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# Navigating the Void in the Portuguese Best Practices on Sustainability Agreements: Why Undertakings Get Lost in the Sauce

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Both Member States and the European Union ('EU') have pledged their commitment to the United Nations 2030 Agenda for Sustainable Development ('Agenda') and its 17 Sustainable Development Goals ('SDGs'). The Agenda represents a comprehensive common framework for sustainable development. The objective is to achieve a better and more sustainable future for all by eradicating poverty, protecting the planet and ensuring peace and prosperity. This should be understood in conjunction with the Paris Agreement which focuses on the threat of climate change and seeks to limit global warming to 1.5 ºC by the end of this century.

The protection of fundamental rights and the improvement of the quality of the environment are objectives that require a cross-cutting and collaborative approach. In this context, the private sector and companies in particular are of increasing importance, with their role evolving from Corporate Social Responsibility best practices to ESG (Environmental, Social, and Governance) and due diligence legal requirements, as set out in the Corporate Sustainability Due Diligence Directive ('CSDDD').

While there are scenarios where companies can effectively adopt and contribute to sustainability objectives through unilateral action and in competition, in other cases, cooperation is necessary. Firstly, the pursuit of efficiency and reduced prices may give rise to negative externalities (the cheapest option is not necessarily the most sustainable), which have the potential to prejudice society at large, even if the consumer at the relevant market benefits from lower prices and from its non-sustainable choices. Furthermore, collaboration may be essential to circumvent the phenomenon of free-riding on the investments required to promote a sustainable product and to disseminate information to consumers (the so-called 'first mover disadvantage'). It may also be necessary to achieve a particular scale, dimension or demand, or to reach a sustainability goal in a more cost-efficient way or more quickly. In short, collective action and, in particular, agreements between undertakings can contribute effectively to the realisation of public sustainability objectives.

National and European competition law rules prohibit agreements that have as their object or effect the prevention, restriction or distortion of competition. If this prohibition is strictly applied, it may hinder innovations with regard to sustainability. As it is up to undertakings to conduct a self-assessment to determine whether or not their agreements restrict competition and whether they meet the conditions to be considered justified in the light of efficiency gains, the lack of legal

certainty may have a chilling effect.

This presents a dilemma for companies. On the one hand, they run the risk of infringing competition law by pursuing their sustainability initiatives, some of which require the support and collaboration with their competitors and business partners. Conversely, they must ensure compliance with competition law by refraining from entering into relevant partnerships with these same economic actors when they are restrictive of competition parameters (which is the case in the majority of instances). This is despite the fact that such cooperation is expected, desired and demanded, not only in the context of the increasing legalisation of their corporate social responsibility, but also due to pressure from investors and consumers.

The necessity of a revolution in competition law frameworks to accommodate sustainability and the SDGs is still under debate. However, it is clear that competition law must be adapted to facilitate the creation of solutions that promote sustainable development. While the objection to its limited scope and the lack of legitimacy of Competition Authorities to value sustainability can be countered with the commitment to the 2030 Agenda and the binding force of fundamental rights in general, the measurement of broader societal benefits can be overcome by the concepts and tools of environmental economics (which may apply to other aspects of sustainability). This positive reading appeared to be acknowledged by national competition authorities such as the Netherlands Authority for Consumers and Markets (‘ACM’) and the Hellenic Competition Commission (‘HCC’).

More recently, the Portuguese Competition Authority (‘PCA’) decided to go up to the stage. It launched a public consultation on a Best Practices Guide on Sustainability Agreements (‘Guide’) through its Press Release 12/2024 of 29 May 2024. According to the PCA, the Guide provides information on exemptions, safeguards and compatibilities envisaged for agreements between companies aimed at achieving economic, social or environmental sustainability objectives. The Guide is part of the PCA’s advocacy mission and, according to the PCA, seeks to ensure a balance between competition and sustainability.

Before this Guide, and following some criticism of the agnostic and potential negative role of competition law towards sustainability initiatives involving collaboration between undertakings, the European Commission (‘EC’) sought to address the intersection of competition and sustainability and clarify in which circumstances companies can engage to achieve a sustainability objective while respecting competition. In the new Horizontal Guidelines on the applicability of Article 101 to horizontal agreements (‘Horizontal Guidelines’), a chapter is dedicated to sustainability agreements (celebrated between competitors). The new section on sustainability agreements is designed to provide guidance on the extent to which collaboration between competitors seeking a sustainability objective can occur in compliance with EU competition law. While more specific, the European Commission has also approved Guidelines for sustainability agreements in agriculture.

