THE STATE OF ESG IN ANTITRUST IN EUROPE

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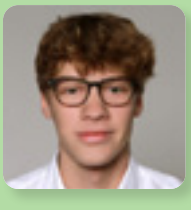

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By Christian Ritz, Benedikt Weiß & Tim Büttner

The interplay between ESG and competition law has gained increasing attention not only in academia but also in competition law enforcement practice. The complexities of this interplay in an ever-increasing regulatory environment pose significant challenges for companies. They raise complex legal, economic and public policy questions that make both enforcement and compliance a true challenge. That is also why companies, enforcers and legislators alike are turning their attention towards these issues. But what exactly are these challenges and how can the somewhat conflicting interests of ESG and competition law be aligned? In this article, we shed some light on these issues and point out what to look out for in times where compliance with ESG and competition law has become particularly challenging.

01
INTRODUCTION

“ESG,” short for “environmental, social, and governance” values, have gone from being a mere buzzword to being both an asset and a challenge for many companies within just a few years. Investors, consumers, and other stakeholders are paying increasing attention to the fact that companies are taking these criteria seriously when taking business decisions. It is thus not surprising that ESG has become a defining feature of modern corporate strategies. From the introduction of travel policies and recycling rules to increasing boardroom diversity and corporate ESG strategies, ESG has and will continue to reshape the corporate landscape. However, when pursuing sustainable practices, companies are not just confronted with the challenge of satisfying their stakeholders, investors, and customers.

They may also face the challenge that the existing and rapidly evolving regulatory landscape calls for the implementation of compliance systems and processes, or even complicates it. This is also true for the legal discipline of competition law, which is designed to promote the proper functioning of markets and to discourage any behavior that is detrimental to this goal. A major challenge at the intersection of competition law and ESG in this respect is to understand how ESG can accommodate the demands of competition law and the other way round. This raises several complex and sometimes even novel questions at the intersection of competition law and ESG compliance, some of which will be addressed in this article.

We will first provide an overview of what ESG actually is (II), then deal with some competition law implications of ESG (III.) and outline the current position of selected European competition authorities on the subject (IV). Finally we will provide a practical outlook on what companies should look out for when tackling these issues more closely (V).

02
WHAT IS ESG ANYWAY?

"ESG" stands for "environmental, social, governance." But what exactly do these terms mean, especially in a legal or competition law context and which concrete goals are covered by ESG?

Recognizing its increasing practical importance, the European Commission's Directorate General for Competition ("DG COMP") has decided to include an entire chapter on Sustainability Agreements into its just now adopted recast of the Horizontal Guidelines, the main non-binding guidance for companies to assess EU competition law compliance of their agreements or cooperation agreements. The new Horizontal Guidelines set out criteria according to which cooperation arrangements with competitors serving sustainability objectives ("sustainability cooperations") can be exempted from the prohibition of cartels in Art 101(1) TFEU.[2] DG COMP derived its understanding of sustainability from the United Nations' 2030 Agenda for Sustainable Development, to which all EU member states are committed.[3] The Agenda 2030 is built around 17 so-called sustainability development goals ("SDGs") which should be implemented by today's generations in order to ensure a qualitative life on our planet for future generations as well. The SDGs include aspects such as climate action, no poverty or responsible consumption and production.[4]

A similar approach has been taken by the Future Group Competition & Sustainability at German Heinrich Heine University Düsseldorf ("HHU") in its latest study.[5] In the study, sustainability is deliberately defined broadly, as the specific aim is to create a life that is more livable for people and nature and to decouple economic growth from the consumption of natural resources.

The term ESG is a broad umbrella term ESG covering constantly changing aspects of sustainability with generally fluid boundaries. Investors, consumers, and other stakeholders who pay attention to ESG issues when making decisions therefore want companies to, among other things, produce their products sustainably, offer workers fair wages and working conditions throughout the production and supply chain, and commit to climate neutrality.

