of the agreement; and
- The extent of any commercially sensitive information exchange; and
- The agreement's effect on key competitive parameters, such as prices for consumers, output (quantity or variety), quality, or innovation.

Examples from the Guidelines illustrate how agreements can restrict competition by effect:

- Where an agreement between competitors on sustainability standards results in higher production costs and thus leads to an appreciably higher price for consumers;
- Where an agreement appreciably limits competitors from introducing alternative solutions or technologies that meet sustainability goals differently;
- Where competitors agree to phase out certain non-sustainable products (e.g., single-use plastics) but this leads to reduced consumer choice and increase prices if alternatives are limited or costly; and
- If such an agreement involves major market players, it could create significant entry barriers for new competitors who might offer sustainable solutions differently.

To illustrate: An agreement among small firms to adopt eco-friendly practices is unlikely to restrict competition in a meaningful way. Conversely, an agreement among major firms in a concentrated market may have far-reaching effects, including foreclosure of smaller competitors or new entrants.

Soft "safe harbor" for standardization agreements

The Sustainability Guidelines lay down specific guidance for the assessment of sustainability standardization agreements, namely agreements between competitors to develop and adopt standards relating to the sustainability of products or processes (including certification labels and marks). These may include, for instance, standards relating to the phasing out, withdrawing, or replacement of non-sustainable products and processes or the purchase of sustainably produced or less environmentally harmful inputs; harmonizing packaging materials in order to facilitate recycling; adopting zero emission production processes; committing to better working standards; and so on.

As noted above, certain restrictive agreements between the parties to a sustainability standard can amount to serious infringements. However, the Commission recognizes that sustainability standardization agreements can generate highly positive effects for competition, such as enabling the development of new products or markets, increasing product quality, improving conditions of supply or distribution, leveling the playing field (e.g. between producers that are subject to different regulatory requirements), and empowering consumers to make informed decisions (e.g. via sustainability information on labels), thus amplifying the role they play in the development of markets for sustainable products.

Accordingly, the Sustainability Guidelines lay down a "*soft safe harbor*" (effectively an informal legal exemption) for sustainability standardization agreements meeting the following six cumulative conditions:

i. 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.
ii. 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.
iii. 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.
iv. 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.
v. Fifth, effective and non-discriminatory access to the outcome of the standard-setting process must be ensured (including 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 it at a later stage); and
vi. Sixth, the sustainability standard must satisfy at least one of the following two conditions:
    a. It must not lead to a significant increase in the price or a significant reduction in the quality of the products concerned (though notably no guidance is provided on what constitutes "significant"); or

b. The combined market share of the participating undertakings must not exceed 20 % on any relevant market affected by the standard.

An agreement meeting these requirements will be deemed not to have adverse effects on competition within the scope of Art. 101(1). Whilst failure to comply with one or more of the conditions does not automatically create a presumption of non-compliance, the effects of the agreement will then need to be assessed in the usual way.

3. Exemption under Article 101(3) due to overriding benefits

Where a sustainability agreement restricts competition within the meaning of Article 101(1), it may still be compatible with Article 101 if the parties prove the four conditions of the exception provided by Article 101(3) are met:

i. First, the agreement must contribute to **"*objective, concrete and verifiable*" efficiency gains**, i.e. well-substantiated improvements in the production or distribution of goods or technical or economic progress. The Guidelines state that a broad range of sustainability benefits may qualify (for instance, the use of less polluting or more efficient production or distribution technologies, improved production or distribution conditions, better quality products, shorter lead times to bring sustainable products to market, and so on).

ii. Second, the restriction of competition must be **indispensable** to the attainment of the purported benefits – i.e. the agreement and the restrictions are reasonably necessary for the claimed sustainability benefits to materialize, and there are no other economically practicable and less restrictive means of achieving those benefits.

