



**Notice on informal guidance from the *Autorité*
in the area of sustainability**

21 December 2023

1. Sustainability is defined as “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*”¹. It is based on three pillars: economically efficient, socially equitable and environmentally sustainable development. Sustainability considerations therefore cover issues such as addressing climate change, combating biodiversity loss, upholding human rights, ensuring a fair income, guaranteeing healthy food, and improving animal welfare.
2. The *Autorité de la concurrence* (the “*Autorité*”) contributes to sustainability by protecting the competitive process, which is a source of innovation, increased quality and choice of products and services, and efficient use of resources. The *Autorité* notes that sustainability considerations are permeating economic activity, becoming both major concerns for public authorities and civil society and parameters of competition between undertakings, and that this trend must be taken into account in its action, in accordance with its mandate under the law.
3. Sustainability is a key priority for the *Autorité*, which has stepped up its action to detect anticompetitive practices that are most harmful in terms of sustainability, but which also wants to support stakeholders in examining their projects with sustainability objectives in the light of competition rules.
4. Many types of conduct that pursue sustainability objectives are not likely to be classified as anticompetitive, in particular conduct that does not have a negative impact on parameters of competition between undertakings, such as price, quantity, quality, choice of products or services, and innovation. The European Commission (the “*Commission*”) states that, in principle, the following agreements do not constitute restrictions of competition: (i) “*agreements that aim solely to ensure compliance with sufficiently precise requirements or prohibitions in legally binding international treaties, agreements or conventions*”, (ii) “*agreements that do not concern the economic activity of undertakings, but their internal corporate conduct*”, (iii) “*agreements to set up a database containing general information about suppliers*” concerning the sustainability of their production processes, and (iv) “*agreements between competitors relating to the organisation of [...] awareness campaigns*” among their customers on the impact of their consumption habits².

¹ United Nations (UN), Report of the World Commission on Environment and Development, Our Common Future (“*Brundtland Report*”), August 1987.

² European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01), 21 July 2023, paragraphs 528-531.

5. Other conduct that pursues sustainability objectives is likely to fall within the scope of competition law, and therefore requires closer scrutiny to determine whether it is lawful. There are a number of instruments available to undertakings for this purpose. For example, undertakings can refer to decision-making practice and case law. They can also refer to Commission guidelines, in particular the Guidelines on Vertical Restraints³ or the chapter dedicated to sustainability agreements in the Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) to Horizontal Co-operation Agreements, which provides, in particular, for a “*soft safe harbour*” for sustainability standardisation agreements meeting certain conditions⁴. Lastly, stakeholders can refer to Article 210a of the regulation establishing a common organisation of the markets in agricultural products (“CMO Regulation”), which introduces an exemption from the application of competition law for “*vertical and horizontal initiatives for sustainability*”⁵, and the Commission guidelines on the conditions for applying this exemption⁶.
6. The *Autorité* encourages undertakings and their legal counsel to consider all of these instruments in order to choose the most secure legal route for implementing their projects.
7. Nevertheless, undertakings may wish to consult with the *Autorité* before implementing a project with sustainability objectives, if analysing the compatibility of the project with competition rules would be particularly complex.
8. In view of the novelty, specificities and major challenges involved in bringing sustainability issues within the scope of competitive analysis, the *Autorité* has decided to adopt an “open door” policy, inviting undertakings that wish to develop virtuous projects in terms of sustainability to submit them to the General Rapporteur, who may issue informal guidance as to their compatibility (or non-compatibility) with competition law. This “open door” policy does not affect the principle of self-assessment by undertakings of their conduct, which has been central to the application of competition law since the adoption of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 of the TFEU).
9. In this notice, the *Autorité* sets out the conditions under which undertakings may request informal guidance (I), indicates the procedure to be followed (II), and specifies the scope of this guidance (III).

³ European Commission, Guidelines on vertical restraints (2022/C 248/01), 30 June 2022, in particular paragraphs 144, 235 and 316.

⁴ European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01), 21 July 2023, chapter 9.

⁵ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (“CMO Regulation”), Article 210a.

⁶ European Commission, Commission guidelines on the exclusion from Article 101 of the Treaty on the Functioning of the European Union for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation (EU) No 1308/2013 (C/2023/1446), 8 December 2023.

I. REQUEST FOR INFORMAL GUIDANCE

10. Any undertaking that wishes to engage in unilateral or collective conduct, including agreements between competitors, that is likely to fall within the scope of competition law⁷ may submit a request for informal guidance to the General Rapporteur, under the following conditions:
 - the project is sufficiently advanced to be examined as part of such a request; projects that are still at a purely hypothetical stage or that have already been implemented are therefore not concerned;
 - the project pursues sustainability objectives, as defined in this notice, such as addressing climate change, reducing pollution, ensuring a living income, or safeguarding animal welfare⁸;
 - the project has a potential impact on all or part of the French territory.
11. The request must relate to a project that presents a new or particularly complex competition law issue, which the requesters or their legal counsel cannot easily answer by applying the principle of self-assessment. Prior to submitting a request for informal guidance, undertakings must conduct an initial self-assessment of their project, based on French and European decision-making practice and case law and the applicable legal texts, in particular the Commission guidelines mentioned in paragraph 5 above.
12. The request must not clearly fall under any specific exemptions from competition law. In the area of agriculture, for example, requests must not relate to a draft agreement that clearly falls within the scope of Article 210a of the CMO Regulation. The European legislator has provided for a specific channel, through the Commission, to obtain an assessment of draft agreements covered by this provision⁹.
13. Informal guidance is not possible in the following cases:
 - an identical or similar project is the subject of an ongoing investigation by the *Autorité* or another competition authority;
 - the project is already being examined as part of a similar request for informal guidance by another competition authority or by a sector regulator;
 - relevant informal guidance could only be provided after an in-depth investigation.