2 Draft Guidelines on the applicability of Art. 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, adopted by the EU Commission on 1 June 2023, but not yet officially published ("Draft Horizontal Guidelines"), paras. 515 et seq.

3 *Ibid*.

4 SDGs, https://sdgs.un.org/.

5 (in German) HHU-Zukunftsgruppe Competition & Sustainability, Wettbewerb und Nachhaltigkeit in Deutschland und der EU, Studie im Auftrag des Bundesministeriums für Wirtschaft und Klimaschutz, p. 1.

At best, therefore, this interest leads to a general push towards business practices that promote ESG. However, as these are usually major challenges, companies may feel compelled to collaborate and share risks and financial burdens to achieve ESG goals more efficiently. But, even when "serving a good cause," competition laws still apply.

03

WHY DOES COMPETITION LAW MATTER WHEN COMPANIES COMPLY WITH ESG REQUIREMENTS?

In this section we show how the relationship between competition law and ESG can lead to tensions (A), provide an overview on potential approaches to reconcile the sometimes diverging interests (B) and summarize the current views taken by the EU Commission and selected national competition authorities in Europe (C).

A. ESG and Competition Law as a Field of Tension

By observing ESG criteria, companies are trying to meet the increasing demands placed on them by various stakeholders. At the same time, ESG efforts are usually costly and the competitive advantage they bring may neither be obvious nor pay our from the beginning.[6] In this context, companies will in many cases be tempted and in some cases even forced to enter into cooperations with competitors in order to avoid "first-mover risks" when observing and promoting ESG objectives. Competition law, by contrast, wants to promote the proper functioning of markets and strives to discourage any behavior that is detrimental to this goal. This can lead to a rather conflictful relationship.

Take, for example, production or purchasing agreements between competitors: While they can be certainly helpful in the context of ESG to gain a better overview of the supply chain and to better manage human rights or environmental risk and resources in the same, they can become problematic from a competition law perspective.[7] The same applies to certain vertical agreements, i.e. agreements between companies that do not compete with each other but operate at different levels of the supply chain. For example, companies may have an interest in having their customers set a higher resell price for their products vis-à-vis their customers in order to make a statement for the higher product quality resulting from increased supply chain standards or to guarantee the supplier a sufficient margin for its ESG efforts.[8] Notwithstanding the noble objectives, such agreements could constitute illicit resale price maintenance and would likely be considered a hardcore restriction under EU competition law, making it quite difficult to avoid competition law liability.

Another gateway for competition law violations is the exchange of strategic information that companies could undertake as part of an ESG collaboration.[9] The EU Commission and the national competition authorities in the EU generally take a strict stance against the exchange of competitively sensitive information being qualified as an illicit restriction of competition pursuant to Art. 101 (1) TFEU. This should be borne in mind when, with the European Green Deal and the general trend towards stricter supply chain legislation, such exchanges may become even more frequent in the future, given that several ESG aspects that are now largely a matter of voluntarily set targets will even become legally binding obligations.[10]

To give just two examples of how obligations implemented by EU ESG regulations could lead companies to engage in a range of actions and cooperations that could be problematic under competition law:

- It is conceivable that supply chain laws may encourage companies to exchange information horizontally about their choice of suppliers (see above), which could be regarded as a competition law violation

6 As an example, one can think of a cooperation between competitors in the meat production industry, where chicken from sustainable, animal welfare-oriented husbandry is produced and sold at double the price of chicken from non-sustainable husbandry.

7 See Horizontal Guidelines 2011, paras 157, 158, paras. 201 et seqq.

8 Ritz & von Schreitter: Chain(ed) Reaction? Das Lieferkettengesetz und seine kartellrechtlichen Hürden, NZKart 2022, 251, p. 254.

