

Sustainability agreements and competition law compliance: Belgium chips in with new sustainability guidelines

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Earlier this month, the Belgian Competition Authority (the “**Authority**” or “**BCA**”) addressed certain aspects of competition law compliance of sustainability agreements by issuing new specific guidelines (the “**Guidelines**”).

As a result, Belgium joins the Netherlands¹ and France,² whose national competition authorities published similar guidelines in recent years. The BCA explicitly acknowledges the existing regulatory framework and refers in the Guidelines to both the Dutch and French examples, as well as the European Commission’s (the “**Commission**”) horizontal guidelines³ and guidelines 210a,⁴ which are all relevant for the assessment of sustainability agreements. The BCA’s view is substantially aligned with the existing guidance provided by other authorities.

¹ The Netherlands Authority for Consumers and Markets, Policy Note, The ACM’s supervision of sustainability agreements, 4 October 2023.

² Notice on informal guidance from the French Competition Authority in the area of sustainability, 27 May 2024.

³ Communication from the Commission, Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements (2023/C 259/01), 21 July 2023.

⁴ Communication from the Commission, Guidelines on the exclusion from Article 101 TFEU for sustainability agreements of agricultural producers under Article 210a of Regulation (EU) No 1308/2013 (C/2023/1446), 8 December 2023.

The Guidelines' main benefit for companies lies, in our view, in the accessibility of the document to a wider audience: it makes numerous references to specific practical examples and exposes in a clearly structured manner the assessment the BCA will make of agreements between competitors aiming to pursue sustainability objectives. The reference to practical examples is particularly welcome considering that companies are expected to conduct a self-assessment of the agreements that they take part in and only consult the BCA in exceptional cases.

We summarize below the analytical framework proposed by the BCA and describe the possibilities offered to companies to consult the BCA. Note that the Guidelines also include specific guidance on sustainability agreements in the agricultural sector, which we do not discuss further here.

Three categories of sustainability agreements: Guidance to self-assessment by companies

The BCA distinguishes three categories of sustainability agreements which can be ultimately considered compliant with Belgian competition law, subject to individual self-assessment by the participants to the agreement.

1. *Agreements unlikely to restrict competition (hence in principle considered compliant with Belgian competition law)*. This category comprises agreements which, by their very nature, do not affect the competitive landscape. They encompass four main subcategories: (a) agreements whose sole purpose is to anticipate compliance with legally binding requirements not yet fully in force; (b) agreements related purely to internal conduct of a company, with no impact on its market behaviour, except for agreements relating to essential inputs or human resources; (c) sharing of sustainability-related information concerning suppliers or distributors, provided that it entails no commercial obligation, limitation or prohibition; and (d) joint initiatives aiming to raise consumer awareness regarding the environmental footprint of consumption habits, provided that they do not amount to the joint promotion of specific products, to the denigration of competing offers or to the restriction of individual communication.
2. *Standardisation agreements on sustainability*. This category covers agreements between companies active in the same value chain, setting common sustainability indicators. These standardisation agreements are exempt from competition scrutiny, provided that they do not restrict competition by their object⁵ and that they cumulatively meet six requirements listed in the Guidelines: (a) the standard-setting process is based on an open and transparent procedure, (b) participation by companies is voluntary, (c) the standards agreed upon constitute a minimum rather than a maximum, (d) the exchange of information is limited to what is strictly necessary and proportionate to the objective pursued, (e) access to the terms of the standard is guaranteed in an effective and non-discriminatory manner, and (f) the agreement does not have a substantial impact on competition, meaning that (i) it does not lead to a significant increase in prices or a notable erosion of the quality and choice offered to consumers, or (ii) the combined market share of participants does not exceed 20 percent.

⁵ As outlined in the Guidelines, agreements aimed at (i) coordinating the pass-through of costs resulting from a standard via a price increase, or harmonising the prices of products compliant with the standard, (ii) excluding from the market third parties producing products that do not comply with the standard, or (iii) limiting technological development to the minimum sustainability standards required by law, are generally deemed to constitute a restriction of competition by object.

3. *Restrictive agreements eligible for exemption.* Agreements which restrict competition but fall outside categories 1 and 2 above can be nevertheless compliant with competition law if they qualify for an exemption under Article 101(3) TFEU and/or Article L. IV.1(3) of the Belgian Code of Economic Law. This is the case if four cumulative conditions are met: (a) the agreement results in objective, concrete, and verifiable efficiency gains; (b) the restrictions of competition are indispensable to achieve the efficiency gains claimed; (c) a fair share of benefits is passed on to consumers; and (d) competition is not entirely eliminated.

