

# **Sustainable development and competition, a growing combination**

Our world is undergoing major societal upheaval, including the urgent need to create a more sustainable and resilient society. Sustainable development has therefore become an important topical issue for competition authorities both at the European level, with the ambitions of the Green Deal and the revision of the block exemption regulations, and at the national level, with the *Autorité*'s stated desire to invest in these areas.

**Sustainable development issues are now playing an increasingly important role in litigation and advisory proceedings and in the context of merger control, particularly in the examination of new markets. They are also emerging in the support offered by the *Autorité* under its “open door” policy, which enables players involved in the transition to consult the *Autorité* on their projects at an early stage.**



## A clarified legal framework

When it comes to sustainable development, companies have started to take part in the change. While, at first glance, competition policy would not appear to be at the forefront of sustainability issues, **competition law and sustainable development nevertheless find a meeting point to the extent that, by safeguarding the competitive process, competition law protects and promotes not only consumer welfare, which is increasingly expressed towards sustainable products, but also sustainable innovations.** Even more directly, competition law **provides a framework for the initiatives envisaged by economic actors in the area of sustainable development.** Nevertheless, in some cases, these initiatives may potentially contradict competition law. The examination of these initiatives by competition authorities thus makes it possible to secure cooperation agreements that are favourable to sustainable development and that generate positive effects in terms of public interest that

offset the negative effects on competition while sufficiently benefiting consumers.

### In-depth reflection

In France, the *Autorité* is aware of the difficulty for economic actors to ensure, in certain cases, that their agreements do not create issues with respect to competition rules. That is why **the Investigation Services carry out in-depth reflections on these topics, within a dedicated internal network (Sustainable Development Network) and why the *Autorité* participates in the various projects undertaken in international forums, whether at the OECD, within the European Competition Network or the International Competition Network.**

At the European level, the new rules on vertical and horizontal agreements largely take account of the need to clarify the legal framework and adapt it to the economic and societal changes that have taken place over the last ten years in terms of digital and green transitions. **As a result, the guidelines on agreements between competitors now include a chapter on the assessment of agreements that pursue sustainability objectives.** They clarify when companies can lawfully cooperate with competitors, including, as the case may be, through individual exemption in the most complex situations. In particular, the guidelines give special attention to agreements that set sustainability standards, as, in practice, this is expected to be the most common form of cooperation for achieving sustainability objectives.

**Support in analysing the most complex virtuous projects**

**The *Autorité* has also been committed to an “open door” policy since 2020.**

Players wanting to develop virtuous projects, but for which the analysis in terms of competition rules is particularly complex, can ask the *Autorité* for guidance so they can better self-assess the compatibility of their projects with the competition rules.

In order to better support undertakings in their efforts, the *Autorité* wants to offer a flexible framework in which they can submit a request for guidance. In December 2023, the *Autorité* submitted for public consultation a draft notice aimed at providing undertakings with informal guidance.

## **Advisory action: requests for an opinion in the context of growing public action as regards the transition**

The green transition prioritised by the French government and parliament has prompted the **adoption of new regulatory frameworks** in various sectors. In this context, and pursuant to Article L. 462-1 of the French Commercial Code (*Code de commerce*), the *Autorité* may be asked to consider draft bills that present sustainable development considerations in interaction with competition issues.

For example, in 2021, the *Autorité* was asked to give its opinion on the criteria for allocating contracts for the collection, transport and regeneration of used oils as part of the implementation of a new extended producer responsibility (EPR) scheme for mineral or synthetic lubricating or industrial oils.

In particular, the *Autorité* considered that the proposed criteria were not relevant given the historical structure of the market and existing competitive pressures. The recommendation made by the *Autorité* to this effect (Opinion 21-A-13 of 11 October 2021) was followed, and the Ministerial Order of 27 October 2021 does not therefore contain these criteria.