In its Best Practices Guide, the PCA merely summarises the existing legal framework, referring in particular to the Commission guidelines. In contrast to the ambition of other national competition authorities (‘NCAs’), both the European Commission and the PCA adopt a conservative position with a number of insurmountable shortcomings. As a result, instead of avoiding the chilling effect criticised to competition law, the Commission’s and the PCA’s *non-guidelines* risk exacerbating it. A further shortcoming of the Portuguese Best Practices Guide is the PCA’s scepticism and negativity towards companies pooling resources and efforts to achieve sustainability.

In this piece, we first point out the shortcomings inherent in the Commission's guidelines and then focus on the PCA's recent Best Practices Guide. Our final recommendation, which is based on an open-door policy and a cooperative approach, is inspired by the experiences of other national legal systems. In our view, they should serve as a benchmark for an EU top-down alignment in favour of a more positive and objective competitive framework of analysis for sustainability agreements.

## Sustainability Agreements in the European Commission Guidelines: Assurance or Greenwashing?

The year 2023 can rightly be catalogued as the year of sustainability guidelines. Firstly, with the inclusion of a new ninth chapter in the Commission's Guidelines on horizontal cooperation agreements of 1 June 2023, dedicated specifically to sustainability agreements, and with a particular focus on standardisation agreements. Then, on 7 December 2023, with the adoption of guidelines specifically aimed at Article 210a of the Regulation establishing a common organisation of the markets in agricultural products ('CMO Regulation'), which excludes from the scope of the prohibition of agreements restricting competition sustainability agreements concluded by agricultural producers and relating to the production of and trade in agricultural products. For an overview, see Modrall, Kampouridi and van den Bogart, 2023.

Given the specific nature of the latter, we will focus here on the Horizontal Guidelines.

The European Commission starts with the obvious: there are sustainability agreements that have nothing to do with competition. These are agreements that do not restrict competition, either *i)* because they aim to ensure compliance with and respect for legally binding international normative-regulatory frameworks (but not yet, it seems, national or European Union law – perhaps because the exception of *state action defence* could already apply here), in relation to sustainability and human rights, or *ii)* because they relate to internal corporate behaviour, or *iii)* because they aim to ensure transparency in the value chain without affecting the freedom of action of the parties (for example, the creation of a database containing information on operators with sustainable behaviour and practices), or *iv)* because they aim to organise awareness campaigns (as opposed to a scenario of joint advertising). The simplicity of the list contrasts with a very colourful palette in practice. In fact, if all the scenarios are considered in their pure state, it is possible to think of sub-hypotheses in which the absence of a restriction of competition is no longer obvious. One example is the agreement to create the database, which, for the purposes of this 'exclusion', cannot be linked to a prohibition or an obligation for the parties to source or purchase from operator *x* or *y*, depending on their compliance with sustainability standards.

The scope of the exclusion referred to in *i)* is itself highly uncertain. A pro-sustainability interpretation would be that all cooperation in the context of the latest Corporate Sustainability Due Diligence Directive should be allowed, as it aims to prevent or mitigate negative impacts, which are indeed included in legally binding international instruments. However, this is not the only possible interpretation. Given the CSDDD's reference to the terms allowed by competition law, and the subsidiarity perspective adopted with regard to cooperation between companies as an appropriate measure in the context of their due diligence duty (see, among others, Articles 10(2)(f) and 11(3)(g) and Recital 49), it could be understood from the outset that there is no binding legal framework here that imposes cooperation and allows companies to benefit from this safe harbour. In fact, it is sufficient to recall that in competition law it is not sufficient for the State or public

authorities to create incentives for cooperation between undertakings in order for them to be exempted from the prohibition of anti-competitive restraints. On the contrary, there must be an effective imposition, in which case competition law ceases to apply and the principle of loyal cooperation comes into play (see Article 4(3) Treaty on European Union).

Having ruled out the application of either of the pure scenarios, we must then turn to the dialogue between Article 101(1) and (3) TFEU. The pursuit of sustainability objectives is relevant at both levels. At the first level – that of prohibition – it will serve either to justify a retreat from the application of Article 101 TFEU in favour of pursuing an overriding public interest (the Commission doesn't say so, but we take it from the Wouters case law) or to frame the distinction between restriction by object and restriction by effect, thereby softening the harmfulness associated with the restriction. However, the Commission points out that restrictions of competition by object can also be found in sustainability agreements. This is the case for agreements aimed at directly pressuring third party competitors to comply with a sustainability standard or, as in the AdBlue case, agreements between competitors to limit technological development to the minimum sustainability standards required by law.

The analysis becomes particularly problematic at the second level, which concerns the justification of a sustainability agreement that restricts competition. The doubts do not concern some assumptions and principles that can be taken for granted. Examples of this include the proposition that sustainability agreements can contribute to a very wide range of objective efficiency gains; that efficiency and speed in the pursuit of the SDGs may qualify a particular agreement as indispensable, and that consumers may realise the impact of their choices (more or less sustainable). In addition, it should be noted that, in many cases, consumers in the relevant market (potentially affected by an increase in prices or a reduction in supply) are also recipients of the collective benefits that the agreement results in for present or future society.

