

Competition and Sustainability – Commission adopts new Horizontal Guidelines

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On 1 June 2023, the European Commission finally adopted its revised Horizontal Block Exemption Regulations on Research and Development ('R&D') and Specialisation agreements ('HBERs'), which are accompanied by the revised Horizontal Guidelines (2023 Horizontal Guidelines).

The first draft of the new Horizontal Guidelines was published in March 2022 (*2022 draft*), followed by a 2-month public consultation period. Ever since, the competition community had to be patient. In December 2022, the Commission prolonged the applicability of the 2011 HBERs and Guidelines until 30 June 2023. The new HBERs will come into force on 1 July 2023, the Guidelines will be applicable after their publication in the Official Journal of the EU. Unlike the 2011 Horizontal Guidelines, the new Guidelines contain a chapter on sustainability, providing guidance on the admissibility of sustainability agreements. This briefing gives an extensive overview over the key points of the new chapter as well as the main changes to the 2022 draft.

New definition of sustainability agreements

The Guidelines provide for a broad definition of sustainability agreements, based on the UN Sustainable Development Goals. Sustainability is not limited to the environment but comprises economic, environmental and social aspects, such as reducing food waste, limiting the use of natural resources or respecting human rights. The Commission defines sustainability agreements as “any horizontal cooperation that pursues a sustainability objective, irrespective of the form of cooperation.”

Sustainability agreements do not form a distinct category

The Horizontal Guidelines clarify that sustainability agreements are not a distinct category of horizontal cooperation agreements. If a horizontal cooperation agreement corresponds to a R&D, Production, Purchasing, Specialization Agreement or any other type of agreement covered by the Horizontal Guidelines, the agreement should be assessed on the basis of the guidance contained in the relevant chapter(s) of the Horizontal Guidelines. The 2023 Horizontal Guidelines include a new clarification that in case of any inconsistency between the guidance on sustainability agreements and any of the chapters on the specific agreements, parties can rely on the guidance in the chapter that is more favourable to them.

Specification of Sustainability Agreements not caught by Article 101(1) TFEU

If sustainability agreements do not affect price, quality, quantity, choice or innovation, i.e., the parameters of competition, they will not restrain competition. The 2023 Horizontal Guidelines name four, non-exhaustive examples of when sustainability agreements are not caught by Article 101(1) TFEU (adding one example in comparison to the 2022 draft):

- Agreements aiming at ensuring compliance with sufficiently precise requirements or prohibitions in legally binding international treaties, agreements or conventions;
- Agreements concerning internal corporate conduct, such as measures to increase the industry's reputation for acting environmentally responsible;
- Agreements on databases containing general information about suppliers that have (un)sustainable value chains, use (un)sustainable production processes, or supply (un)sustainable inputs without obliging the parties of the agreement to buy/refrain from buying from those suppliers, or
- Agreements relating to campaigns raising awareness of the economic footprint if they don't result in a joint advertising of specific products.

Factors of assessing sustainability agreements under Article 101(1) TFEU

The Guidelines clarify that sustainability agreements are caught by Article 101(1) TFEU, if they affect one of the parameters of competition. The new 2023 Horizontal Guidelines include a list of factors that should be taken into account when assessing the effect of a sustainability agreement:

- the market power of the parties participating in the agreement;
- the degree to which the agreement limits the decision-making independence of the parties in relation to the main parameters of competition;
- the market coverage of the agreement;
- the extent to which commercially sensitive information is exchanged in the context of the agreement; and
- whether the agreement results in an appreciable increase in price or an appreciable reduction in output, variety, quality, or innovation.

Soft safe harbour for sustainability standardization agreements

A focus of the Horizontal Guideline's chapter on sustainability agreements is on sustainability standardization agreements, which form a sub-category of sustainability agreements. Such agreements aim to adopt and comply with certain sustainability standards and specify the requirements which stakeholders along the supply chain have to meet with regard to sustainability metrics. Examples of such sustainability standards would be initiatives that establish a green logo for products meeting minimum requirements,

like fair trade or green button. The 2023 Horizontal Guidelines clarify that agreements cannot be qualified as sustainability standardization agreements if they limit the companies' output of the products concerned by the agreement.

Sustainability standardization agreements can raise competitive concerns by way of price coordination, foreclosure of alternative standards and the exclusion of or discrimination against certain competitors. If such agreements contain a restriction by object, such as price fixing, market allocation or limitations of output, they are inadmissible. As an example, the 2023 Horizontal Guidelines refer to the AdBlue Case by naming agreements limiting technological development to the minimum standard required by law, instead of cooperating to achieve better environmental standards.

If agreements pursue sustainability objectives and satisfy certain criteria, the Commission provides for a soft safe harbour. Sustainability agreements are unlikely to restrict competition if six criteria are cumulatively met:

- (i) they are transparent,
- (ii) they do not impose obligations on companies that do not wish to participate,
- (iii) companies remain free to adopt a higher standard,
- (iv) no unnecessary exchange of commercially sensitive information takes place,
- (v) it is ensured that the outcome of the agreement is effective and non-discriminatory,
- (vi) either the agreement does not cause a significant price increase, **or** the combined market share of the participating companies does not exceed 20% on the market affected by the standard.