iii. Third, **consumers must receive a fair share** of the purported benefits. This condition is framed more broadly in the Sustainability Guidelines than in the traditional context (which typically requires efficiency gains to be passed on in some tangible form). The Sustainability Guidelines identify three types of potential benefits for consumers, any one of which, or a combination, may satisfy this third condition. They are:

a. "Individual use value benefits": direct advantages for the individual consumer resulting from use of the product (e.g. improved food quality due to organic ingredients);

b. "Individual non-use value benefits": indirect advantages for the individual consumer where the consumer does not directly benefit but may be prepared to accept higher prices or fewer options (for instance) because of their appreciation of the impact of their sustainable consumption on others (e.g. future generations or the community). Examples may include choosing products produced using more sustainable methods or that are less polluting, not because of their better performance but because of their impact on the local environment or society. The Guidelines require that these benefits of appreciation must accrue to the consumers within the *relevant market affected by the restriction (even if the positive impact they appreciate is felt by non-users outside the relevant market)* – e.g. a consumer in an EU country buys a toy produced with recycled material because that *individual consumer* values the impact of the reduction of waste on others, including non-users outside the relevant market.

c. "Collective benefits: advantages to society regardless of consumers' individual appreciation, experienced outside the relevant market (e.g. use of greener energy sources which reduce climate change or air pollution impacts, or of products using fewer natural resources). However, to rely on collective benefits to exempt an otherwise restrictive sustainability agreement, the Guidelines require the parties to clearly demonstrate an overlap between (i) the individuals in the market affected by the reduction in competition (e.g. purchasers of the more sustainable product that pays more for it) and (ii) the beneficiaries of the sustainability agreement in the other market (i.e. that benefit from cleaner air, less resource depletion etc.) – so that the benefits directly "compensate" the harm suffered.

Reflections on the fair share test – defeating the point of the Guidelines?

The "collective benefits" test in the Sustainability Guidelines is surprising and has been heavily criticized, as it seems to ignore that consumers are very often not located in the same area that a product is produced (i.e. where the beneficiaries of the sustainability benefits are located). This test could therefore be very difficult for parties to rely on to exempt agreements that could deliver enormous positive impacts addressing challenges considered as major priorities under the EU's own Green Deal, such as sustainable supply chains, responsibly produced inputs, product circularity, climate neutrality, water preservation, biodiversity preservation, labor rights, and so on.

It contrasts with the broader approaches of certain national competition regimes, which have committed to more readily taking account of (certain) out of market benefits, recognizing the shared global responsibility and value in addressing challenges that transcend national borders. Examples include Austria's prominent "consumer welfare" framework[351] and (outside the EU) the UK's Competition Markets Authority (CMA) guidance for climate change agreements which takes into consideration the totality of climate change benefits to all UK consumers instead of only those affected by the competition restriction.[352] (Notably in its second draft guidelines on sustainability agreements[353], the Dutch Authority for Consumers and Markets (ACM) developed an

[351] Austrian Federal Competition Authority's Guidelines on the Application of Section 2 (1) Austrian Cartel Act to Sustainability Cooperation Agreements (Sustainable Guidelines) (2022)
[352] Competition and Markets Authority's Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements (2023)
[353] Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law, available at https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf

assessment framework incorporating collective benefits, but it has since aligned itself with the Commission's more narrow approach being the prevailing EU regime.

The authors therefore hope and are cautiously optimistic that the Commission will not apply the benefits tests overly rigidly and formalistically, or demand prohibitive volumes of benefits evidence, which could end up putting parties off pursuing highly beneficial sustainability agreements for fear they will not overcome the high thresholds for competition compliance – a quelling effect the new Sustainability Guidelines were specifically intended to avoid.

We might also see additional reliance on the "individual non-use value benefits" test (i.e. "consumers feel good" about buying/using a more sustainable or cleaner product). However, the law should not be indirectly forcing companies to have to advertise the sustainability credentials of their initiatives to ensure and prove that consumers are always aware of these and furthermore sufficiently appreciative of them. Indeed, the policy objective of the Green Deal would seem to be that sustainable business practices and products should ultimately be the rule and not the exception, irrespective of consumer demand. To the extent that companies do promote the sustainability benefits, they would also need to be mindful of the strict new rules for green claims under the EU's new Greenwashing Directive and proposed Green Claims Directive.

