

# Sustainability Agreements in Light of Argentina's Competition Law

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Argentina is a member of the United Nations, and has committed itself to achieving the 17 economic, social and environmental goals set by the UN's Agenda 2030 for Sustainable Development.<sup>1</sup> These goals include actions to mitigate the effect of climate change and global warming (goal #13); the creation of sustainable cities with lower environmental impact (goal #11); the creation of renewable and sustainable energy sources (goal #7); and the creation of sustainable industry and the promotion of innovation (goal #9), among others.

In many cases, the adoption of sustainable inputs, processes, or materials involves considerable risks, or requires relevant investment. A switch to "green" components or "clean" processes often implies buying more expensive inputs, adopting costly manufacturing technologies, or resigning margins. Persuading consumers to buy sustainable (though perhaps more expensive) products may also require additional investment. These risks and costs are aggravated by a dilemma referred to as the "first mover disadvantage".<sup>2</sup> In short, this means that the adoption of sustainable products or services by a company may place it at a competitive disadvantage *vis-à-vis* competitors that use or sell non-sustainable products. For example, a food producer that wishes to adopt sustainable processes or inputs will probably face higher costs than their competitors and knows that he or she will have to charge higher prices. When he or she considers that most consumers will choose cheaper products over sustainable products, the producer may be discouraged from "going green". This problem creates disincentives to the adoption of sustainable inputs, processes, or materials.

However, cooperation amongst competitors may help counter these disincentives: if several companies agree to modify their inputs, products, or processes to reach sustainability goals, no individual player is placed at a disadvantage. Coordination also allows competitors to share the costs and risks involved in sustainability projects whose results may yet be untested (e.g. the creation of less polluting or energy consuming products or materials).

Cooperation amongst competitors, however, is the main foe for competition enforcers. And legal uncertainty –particularly when related to antitrust– is the main foe for sustainability agreements: the mere fear of being investigated by antitrust enforcers may discourage companies from adopting joint sustainability efforts.

As with regulations in other jurisdictions, under Argentina's competition law N° 27.442 ("ACL") there may be some uncertainty regarding whether certain sustainability initiatives, particularly those involving agreements between competitors, may amount to competition law infringements. Furthermore, under Article 2 of the ACL, certain agreements between competitors are *presumed* to be illegal.<sup>3</sup>

For example, an agreement to stop using polluting inputs (ranging from packaging materials to certain kinds of fertilizers or energy) in the manufacturing processes of various products, or an agreement to stop commercializing specific polluting products, may indirectly impact the prices of those products or of competing products, and in certain settings also limit consumer choice to a larger or lesser extent. Some of these

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<sup>1</sup> <https://sdgs.un.org/2030agenda#:~:text=We%20resolve%2C%20between%20now%20and,protection%20of%20the%20planet%20and>

<sup>2</sup> White paper, "When Chilling Competition Contributes to Warming: How Competition Policy Acts as a Barrier to Climate Action", available at: <https://iccwbo.org/content/uploads/sites/3/2022/11/when-chilling-contributes-to-warming-2.pdf> ("ICC White paper");

<sup>3</sup> This article lists a number of agreements, including agreements to fix sale or purchase prices, agreements to establish obligations to sell, purchase, produce or commercialize goods or services, and agreements to allocate clients, markets or suppliers.

agreements might fall under Article 1 of the ACL -prohibiting any conduct that might have the purpose or effect of affecting or distorting competition. In some scenarios, an agreement to modify the features of certain products (for example to reduce the fat or salt content of foods, or to stop using specific ingredients) may also impact competition, since it may be considered to reduce the quality or differentiation of products. Furthermore, such agreements might also result in B2B boycotts of suppliers of inputs that have certain features, which may also lead to an infringement of the ACL.

In spite of the legal uncertainty related to the potential infringement of competition laws triggered by sustainability agreements, the ACL includes an extremely useful tool that may be used to counter such uncertainty, namely: a mechanism that allows for the authorization of particular agreements between competitors that may otherwise be deemed to fall under Article 2 of the ACL (mentioned above) by the Argentine Competition Agency (the “ACA”).

This places Argentina in a privileged position: mechanisms that allow for the approval of specific sustainability initiatives by competition enforcers are usually at the top of the list of global proposals being made to reduce the legal uncertainty that paralyzes many sustainability projects.

Article 29 of the ACL establishes that the ACA may issue “permits” for the execution of agreements involving practices covered in Article 2, so long as they do not affect the general economic interest.<sup>4</sup> Article 29 of Decree N° 480/2018 (which regulates the ACL), in turn, establishes that these agreements need to meet four conditions, namely:

**1. They must contribute to improving the production or distribution of goods or services.**

While vague, the wording of this provision seems broad enough to claim that an agreement which results in the commercialization of more sustainable goods or services could meet the condition. This wording seems to have drawn from the conditions that must be met in order to prove efficiency gains under the “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements” (“EU Horizontal Guidelines”). Section 9 of the EU Horizontal Guidelines, which deals specifically with sustainability agreements, establishes: “The first condition of Article 101(3) requires that the agreement in question contributes to improving the production or distribution of goods or contributes to promoting technical or economic progress. In essence, it requires that the agreement contributes to objective efficiencies *understood in broad terms*, as encompassing not only reductions in production and distribution costs *but also increases in product variety and quality, improvements in production or distribution processes, and increases in innovation. It therefore allows for a broad range of sustainability benefits resulting from the use of specific ingredients, technologies and production processes to be taken into account...*”<sup>5</sup>

**2. They must encourage technical or economic growth.**

The notion of technical growth is also vague. For reasons similar to those examined above, it seems reasonable to claim that it could be met if the agreement in question results in the introduction of innovative products or services to the market, or if it results in the introduction of sustainable

<sup>4</sup> As explained above, in the case of agreements between competitors that fall within Article 2 of the ACL, harm to the general economic interest (which under the ACL is a necessary condition for finding an infringement) is presumed, although this presumption may be rebutted. In the case of other practices, including agreements between competitors that do not fall within Article 2, abuses of dominance, and other conducts that may have the purpose or effect of affecting or distorting competition, no such presumption applies.