With regard to the soft safe harbour criteria, the 2023 Horizontal Guidelines differ slightly from the 2022 draft. The 2022 draft did not include a market share threshold but asked for a monitoring system to be in place. In the 2023 Guidelines, the monitoring system is not a criterion anymore. However, the Guidelines clarify that sustainability standardization agreements are more likely to reach sustainability objectives if such a system is in place.

In case the sustainability agreements do not fulfil (all) the criteria of the agreements needs to be assessed individually under Articles 101(1) and 101(3) TFEU.

Assessment of sustainability agreements under Article 101(3) TFEU

If sustainability agreements meet the criteria of Article 101(1), they can still be exempted under Article 101(3) TFEU. The Guidelines give more detail on how to meet the four conditions of Article 101(3) TFEU in the context of sustainability agreements. In this respect, the 2023 Horizontal Guidelines have not changed from the 2022 draft.

- (i) **Efficiency gains:** The Guidelines allow for a broad spectrum of sustainability benefits, such as better quality products, less pollution, cleaner production or

distribution technologies but also the improvement of consumer choice by facilitating the comparison of the product. It clarifies that efficiency gains have to be substantiated as objective, concrete and verifiable.

(ii) **Indispensability:** The draft Horizontal Guidelines clarify that the obligation imposed by sustainability agreements should not go beyond what is necessary to achieve the aim of the agreement. Sustainability agreements can be indispensable in order to reach the sustainability goal in a more cost-efficient way, for instance, to avoid free-riding on the investments required or achieve economies of scale by covering the cost of setting up and monitoring a sustainability label.

(iii) **Pass on to consumers:** The most interesting criteria is the pass-on to consumers. Benefits deriving from the agreement must outweigh the harm, so that the overall effect on consumers is at least neutral. The draft Horizontal Guidelines outline that consumer pass-on could take three forms (alternatively or cumulatively):

- individual use value benefits, resulting from the use of the product and directly improving the consumer's experience of a product in question, for instance by an improved product quality or product variety;
- individual non-use value benefits, resulting from the consumers' altruistic choice to appreciate the impact of their sustainable consumption on others, for instance by using washing liquid that is less water-pollutant;
- collective benefits, occurring irrespective of the consumers' individual appreciation of the product. Consumers can objectively benefit thereof in the relevant market if there is a substantial overlap of consumers and the beneficiaries. The Commission recognises that collective benefits are only likely to arise if the market coverage of the agreement is significant and therefore does not recognize out of market benefits.

In order to demonstrate collective benefits, the parties must be able to:

- o describe the claimed benefits, with evidence occurred or is likely to occur;
- o define the beneficiaries;
- o demonstrate that consumers in the relevant market substantially overlap with the beneficiaries or are part of them; and
- o demonstrate what part of the collective benefits occurring outside the relevant market accrue to consumers in the relevant market.

(iv) **No elimination of competition:** The agreement must not allow the parties the possibility to eliminate competition in respect of a substantial part of the

products in question. The Horizontal Guidelines acknowledge that an agreement will not eliminate competition even if it covers the entire industry, provided the parties to the agreement continue to compete on at least one key aspect of competition, such as price, quality, variety. Agreements may also be acceptable if competition is eliminated only for a limited period of time, for instance in order to introduce to the market a sustainable substitute for an existing product, provided there is no impact on competition in that market once the period lapses.

Takeaways

It is highly welcome that the European Commission recognizes the importance of addressing sustainability agreements in more detail and provides more guidance. It clarifies its approach towards sustainability agreements and gives a few case studies of how it would assess certain sustainability agreements.

However, while the revised Horizontal Guidelines have been eagerly awaited, not much change has been made to the Chapter on sustainability agreements. In terms of leeway for sustainability agreements, they still stay behind the Guidelines of other competition authorities, such as the draft guidelines of the Dutch ACM or the guidelines by the Austrian FCA, which, unlike the 2023 Horizontal Guidelines do not require a full compensation of the consumers. It would have been desirable to find one approach for the European Union so that companies do not have to worry about whether the scope of the agreement is national or whether it may affect trade between Member States. A legal patchwork in the European Union will be created, leading to legal uncertainty.

Nonetheless, the 2023 Horizontal Guidelines explicitly outline that the European Commission is committed to provide informal guidance regarding any questions on sustainability agreements through its informal Guidance Notice, which is currently being updated. Companies can therefore ask both national competition authorities as well as the European Commission before entering into sustainability agreements with competitors.

We continue to follow developments on sustainability agreements closely. BLOMSTEIN is at your disposal at any time to answer questions on the practical implementation as well as on the scope of application of these measures. Please do not hesitate to contact Anna Blume Huttenlauch and Marie-Luise Heuer.