European Commission's Open-Door Policy – Slow uptake to start

In addition to the general guidance in the Sustainability Guidelines, the Commission has committed to providing informal guidance regarding novel or unresolved questions on individual sustainability agreements through its Informal Guidance Notice. This mirrors the "open-door policies" or "regulatory sandboxes" established by some national regulators.

The Commission has expressed disappointment at the lack of requests for informal guidance from industry, with no letters issued thus far and "not for a lack of trying" on the Commission's part.[354]

There may be several reasons for the slow uptake of the Commission's open-door policy.

In the authors' experience, many collaborations are likely already underway, as certain sustainability goals or requirements are too challenging to achieve individually.

However, many industries still lack awareness of the new Guidelines, often because sustainability officers and staff are less familiar with competition law — and its associated risks — than their counterparts in commercial roles.

Second, when there is awareness of the Guidelines, the lack of outreach may indicate that companies are using them as intended – with collaborations being self-assessed as

[354] EU Director-General for Competition Oliver Guersent presenting at the ICN 2024 Workshop on Sustainability, reported in Global Competition Review, *Guersent: EU prepared to grant sustainability collaborations, wider fears slowing take-up* (2 July 2024)

compatible (or not compatible) – since most collaborations should not require further direction from regulators.

Third, building a substantial sustainability collaboration takes time, involving steps such as securing stakeholder buy-in, assigning responsibilities, engaging third-party advisors (legal counsel, economists, or consultants), planning, reaching agreement on key terms, and conducting a thorough competition law assessment under the Sustainability Guidelines (including gathering sufficient evidence if relying on Article 101(3)). A potential agreement needs to be sufficiently thought through before the Commission is likely to feel informed enough to issue public guidance. That being said, the regulators have stressed they do not want to make approaches overly burdensome for companies or to force companies to incur excessive costs before they engage informally. Therefore, as experience in the new Guidelines matures, we expect considerable flexibility from the Commission and other European competition authorities in their review processes, as well as a willingness to engage in constructive informal dialogue with parties early on.

It is noted that there is some trepidation that the EU's policy focus on sustainability could decelerate under the new Commission administration, considering the region's pressing demands in defense and economic development. However, whilst a collaboration may fall further back in the Commission's queue, it is the authors' expectation that testing its new Sustainability Guidelines will remain high on the Commission's agenda.

Considerations for international collaborations

In practice many sustainability collaborations will involve parties with international activities, with potential spillover effects into other markets. Thus, whilst a collaboration might be deemed to comply with the EU rules, the parties should take steps to also assess the antitrust risk in regimes that apply divergent tests or are less accommodating of sustainability cooperations.

US laws provide no exemption or additional latitude for sustainability agreements. Thus sustainability agreements with potential impacts on the USA or involving US parties should be carefully assessed, particularly as the risk of heightened scrutiny and investigations for alleged "sustainability cartels" is generally expected to increase under the new Trump administration. In practice, some international collaborations may require adopting more conservative structures or measures to ensure that the agreement complies with the "black letter" of traditional US antitrust rules that would apply in a non-sustainability (i.e. purely commercial) context.

Additionally, even in new regimes that are welcoming of sustainability cooperations, key differences should be taken into account when assessing risk and developing the agreement and implementation protocols (to illustrate, whilst the UK is expected to broaden its regime when it has more decisional experience, for now the UK guidance is limited to environment and climate agreements, and does not extend to broader sustainability objectives such as social initiatives).

Finally, parties may also need to consider whether it is advisable to approach multiple authorities for guidance. This would involve weighing up the value of additional legal certainty against potential downsides, such as different evidential thresholds, the risk of inviting conflicting public statements, and the additional costs and timing impacts of such a strategy. In practice, applying a "highest common denominator" approach to agreement structuring and application may mitigate this risk in multi-region agreements.

Conclusion

The new Sustainability Guidelines represent a paradigm shift in EU competition law, reflecting an encouraging integration of long-term sustainability considerations. By providing a clearer legal framework, the Guidelines should facilitate responsible collaboration while maintaining robust competition in the EU. For businesses, this presents an opportunity to contribute to shared environmental and social goals with greater confidence and compliance.