9 Regarding information exchange, see Horizontal Guidelines 2011, paras. 86 et seqq.

10 The German Supply Chain Due Diligence Act (in German: "Lieferkettensorgfaltspflichtengesetz" or "LkSG"), which came into force on January 1, 2023, and the draft EU's Corporate Sustainability Due Diligence Directive ("CSDDD") are perfect examples of current supply chain legislation.

depending on the type and scope of the information exchange.[11]

- Also within the context of remedial action in the event of a violation of human rights or environmental positions in the supply chain, competitors may find themselves in a situation where an exchange of strategic information horizontally may actually facilitate compliance with supply chain due diligence laws.[12]

Another – more recent – challenge arises from the fact that the use of technology plays an increasingly important role in achieving both ESG goals and ESG compliance and most importantly reporting on ESG targets. Just to provide two examples:

- When a company wants to assess its environmental footprint, measure its social impact, or monitor its governance practices, it will almost certainly rely on technical solutions such as specialized software, business applications or other tools. To this end, these solutions are constantly supplied with data, which is then processed and analyzed to monitor compliance with set or legally binding targets. For example, a manufacturer who wants to assess its environmental footprint needs data on CO2 emissions to determine the total emissions caused by the production of its product. Perhaps the supplier also wants to contribute to a better circular economy and therefore needs additional information about the (raw) materials used in a product in order to pass this information on to the recycler at a later stage. Clearly, all this data needs to be collected, processed, and shared at some point between the manufacturer and other companies that are part of its supply chain. However, to ensure full compliance with competition law, it is crucial that clear and transparent competition law safeguards are in place that accompany such (automated) exchanges to avoid any illicit exchange of competitively sensitive information between competitors.

- The need to share information to achieve ESG goals and comply with ESG regulations requires continuous technological advancements. Currently, the problem in various industries is that companies within a certain supply chain are hesitant to share data because they fear repercussions such as data leaks, lock-in effects, or lack of data control. Commonly used proprietary technological solutions have so far failed to provide them with the comfort they need, leading to a trend towards increased co-development of open source and/or standardized solutions in certain industries to help overcome the hurdles that currently exist. In terms of competition law compliance, it is important to understand that such collaborations raise complex competition law compliance questions and should therefore be closely guided from the beginning.

As these examples show, competition law does not (yet) provide a broad scope exception for agreements that aim at increasing or contributing to ESG in general or sustainability in particular. Companies must therefore pay attention to competition law compliance to ensure that the partially diverging interests of ESG and competition law can be reconciled. How this might be tackled will be shown in the following.

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B. ESG and Competition Law as a Symbiosis

There are many – in parts only rather theoretical - suggestions for how ESG could be given more consideration in competition practice. Some of them are presented in the following:

- One approach could be a far-reaching competition law exemption for ESG collaborations. An example of such an approach is Art. 210a CMO, which was introduced in 2021. According to Art. 210a CMO, farmers are exempted from the prohibition of cartels under Art. 101 (1) TFEU if their concerted practices are aimed at ensuring a higher standard of sustainability than required by Union law. Art. 210a (3) CMO mentions, among others, environmental protection, and animal welfare as sustainable objectives. However, this is a sector-specific exception that is justified by the particularities of the agricultural industry, such as the politically intended strengthening of the

11 More details on competitive challenges in horizontal relationships in the context of the implementation of the German LkSG: (in German) Ritz von Schreitter: Chain(ed) Reaction? Das Lieferkettengesetz und seine kartellrechtlichen Hürden, NZKart 2022, 251, p. 255 et seqq.

12 See (in German), Denzel & Hertfelder, in Wagner, Ruttloff & Wagner, Das Lieferkettensorgfaltspflichtengesetz in der Unternehmenspraxis, § 7, para. 1158.

negotiating position of food producers.[13] Therefore, this exception does not apply to ESG collaborations in general and there is also no equivalent for other sectors. Nevertheless, Art. 210a CMO clearly represents a step towards a greater importance of ESG in competition law.