<sup>5</sup> “..... Examples of efficiencies that can be generated by sustainability agreements include the use of less polluting production or distribution technologies, improved conditions of production and distribution, more resilient infrastructure, better quality products. Sustainability agreements can also reduce supply chain disruptions, shorten the time it takes to bring sustainable products to the market and enable consumers to make informed purchasing decisions by facilitating the comparison of products” (pars 557-558).

products or services (in fact, many sustainable products or services are also innovative products or services).

### **3. They must be indispensable in order to achieve conditions (1) and (2)**

A reasonable interpretation of this condition is that the restrictions included in the agreement at stake are necessary for improving the production or distribution of goods and services “encouraging economic or technical growth.”

The wording of this condition also seems to draw from the EU Horizontal Guidelines. Section 9 of those Guidelines dealing with sustainability agreements establishes that “According to the third condition of Article 101(3), the restrictive agreement must not impose restrictions that are not indispensable to the attainment of the benefits generated by the agreement... Where there is demand for sustainable products, cooperation agreements are in general not indispensable for the attainment of sustainability benefits. *However, they may be indispensable for reaching the sustainability goal in a more cost efficient or quicker way... There may be other instances where, due to negative externalities or other market failures, sustainability benefits cannot be achieved through the free interplay of market forces, or can be achieved more cost-efficiently through cooperation between undertakings. For example, a sustainability agreement may be necessary - in an initial phase - to avoid free-riding on the investments required to promote a sustainable product and to provide information to consumers (overcoming the so called “first mover disadvantage”). ...In this*

*context, a restrictive agreement may also be necessary to achieve economies of scale, in particular to reach a sufficient scale to cover the fixed costs of setting up, operating and monitoring a sustainability label or standard. Restrictions may also be indispensable in order to align the incentives of the parties and ensure that they concentrate their efforts on the implementation of the agreement...”<sup>6</sup>*

### **4. They must not eliminate competition from a “substantial part” of the relevant market.**

The wording of this last condition also draws from the EU Horizontal Guidelines. Section 9 states: “According to the fourth condition of Article 101(3) the agreement must not allow the parties the possibility to eliminate competition *in respect of a substantial part of the products in question. In essence, this condition ensures that there remains some degree of residual competition on the relevant market(s), regardless of the extent of the benefits. ...This last condition may be satisfied even if the agreement restricting competition covers the entire industry, as long as the parties to the agreement continue to compete vigorously on at least one important parameter of competition. For instance, if the agreement eliminates competition on quality or variety, but competition on price is also an important parameter for competition in the industry concerned, and prices are not restricted, this condition can still be satisfied.*”<sup>7</sup>

The interpretation of these four conditions in connection with sustainability agreements is not

<sup>6</sup> ... A sustainability agreement may be indispensable in cases where the parties can show that the consumers in the relevant market find it difficult, for example due to lack of sufficient knowledge or information about the product or the consequences of its use, to objectively assess whether the benefits that they will obtain from the sustainability agreement outweigh the harm that they will suffer from the agreement and that, as a result, they overestimate the magnitude of the immediate negative effects. For example, fast-moving consumer goods manufacturers often use large packaging because consumers perceive big as better. If the manufacturers reduce the excess packaging while maintaining the same contents, consumers will not suffer any harm, however they may perceive the smaller package as a reduction in quantity (see Example 1 at paragraph 599). Similarly, consumers may not appreciate the value of future benefits in the form of improved quality or innovation where the immediate effect of the agreement is an increase in the price of the product (pars 561-562, 563, 564-566).

<sup>7</sup> ... Moreover, if competitors compete with a range of differentiated products, all in the same relevant market, the elimination of competition for one or more of the variant of the product does not necessarily mean that competition in the relevant market is eliminated. ... Similarly, if competitors decide not to use a particular polluting technology or a particular non-sustainable ingredient in the production of their products, competition will not be eliminated if they continue to compete on the price and/or the quality of the final product. ... Finally, the elimination of competition for a limited period of time, where this has no impact on the development of competition after this period elapses, is not an obstacle to meeting this condition. For example, an agreement between competitors to temporarily limit the production of one variant of a product, containing a non-sustainable ingredient, in order to introduce in the market a sustainable substitute for the product, with the aim of raising consumer awareness about the characteristics of the new product, will, in general, fulfil the last condition of Article 101(3)” (pars 592-596)

constrained by rigorous or inflexible standards or precedents. The four conditions that an agreement amongst competitors needs to meet in order to be authorized by the ACA under Article 29 of Decree N° 480/2018 seem broad enough to apply to a large number of sustainability initiatives.

In this scenario, Argentina has a great opportunity to position itself at the forefront of the analysis of problems involving the intersection of sustainability and competition law in Latin America.