In more detail, the BCA confirms in the Guidelines that it will apply a flexible and pragmatic approach calibrated to the nature of the sustainability agreement when assessing its validity. In particular, the Guidelines indicate that where the restriction of competition is minor and the benefits of the agreement are significant, precise quantification of consumer impact will not be required, considering that the benefits clearly outweigh the harm.

It is also worth noting that the Authority permits reliance on collective benefits—such as the reduction of negative externalities—so long as there is substantial overlap between the consumers affected by the restriction and those who stand to gain from the environmental improvements. Individual and collective benefits may also be combined to demonstrate that the agreement is, at a minimum, neutral for the consumers concerned. The efficiency gains that will be accepted by the BCA are broadly conceived: they encompass reductions in production costs, improvements in quality, consumers' subjective preferences—including for local, fair-trade, or less polluting production—and wider societal benefits. Finally, the Authority encourages companies to follow recognised methodologies such as the Product Environmental Footprint (“PEF”) or Organisational Environmental Footprint (“OEF”) to evaluate benefits of an agreement. Future benefits are also admissible. Note, however, that the more distant the projected timeline to achieve these benefits, the more substantial they must be to offset interim consumer harm.

Informal consultation of the BCA is possible to enhance legal certainty

While the Authority insists in the Guidelines on the necessity for companies to conduct a self-assessment of their agreements, it nevertheless offers two channels allowing informal consultations to gain additional legal certainty.

1. *Informal opinion of the President of the BCA.* This procedure is based on Article IV.19(1)(5) of the Belgian Code of Economic Law. It is intended for companies considering an agreement that has not yet been concluded or implemented, is not subject to any pending proceedings, and raises a new legal issue of sufficient economic or societal interest.

If eligible for the procedure, parties may submit their agreement and information deemed relevant for the assessment to the President and expect the informal guidance to be provided in the form of a letter. Note that a redacted version of the letter is generally published on the Authority's website, thus providing some publicity to the request. The informal guidance is provided solely based on the information submitted by the applicant, without any further investigations conducted by the BCA. As such, the BCA's investigation services are free to investigate the agreement in the future if they deem it anticompetitive.

2. *Informal opinion of the Head Prosecutor of the BCA.* The scope of this procedure is more flexible, allowing consultations on agreements that have already been concluded or implemented, or relating to matters that the BCA previously dealt with. The BCA may in this context ask additional questions and conduct further investigations, instead of relying solely on the information provided by the applicant. While in practice likely more burdensome for the companies, the main advantage of this type of consultation lies in its result if the informal opinion is positive. In this scenario, the BCA's investigation services indeed commit not to initiate an investigation against any company that has submitted its agreement in a complete and transparent manner and has implemented it in accordance with the terms set out in the opinion. This guarantee extends to any anticompetitive effects produced by the agreement during the year preceding its submission.

Irrespective of the consultation procedure considered, the Guidelines provide that the Authority will work towards issuing its opinion within three months of receipt of the request. This is of course subject to the complexity of the case and, where applicable, a duly justified urgency.

Practical takeaways

The Guidelines only reinforce our conviction that businesses considering joint sustainability initiatives with their competitors should follow several key recommendations:

- *Engage in a rigorous self-assessment of the agreement.* The Guidelines provide helpful guidance in terms of categorising the agreement and following a structured analysis. They also allow one to anticipate the appropriate depth of analysis.
- *Document and quantify efficiency gains.* Creating a set of contemporary and verifiable evidence to substantiate the (positive) antitrust assessment of a sustainability project is a part key of mitigating any future compliance risk.
- *Consider regular monitoring of key agreements.* Sustainability agreements may be concluded for a longer period of time. Factual situation, market shares, regulatory framework and compliance conditions may however evolve during that time. It is good practice to set up regular reviews and monitoring to ensure continued compliance with competition law.
- *Informal opinion from the Authority.* For complex or high-stakes initiatives with a Belgian nexus, seeking an informal opinion from the BCA can provide significant upsides especially in terms of legal certainty and, possibly, BCA's commitment not to investigate the agreement. Considering the three-month timeline to receive such opinion, the BCA may be a good option to consider if Belgium is covered by the agreement.

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