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EU Issues Competition Safe Harbor Guidelines For Sustainability Agreements

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The European Commission **recently issued Guidelines** "on the competitive assessment of agreements between competitors that pursue sustainability objectives ('sustainability agreements')." Recognizing sustainability as a "core principle" of the European Union, the Commission promises "to implement the United Nations' sustainable development goals." Noting that the concept of "sustainability" includes climate change, such as the reduction of greenhouse gases, the Guidelines state they are also intended to embrace other economic, environmental and social sustainability objectives, citing labor and human rights as examples. The revised Guidelines are set to take effect in July 2023.

The new provisions explain that, as a threshold matter, not all sustainability agreements raise competition issues. Only those agreements that "negatively affect parameters of competition, such as price, quantity, quality, choice or innovation," are even subject to EU competition law. The language suggests that the first line defense of a challenge to a sustainability agreement among competitors is that the agreement is outside the scope of the statute because it does not affect a parameter of competition. The Guidelines provide examples (with no real analysis) of agreements that fall outside the scope of competition law:

- agreements that aim solely to ensure compliance with international treaties;
- agreements related to internal corporate conduct, for example on measures not to exceed a certain ambient temperature in their office building;
- agreements to set up an industry-wide database containing general information about suppliers that have (un)sustainable value chains (e.g., pay or do not pay a living wage; do or do not limit input supplies from sustainable manufacturers); and
- agreements related to industry-wide awareness campaigns.

The Guidelines next proceed to examine the application of competition principles to what it calls "sustainability standardisation agreements" (SSAs). SSAs are agreements between competitors to adopt and comply with certain sustainability standards, such as agreements to replace or phase out certain products (e.g., fossil fuels, such as oil and coal) or to harmonize product packaging to reduce waste or facilitate recycling. It distinguishes legitimate SSAs from sustainability standards that are used to disguise price fixing, output limitations and other anticompetitive practices, such as agreements to adopt sustainability measures but to pass on any higher costs in the form of increased sales prices to customers. By contrast the Guidelines provide safe harbors for SSAs that include the following six cumulative conditions:

First, the procedure for developing the standard must be transparent and open to all competitors in a market;

Second, the standard may not be imposed on competitors who do not wish to adopt it;

Third, competitors must remain free to adopt higher sustainability standards than those adopted by an industry;

Fourth, competitors may not exchange commercially sensitive information that is not objectively necessary to develop and implement the standard;

Fifth, non-discriminatory access to the outcome of the standard (e.g., an agreed-upon label) must be provided to each competitor; and

Sixth, the standard must satisfy at least one of the following two conditions: (a) it does not result in a "significant increase in price" or significant reduction in product quality; or (b) the combined market share of the competitors may not exceed 20% of any relevant affected market.

The Guidelines provide no guidance on what would constitute a "significant increase in price," except to say that the "significance of the price increase will depend on the characteristics of the product and the relevant market." For SSAs that do not qualify for safe harbor treatment, participants may nevertheless defend the agreement on the basis that it does not adversely affect competition or that it provides offsetting efficiency gains.

The Guidelines provide examples of SSAs that either would qualify for safe harbor treatment or else would create no appreciable effect on competition. As an example of the former, the Guidelines posit a situation where breakfast cereal manufacturers organize to limit excess packaging size, the result of which is the preservation of natural resources that go in to the packaging as well as a reduction in cost due to the decrease in packaging input purchases.

As an example of the latter, the Guidelines envision a clothing industry-wide effort to create a label to be used on garments made with fabric produced in developing countries where workers are paid a fair wage that is above the local prevailing wage rate. The hypothetical wage increase of 20% leads to an increase in the retail price of the goods of between 1.5-2%. The Guideline's analysis is that the positive labor effects (more nutrition and healthcare access for workers) offset the price increase to consumers so that the agreement is "unlikely to have appreciable negative effects for customer."

Taking the Temperature: The adoption of sustainable agreement safe harbors in the EU places the U.S. and EU antitrust enforcement of sustainability agreements in stark relief. In both the EU and, previously, the UK, antitrust enforcers are incorporating national and international sustainability goals into competition policy. In the U.S., however, federal antitrust enforcers remain largely silent about sustainability goals, while (mostly Republican) State AGs and federal and state legislators representing states with carbon production or processing industries continue to ramp up threats of antitrust lawsuits and investigations with attendant fines and damages against firms that participate in industry-wide climate sustainability agreements. The most recent industry reaction to the flurry of Republican warnings are reflected in reports of major insurers quitting the Net-Zero Insurance Alliance (NZIA) over concerns about antitrust exposure. These reports follow earlier reports of other financial institutions abandoning their participation in certain financial sector climate coalitions. With no U.S. legislative or enforcement relief for sustainability standardization agreements in sight, it remains to be seen whether banks, insurers and other financial institutions subject to U.S. antitrust law will take sufficient comfort from the EU or UK policies to enter sustainability agreements despite the risks posed by U.S. antitrust law.

However, the new Commission Guidelines raise many unanswered questions, including how to determine what is a "significant increase in price" or a "significant reduction in quality" for purposes of applying the safe harbor. Similarly, the Guidelines suggest there may have to be an inherent balancing between the concern for consumer prices against the concern for higher labor wages, though it provides little or no guidance on how to analyze it. That same balancing act has caused an unresolved but continuing tension in current U.S. antitrust enforcement.