In 2023, the *Autorité*'s advisory action focused in particular on land passenger transport and the electric vehicle charging stations sector. In November 2023,

the *Autorité* published its opinion on the competitive functioning of the land passenger transport sector. The investigation showed that opening up to competition can accelerate the ecological transition of transport. The introduction of environmental criteria in calls for tender issued by mobility organising authorities can encourage players to intensify their innovation. For example, in a call for tender, the Hauts-de-France region selected a carrier that made an ambitious ecological proposal (80% of the fleet “greened”). From 23 August 2026, it will be mandatory to include at least one environmental criterion in the award criteria for public procurement contracts.

Given their importance, sustainable development objectives and the intermodality that contributes to them could be more clearly integrated into the missions of the sector-specific regulator, the French transport regulatory authority (*Autorité de régulation des transports* – ART), by introducing a more explicit legal basis. With this in mind, the *Autorité* recommended that the legislator amend the French Transport Code (*Code des transports*) to ensure that the ART's missions are consistent with the overall objectives of France's transport policy, which include environmental protection and regional development.

In 2024, the *Autorité* also decided to start inquiries *ex officio* to analyse the competitive functioning of the product rating systems sector, which aims to provide consumers with information on the sustainability-related characteristics of consumer products and services.

## **Enforcement action: a gradually expanding decision-making practice**

The *Autorité* also acts in the domain of litigation, with a focus on identifying anticompetitive practices that could harm sustainable development.



## **Floor covering cartel**

As the Autorité indicated when it issued fines against the floor covering cartel, practices that have a negative impact in terms of sustainable development are considered particularly serious. In this case, the three main manufacturers of PVC and linoleum flooring had, inter alia, refrained from competing on the basis of the merits of their respective products with regard to environmental criteria, by avoiding using this as a selling point, even though the environmental performance of floor coverings, particularly with regard to emissions of volatile organic compounds, has become one of the main criteria of choice for distributor client, businesses or private consumers. The Autorité found that this agreement may have deterred companies from improving the technical performance of their products and investing in innovative processes intended to improve their environmental performance (Decision 17-D-20 of 18 October 2017).

Following this fine, several French hospitals decided to initiate proceedings in 2022 for compensation for the damage they suffered as a result of the overcharging of millions of meters of linoleum flooring.

[See the press release](#)

## **Road transport**

In September 2021, the Autorité fined anticompetitive practices that disrupted the digital transition in the road transport sector, with potentially negative effects on the environment. In this sector, various organisations had joined forces to boycott or incite road transport companies to boycott new digital intermediation platforms that offered optimisation services which made it possible to eliminate a level of intermediation or reduce empty returns by road transport companies. Nevertheless, according to ADEME, a 1% reduction in empty returns would result in a 0.70% reduction in greenhouse gas emissions. The Autorité therefore took into account the fact that the practices impeded efforts to improve environmental efficiency of the sector when setting the fine (Decision 21-D-21 of 9 September 2021).

[See the press release](#)

### **Bisphenol A in food containers: almost €20 million in fines**

In January 2024, the Autorité fined three professional canning associations (the FIAC, the ADEPALE and the ANIA) and the can manufacturers' trade union SNFBM for having implemented a collective strategy intended to prevent manufacturers in the sector from competing on the presence, or absence, of Bisphenol A (BPA) in food containers (cans, tins, etc.).

11 companies, in their capacity as members of these organisations, were also fined. The Autorité considered the practices to be very serious, as they meant that consumers were unable to choose BPA-free products, at a time when these products were available and when BPA was already considered dangerous to health.

The cumulative amount of fines was close to €20 million.

Decision 23-D-15 of 29 December 2023 (in French)

Press release of 11 January 2024

## **New “green” considerations examined in the context of merger control**

**Sustainable development issues also apply to merger control, which ensures in particular that mergers between competitors do not impair innovation.**

Indeed, by ensuring that mergers do not harm competition, the *Autorité* safeguards and encourages innovation, so that companies continue to develop new technologies, new know-how or better products that lead to environmental and sustainable improvements.

In terms of merger control, defining the relevant markets is an essential step, insofar as this makes it possible to identify the scope within which competition between companies takes place and to assess, in a second stage, the respective market powers of the players involved. As part of the examination of transactions submitted to it, the *Autorité* is increasingly called to define and examine what are known as new “green” markets.