The Commission's guidelines, however, raise concerns regarding the manner in which they specify various requirements of Article 101(3) TFEU, which are necessary for the justification of an agreement. This approach is perceived as being contrary to the principles of legal certainty.

Firstly, efficiency gains must be objective, concrete and verifiable. This places the onus on the parties to demonstrate a certainty or truth which, with regard to sustainability objectives in particular, may and certainly will not be within their reach. At least not without the cost of discouraging any attempt at measurement. The question is whether intergenerational justice can be quantified.

Secondly, the Guidelines stipulate that, in any scenario, consumers in the relevant market should be able to receive a fair share of the benefits resulting from the agreement. The (limiting) WTP ('willingness to pay') test then comes into play. This implies that collective benefits (i.e. those that are felt outside the relevant market, in favour of society in general) will only be valued if there is a substantial overlap with consumers in the relevant market and if they are sufficiently compensated for the damage suffered. Moreover, the overlap and compensation (and not merely marginal) must also be demonstrable by the parties.

In light of the aforementioned considerations, while the simple existence and impetus to adopt guidelines in this regard is to be welcomed (see Czapracka, Harjula, Kuhn and Citron, 2023 as well as Murray, 2023), it is important to acknowledge their shortcomings (as Gassler, 2023, points out) as they risk a 'greenwashing' by the Commission (in this regard, while referring to NCAs, see

Kuipers, Beetstra and van Roosmalen, 2022).

We posit that the approach of the ACM in its Policy Rule on ACM's oversight of sustainability agreements (Beleidsregel Toezicht ACM op duurzaamheidsafspraken) – already more restrictive than the first and second draft versions of its Guidelines on Sustainability Agreements – provides a more useful background that could be taken into consideration to address and solve the shortcomings outlined above. Although the Commission was not persuaded by this leniency (see Kuipers, Beetstra and van Roosmale, 2023), it is our contention that it would be preferable for the EC to align with the ACM's approach rather than vice versa. Furthermore, in the context of the future application of the CSDDD (which promotes interactions between companies – see Ünekbas, 2022), it will be of great importance to understand how the European Commission will evaluate vertical agreements pursuing a sustainability objective and in the context of the due diligence framework. In light of the PCA's followerism to the EC's approach in its most recent Guide and the likelihood that the NCAs will follow the same paradigm, a critical approach to the Commission's Guidelines becomes particularly pressing.

**Getting Sense of the Portuguese Best Practices Guide on Sustainability Agreements**

The Guide presented by the PCA lacks a clear structure, with no discernible sections or paragraphs, in contrast to the typical structure of the Commission and NCAs' Guidelines. Rather than offering practical guidance, the Guide is presented as a set of good practices, which renders it (apparently) more informative and pedagogical than useful from a technical standpoint. Furthermore, due to the sparse and negative manner in which the list of best practices are presented, they do not contribute to ensure legal certainty about the existing legal framework and regulatory environment.

Despite its fluid and synthetic content, it is possible to divide the Guide in a systematic way. It is implicitly divided into three main segments. Firstly, there is a set of introductory points, including an initial note on the relationship between competition and sustainability. This is followed by the delimitation of the scope of the Guide, which defines sustainability agreements for these purposes as "*horizontal agreements between actual or potential competitors, decisions by associations of companies and concerted practices with a sustainability objective*". The respective recipients are then delimited, with companies and associations of companies wishing to sign sustainability agreements being identified. The PCA then makes reference to the respective objectives, which are to raise awareness of best practices when concluding sustainability agreements; to inform about potentially applicable exemptions, safeguards and compatibilities; and to warn of the respective anti-competitive risks.

The PCA then proceeds to address the fundamental principles of the Guide, commencing with an explication of its interpretation of the question "How to determine if the agreement is compatible with competition law?". The subsequent pages are devoted to an examination of the various stages of the analysis, which are presented in the form of questions. The first of these is: "1. Does the agreement restrict any competition parameter?". Subsequently, examples are provided of agreements that do not contravene competition law, in accordance with the European Commission's guidance on sustainability agreements set out in the Horizontal Guidelines. The second question is: "2. Can the agreement violate competition law?".

In this case, two examples are provided for illustrative purposes: the European Commission's

AdBlue case and the Floor Coverings case decided by the French Competition Authority. With regard to the qualification of a sustainability agreement as restrictive of competition, the PCA merely refers to the theoretical difference between restriction by object and restriction by effects, without specifying it in the context of sustainability objectives. Consequently, it is unclear whether a sustainability agreement will have such a degree of harmfulness that it can be concluded from the outset that it qualifies as a restriction by object.