⁷ Only requests concerning an analysis with regard to the law on anticompetitive practices are examined. The *Autorité* does not comment with regard to the law on mergers, restrictive competition practices under Title IV of Book IV of the French Commercial Code (*Code de commerce*), or State aid.

⁸ European Commission, Guidelines on the applicability of Article 101 to horizontal co-operation agreements, cited above, paragraph 517.

⁹ European Commission, Commission guidelines on the exclusion from Article 101 of the Treaty on the Functioning of the European Union for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation (EU) No 1308/2013 (C/2023/1446), 8 December 2023.

14. In order to be examined, requests for informal guidance must contain the following information and documents¹⁰:
- the names and contact details of the requesters, as well as a point of contact designated for the purposes of the processing of the request;
 - a brief description of their activities;
 - relevant economic information, such as the sector(s) concerned, the main competitors and/or other players in the sector(s) concerned, and the products or services concerned;
 - a description of the project, including the timetable, how it will be implemented, the sustainability objectives pursued, and how the project contributes to them;
 - an analysis of the compatibility of the project with competition rules;
 - supporting documents (draft charter, draft cooperation agreement, etc.);
 - identification of the information covered by trade secrets and a non-confidential summary of the request;
 - a statement to the effect that, to the requesters' knowledge, the project is not the subject of any proceedings pending before a court or any contentious proceedings before a member authority of the European Competition Network;
 - a statement indicating whether, to the requesters' knowledge, the project or a similar project is being examined by another member authority of the European Competition Network or by a sector regulator;
 - a statement by the requesters that the information provided is accurate and complete, and that all opinions expressed are sincere.
15. Requests for informal guidance should be sent by e-mail to the following address: developpement-durable@autoritedelaconurrence.fr
16. In the interests of efficiency, undertakings may contact the General Rapporteur at the same address to discuss the relevance of submitting a request for informal guidance, prior to doing so.

II. PROCESSING REQUESTS FOR INFORMAL GUIDANCE

17. An acknowledgement of receipt of the request is sent to the requesters.
18. When a request for informal guidance is received, the General Rapporteur assesses the appropriateness of processing the request in the light of the criteria set out in points 10 *et seq.* of this notice.
19. The General Rapporteur informs the requesters, as soon as possible, whether or not they intend to provide informal guidance in respect of their request.

¹⁰ Where the information communicated contains personal data, this data is handled in accordance with Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ("GDPR") and French Law No 2018-493 of 20 June 2018 on the protection of personal data.

20. In addition to the information and documents submitted pursuant to point 14 of this notice, the General Rapporteur may also base their analysis on information that is publicly available and/or known to them, and request additional information from the requesters or, exceptionally, from third parties, subject to the requesters' agreement.
21. The General Rapporteur may, subject to the requesters' express agreement, share the information submitted with other member authorities of the European Competition Network, as well as with the Directorate General for Competition Policy, Consumer Affairs and Fraud Control or any other public authority concerned and may, where appropriate, request an opinion from them.
22. Requesters may withdraw a request for informal guidance at any time. In this case, no informal guidance is provided and all of the information submitted is returned.

III. INFORMAL GUIDANCE LETTER

23. Where the General Rapporteur agrees to examine a project, they send an informal guidance letter to the requesters, within a reasonable period of time.
24. The informal guidance letter includes a summary of the facts contained in the request and the legal reasoning adopted concerning the application of competition law to the planned project. It is signed by the General Rapporteur.
25. If, after examining the case, the General Rapporteur considers that the planned project appears to be compatible with competition rules, the informal guidance letter states that, in view of the information provided, there are no grounds, as the project stands at the date of the letter, to open an investigation or to propose, should the project go ahead in the circumstances described to the General Rapporteur, that the case be referred to the *Autorité*.
26. The informal guidance letter is valid only in the light of the factual and legal circumstances of the project at the date the letter is signed. It is without prejudice to the powers vested in the General Rapporteur by law, in particular if new facts are brought to their attention and/or when new factual or legal circumstances call into question the initial analysis.
27. The Board of the *Autorité* may, as the case may be, take into account the existence of informal guidance when examining the case. However, by virtue of the principle of separation of the functions of investigation and decision-making, which is incumbent on the *Autorité*, any guidance letter provided by the General Rapporteur cannot be binding on the Board of the *Autorité*.
28. Informal guidance letters are, in principle, published on the *Autorité* website, subject to the requesters' express agreement, in particular to protect trade secrets.