### **Examination of the transaction relating to the stake acquired by Storengy, a subsidiary of Engie, in DMSE**

**For example, during the examination of the transaction relating to the stake acquired by Storengy, a subsidiary of Engie, in DMSE, the *Autorité* examined, for the first time in January 2021, the markets for the production and distribution of hydrogen, as well as the market for the development, construction and installation of hydrogen stations.** The *Autorité* considered that although, after the transaction, DMSE would be the only operator active on the hydrogen distribution market in the Dijon area, this position was not necessarily problematic, given the emerging and rapidly expanding nature of the market. Taking into account the existence of potential competitors and the absence of barriers to entry on this market, it considered that this situation did not raise competition concerns.

Furthermore, given the importance of electricity in the process of producing hydrogen by electrolysis, the *Autorité* also assessed the effects of the transaction on the market for the retail supply of electricity. In this framework, it questioned the need to identify a separate segment for the retail supply of “green electricity”, grouping together the green electricity offerings that rely on electricity generated from renewable sources or covered by guarantee of origin certificates. In this regard, the *Autorité* noted the growing development of these offerings, which are primarily based on the system of guarantee of origin certificates and on the increasing demand from consumers (companies, local authorities and individuals). In light of these factors, the *Autorité* found that there was less substitutability between the retail supply of green electricity and that of traditional electricity, a finding that seems to suggest the existence of a specific market for the retail supply of green electricity.

Nevertheless, the *Autorité* decided to leave this question open at this stage, as the competitive analysis remained unchanged, regardless of the segmentation applied. At the end of its analysis, the *Autorité* therefore cleared this transaction without imposing any specific conditions.

- [Decision 21-DCC-18 of 29 January 2021 \(in French\)](#)
- [Press release of 29 January 2021](#)

## **Examination of the creation of the GMOB joint venture by AGI, EDF PEI, Genak and SAFO**

**In October 2021, the *Autorité* examined the creation of the GMOB joint venture by AGI, EDF PEI, Genak and SAFO, which planned to operate in the sector of public charging stations for electric vehicles in Guadeloupe and, in a second phase, in Martinique and French Guiana.** On this occasion, the *Autorité* examined, for the first time, the upstream market for the supply of electric vehicle charging points and the downstream market for the installation and operation of electric vehicle charging points. At the end of its analysis, the *Autorité* therefore cleared this transaction without imposing any specific conditions.

- [Decision 21-DCC-172 of 1 October 2021 \(in French\)](#)
- [Press release of 1 October 2021](#)