Thirdly, the question arises "3. Can the agreement benefit from rules that safeguard it from the application of competition law?". This is followed by pages that merely recall, in a sparse and summary way, the existence of *i)* the safe harbour applicable to *de minimis* agreements; *ii)* the soft safe harbour introduced by the European Commission in its Horizontal Guidelines for sustainability standardisation agreements, once again accompanied by examples copied from the Commission Guidelines. Additionally, the Guide makes reference to the block exemptions applicable to research and development (R&D) and specialisation agreements. However, there is no indication of their proximity-application (for instance, through examples) to sustainability agreements. Finally, the PCA includes a reference to the conditions for exclusion of agreements of agricultural producers under Article 210a of the CMO Regulation and the applicable European Commission Guidelines. Once more, examples are drawn from the Commission's guidelines and the Guide is not innovative. The exception is a reference only to the Agrardialog Milch case, decided by the German Competition Authority.

Following the exemptions and exclusions, the PCA introduces the fourth question in the self-assessment procedure, which is as follows: "4. When can an agreement restricting competition be compatible with competition law?". At this juncture, the PCA merely reiterates the conditions set forth in Article 10 of the PCAct, which are identical to those enshrined in Article 101(3) TFEU. It then adheres to what already flows from the European Commission's Guidelines, without offering any additional commentary.

The Guide lacks sufficient support for companies in several domains. For instance, in terms of the type of efficiency gains considered, the manner in which these gains can be proven, verified and quantified, and the standard of proof required – such as in the light of the requirements of indispensability and the obligation to pass on the efficiency gains to consumers – is not clear. Once more, the examples provided by the PCA are derived from the Commission's Guidelines, with only one reference to the Chicken of Tomorrow case, which was decided by the ACM and portrays, once again, an image of a failed initiative.

Before concluding this substantive group of points with a generic checklist that merely reiterates the requirements set forth in the existing legislation and guidelines, the PCA addresses the implications of the involvement of public authorities in the conclusion of sustainability agreements. The Guide reiterates that the knowledge, encouragement or facilitation of anti-competitive agreements does not exclude the liability of companies for such agreements, even if they are sustainable agreements. The restrictive scope of the state action defence is thus echoed.

Before concluding the Guide with a punitive message on the consequences of concluding (sustainability) anti-competitive agreements, including a reference to the possibility of submitting anonymous complaints, the PCA includes an intermediate chapter on public procurement. Once again, and in a manner that is consistent with the extremely negative slant of the Guide, the PCA's aim seems to be to remind undertakings of the dangers of bid-rigging. This is done by warning of the obvious and well-known considerations to bear in mind. These include *i)* the preference to

compete alone; *ii)* the risk of anti-competitive exchanges of information; or *iii)* the limited scope of the parties' collaboration.

While the PCA's initiative is commendable, given that is has hitherto been relatively silent in comparison with its peers, the PCA Guide fails to serve as a tool for promoting and incentivising sustainability agreements.

To begin with, the PCA's Guide largely replicates the content of the Commission's Guidelines, which raises concerns about the simplification of complex issues. If the intention was to demonstrate unwavering support for the European Commission's views, whose clarity is, as previously stated, already open to question, then there is no need for this Guide, as other forums exist to demonstrate adherence and commitment.

A more problematic issue is that the PCA takes a sceptical and negative stance towards sustainability agreements between competitors, mobilising this Guide as a warning of the application of competition law *qua tale*, without any kind of accommodation or openness. In addition to leaving practically everything unanswered, the PCA does not show the openness demonstrated by other NCAs to accommodate companies' doubts and concerns (through an open door policy – see, for instance, the Competition and Markets Authority). In particular, the PCA's Guide fails to provide clarity on how the Authority intends to address initiatives by companies that fall within their due diligence duties or in the context of their corporate social responsibility practices. It is hoped that the (already limited) public consultation will assist the PCA in reconsidering its approach and fulfilling its role in the implementation of the 2030 Agenda.

**Sustainability collaborative efforts in a pickle**

Despite the incentives for companies to work together to fulfil their sustainability due diligence obligations (as evidenced by the recently adopted CSDDD) and to align their operations and activities with ESG factors, the competition law framework still lacks certainty and answers.

Although we are aware of to the inherent risks, uncertainties and complexity of the analysis required by sustainability agreements (broadly defined to include horizontal and vertical agreements), it is not possible to resolve uncertainty by scepticism or by a logic based on undefined concepts and principles. Conversely, even if we acknowledge the impracticability and the dangers of sending erroneous signals to the market, an open-door approach and cooperative enforcement, such as that adopted by the Dutch, Greek and UK competition authorities, appear to be essential in order to fulfil both the fundamental right to good administration (Article 41 of the Charter of Fundamental Rights of the European Union) and the role of all institutions and authorities – European and national – in pursuing the goals of the 2030 Agenda. It is imperative that competition does not abdicate its role.

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