- A different approach is taken by DG COMP in its now adopted new Horizontal Guidelines, which represents a rather cautious advance with regard to the promotion of sustainability agreements under competition law. The new Horizontal Guidelines emphasize that such agreements do not fall under a block exemption, but can at most be exempted under Art. 101 (3) TFEU[14] if specific requirements are met.[15] To this end, the Horizontal Guidelines mention possible efficiency gains and the requirements for their proof[16] and refer to direct benefits consumers could derive from sustainability agreements.[17] However, these new Horizontal Guidelines are controversial because they call for the competitive harm to be fully compensated by the efficiency gains for consumers and refuses to take into account out-of-market efficiencies, i.e. efficiencies that arise for consumers outside the relevant market.[18]

- A completely different, more progressive approach is the so-called "sustainable competition" approach. It is based on the understanding that only sustainable competition is competition in the sense of the law.[19] Under this approach, competition that is harmful to the climate (and therefore not sustainable) could henceforth constitute an abusive behavior, as ecological considerations would have to be included in the supervision and assessment of abusive behavior by competition authorities. Although interesting and progressive, this approach is an idea that is not yet fully developed and is therefore of little relevance to practitioners (as of now).

Overall, there are already some interesting approaches and many ideas on how to integrate ESG and sustainability issues more strongly into competition law and, at least in Europe, there is a chance we will see regulatory efforts to move further into such direction. To date, however, these approaches have not yet been reflected in concrete decision practice too much. It thus remains to be seen to what extent legislators, competition authorities, and courts will take further steps in this area.

04
HOW DO COMPETITION AUTHORITIES VIEW ESG?

Having looked at current developments of ESG in competition legislation, we will turn now to the question of how competition authorities in the EU stand on the issue of ESG. Overall, competition authorities in Europe are generally open to supporting ESG cooperation but have a keen eye on the competitive effects of any such cooperation – in particular its effect on innovation and prices. Among others, the Dutch competition authority ACM in particular has taken a progressive approach in the past.[20]

- In the *SER Energieakkord* case from 2013,[21] the Dutch ACM declared the closure of five coal-fired power plants illegal under competition law, finding that the relevant agreement was not exempt from the ban on cartels. In this context, the ACM recognized lower pollutant and greenhouse gas emissions as efficiency benefits. However, in the opinion of the ACM these advantages did not out-

13 Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021, recital 62.

14 Draft Horizontal Guidelines, para. 522.

15 Draft Horizontal Guidelines, paras. 556 et seq.

16 Draft Horizontal Guidelines, paras. 557 et seq.

17 Draft Horizontal Guidelines, paras. 571 et seq.

18 See Draft Horizontal Guidelines, paras. 569 et seq. and especially the example given in para. 585; For classification cf. HHU-Zukunftsgruppe Competition & Sustainability, *op. cit*., p. 104 et seq. For an overview see Gassler, Sustainability, the Green Deal and Art 101 TFEU: Where We Are and Where We Could Go, Journal of European Competition Law & Practice, pp. 430, 438 et seqq.; Regarding a "greener" Art. 101(3) TFEU, see Monti, Four Options for a Greener Competition Law, Journal of European Competition Law & Practice, 2020, pp. 124, 128 et seq.

19 Cf. HHU-Zukunftsgruppe Competition & Sustainability, op. cit. (footnote 4), p. 42 et seq.

20 See ACM Guidelines on Sustainability Agreements - https://www.acm.nl/en/publications/guidelines-sustainability-agreements-are-ready-further-european-coordination.

21 See (in Dutch) https://www.acm.nl/nl/publicaties/publicatie/12032/Afspraak-sluiting-kolencentrales-is-nadelig-voor-consument.

weigh the disadvantages for Dutch consumers in the relevant case, which is why the agreement was declared inadmissible. From a competition law perspective, the consideration of lower emissions as an efficiency advantage remains interesting as it highlights the recognition of ESG goals as efficiency advantages.