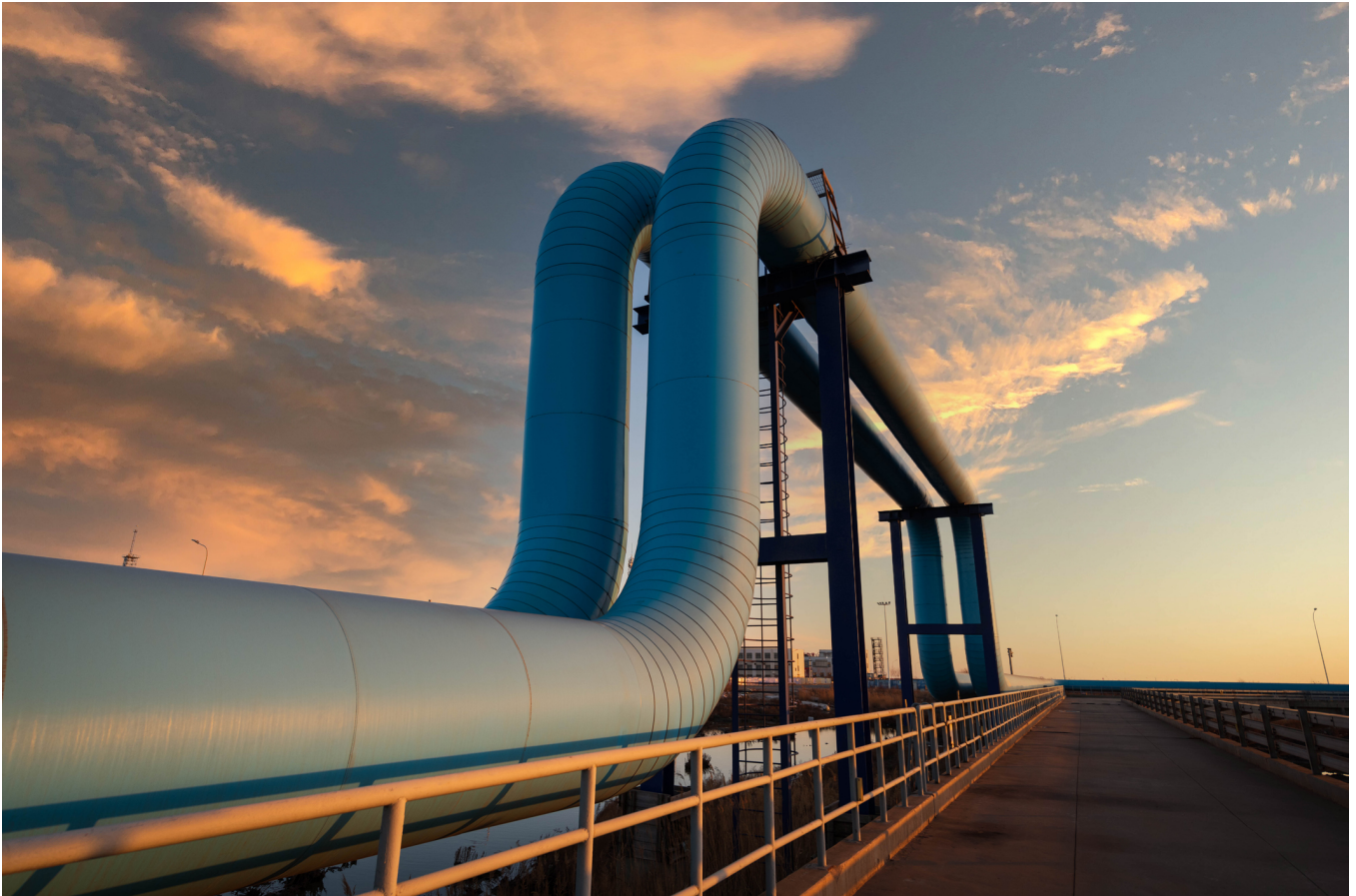
**Consumer preferences for sustainable products have also already been taken into account in the agrifood sector (Carrefour/Bio c' Bon)**

**For example, in Decision 21-DCC-161 of 10 September 2021 clearing the takeover by Carrefour of 100 Bio c' Bon stores**, subject to conditions, the *Autorité* identified the existence of (i) an upstream market for the supply of organic products and (ii) a downstream market for the retail distribution of organic products. Upstream, the *Autorité* noted the specific nature of the supply distribution channel for organic products to mass-market food retailers specialising in the distribution of organic products ("GSS"). Downstream, the *Autorité* considered that conventional and organic products were not substitutable in the eyes of consumers and that generalist mass-market food



retailers ("GSA") were not a substitute for GSS from the point of view of GSS customers.

- [Decision 21-DCC-161 of 10 September 2021 \(in French\)](#)
- [Press release of 10 September 2021](#)



### **Proposed acquisition by the Ardian group of Société du Pipeline Méditerranée-Rhône (SPMR)**

**Lastly, in May 2021, the *Autorité* adopted a decision to block the proposed acquisition by the Ardian group, which is active in the transport, telecoms and renewable energy sectors, of Société du Pipeline Méditerranée-Rhône (SPMR), which is active in the transport of hydrocarbons through pipelines.** Among other things, the Ardian group claimed that it would steer the target's commercial policy in the direction of energy transition and that this "gain" was specific to the planned merger. While the *Autorité* rejected this analysis given the

facts of the case, it nevertheless clarified that environmental gains could, in theory, be admissible to counterbalance the risks of harm to competition associated with a merger.

- Decision 21-DCC-79 of 12 May 2021 (in French)
- Press release of 12 May 2021