- In the *Chicken of Tomorrow* case,[22] the ACM in 2014 quantified the increased animal welfare of chickens resulting from species-friendly husbandry, thus considering animal welfare as a potential efficiency gain from a sustainability initiative between competitors. The logic of the ACM in the case reads as follows: If animal welfare and the environment represent a concrete quantifiable value for consumers, then this is a benefit that consumers also derive directly in the relevant market, so that there may be an efficiency gain under competition law.

In Austria, too, ESG has already found its way into competition law. The Austrian Competition Act ("KartG"), now explicitly provides in Sec. 2 (1) that sustainability aspects are considered as a possibility to exempt collaborations from the prohibition in Sec. 1 KartG. In this context, the Austrian Competition Authority also published guidelines on the application of the Austrian ban on cartels to sustainability cooperations.[23]

At EU level, DG COMP has also taken sustainability considerations into account in various cases in the past such as in *CECED* or *Philips/Osram*.[24] Although sustainability aspects were usually not the key aspects in these cases, this practice shows that DG COMP is also willing to take sustainability considerations into account when applying Art. 101 (3) TFEU.

Further examples come from the Hellenic Competition Commission ("HCC") which seems also open to the topic of sustainability cooperations. After publishing a Draft Staff Discussion Paper on the topic of competition and sustainability in 2020,[25] it launched its own sandbox for sustainability and competition in 2022,[26] which is intended to promote innovative business models and clarify competition law issues at an early stage.

Looking at these cases, there is a certain tendency for competition authorities in Europe to be more open to the issues of sustainability and ESG. However, it remains to be seen how this trend continues and to what extent this trend will be reflected in further concrete decision-making practice.

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22 See *Chicken of Tomorrow,* Reference: ACM/DM/2014/206028, p. 5 et seq.

23 See (in German), https://www.bwb.gv.at/fileadmin/user_upload/Leitlinien_zur_Anwendung_von____2_Abs_1_KartG_auf_Nachhaltigkeitskooperationen__Nachhaltigkeits-LL__final.pdf.

24 See for brief description of the relevant cases, HHU-Zukunftsgruppe Competition & Sustainability, op. cit. (footnote 4), p. 94 et seq.

25 See https://epant.gr/files/2020/Staff_Discussion_paper.pdf.

26 See https://www.epant.gr/en/enimerosi/press-releases/item/2226-press-release-creation-of-the-sandbox-for-sustainable-development-and-competition.html.

05

OUTLOOK AND PRACTICAL COMPETITION LAW IMPLICATIONS

ESG is steadily gaining economic as well as strategic relevance. Companies are being forced to focus on ESG both by increasing demand for sustainable products and services and by legislators, which inevitably raises the question of ESG triggered agreements and cooperations between competitors. In the absence of a clear legal competition law exemption, such cooperations cannot be generally approved, but require an in-depth assessment under EU competition law. However, current developments show that competition authorities across the EU are generally inclined to give more weight to the issue of ESG in the competition law context. Looking at these developments, the following initial key questions should form part of any self-assessment under EU competition law that companies need to conduct when dealing with ESG agreements among competitors: Does the cooperation really promote specific ESG goals? Does the cooperation restrict competition, in particular with regard to key parameters of competition, such as prices, costs, margins? Can the cooperation be exempted from the ban of anti-competitive agreements?

Answering these questions may not always be straight forward; however, the result of such competition law assessment will certainly be crucial for the overall risk assessment of entering into such agreements with competitors. Companies should be aware of these challenges in the dynamic field of ESG collaborations and may even consider reaching out to the EU Commission or the respective national competition authority for – at least – informal guidance, e.g. in the form of a "Comfort Letter" from DG COMP. After all, it will be key for companies to ensure their antitrust compliance systems are updated with regard to these issues to ensure their employees and management are aware and sensitive to ESG and its antitrust compliance implications. Only with an effective antitrust compliance, companies will ensure collaboration for a better planet will not end up in cartel proceedings before competition law enforcement authorities.

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