

# Kluwer Competition Law Blog

## New Draft Sustainability Guidelines for the New Austrian Sustainability Exemption

Martin Gassler (Wolf Theiss) · Thursday, June 2nd, 2022

On 1 June 2022, the Austrian Federal Competition Authority ('FCA') [published](#) its draft Sustainability Guidelines ('Guidelines') to provide guidance for assessing ecological/environmental sustainability agreements under the new sustainability exemption recently introduced in Austrian antitrust law (§ 2 para 1 of the [Austrian Cartel Act](#)).

### Background

The new sustainability exemption was introduced by the Austrian legislator as part of the implementation of ECN+ Directive to give more weight to ecological/environmental considerations (for more background on the legislative process and the provision see [this paper here](#)). It (only) modifies the 'fair share for consumer' criterion under the individual exemption of the national equivalent to Art 101(3) TFEU by providing a (irrefutable) legal presumption that the 'fair share for consumer' criterion is met if the benefits that result from improvements to the production or distribution of goods or the promotion of technical or economic progress "*contribute substantially to an ecologically sustainable or climate-neutral economy*". With the introduction of this new provision the Austrian legislator effectively decided that the Austrian individual exemption (otherwise equivalent to Art 101(3) TFEU) shall deviate from EU competition law (but only) regarding this 'fair share for consumer' criterion. This divergence seems minor at first sight, but is highly relevant since the 'fair share for consumer' criterion of Art 101(3) TFEU is interpreted rather restrictively by the European Commission in its new sustainability chapter of the [draft revised Horizontal Guidelines](#), which is currently hotly debated (see [blog post here](#)).

The legislative materials to the legislative amendment called on the FCA to publish guidelines on the application of this new sustainability exemption as they recognise that more guidance is needed for the interpretation of this new provision. The publication of the Guidelines must be seen and understood in this context.

### Limited scope of the Guidelines

However, the most important aspect (and thus caveat) of these Guidelines is that they are not meant to be used for agreements to which EU competition law applies, i.e., where trade between

EU member states is affected. Instead, they are meant to be used (only) for those agreements to which only Austrian competition law applies (different from the [Dutch Draft Guidelines on Sustainability Agreements](#)). This immediately raises the question of the relevance of these Guidelines as those situations where only Austrian competition law applies may be rather limited, given the broad and extensive interpretation of the inter-state trade criterion that triggers the application of EU competition law.

The Guidelines are also (only) meant for ecological/environmental sustainability agreements since the new sustainability exemption under Austrian antitrust law only refers to this type of sustainability. This is a difference to the sustainability chapter in the [draft revised Horizontal Guidelines](#) of the European Commission, which covers all types of sustainability agreements (for an overview over the sustainability chapter in the draft revised Horizontal Guidelines see [here](#)).

### Conditions for exemption under the new sustainability exemption

The Guidelines must be understood with these caveats in mind. Nevertheless, they provide extensive guidance on how ecological/environmental sustainability agreements can be exempted under the new sustainability exemption. The Guidelines provide that such agreements need to fulfil five conditions:

- *Benefits*: The agreement must contribute to an improvement in the production or distribution of goods or to the promotion of technical or economic progress (as under Art 101(3) TFEU). The Guidelines clarify that this means an improvement of the use of scarce resources so that the welfare of society as a whole increases (total welfare), but that a mere redistribution of welfare between producers and consumers is not sufficient. Importantly, the Guidelines recognise that even benefits can be taken into account that do not materialise soon after the cooperation, but later, including benefits for future generations (but do not say anything about whether and which level of discount factor would be appropriate in such case).
- *Indispensability of the restrictions of competition*: Based on the principle of proportionality, the Guidelines require that the companies must show that there is no other way to materialise the benefits of the agreements that would restrict competition less. In other words, the environmental benefits would not occur under competitive conditions (e.g. because of significant first mover disadvantages in connection with free-riding conduct). Crucially, it is not sufficient to merely show that the benefits could be achieved more cost-effectively due to the agreement (this is stricter than para 582 of the draft revised Horizontal Guidelines of the Commission).
- *Contribution to an ecologically sustainable or climate-neutral economy*: This condition is understood as essentially meaning that the agreement has to result in certain types of sustainability benefits, namely ecological/environmental benefits. The Guidelines provide a non-exhaustive list with concrete examples of what qualifies as ecological/environmental benefits (closely following the terminology and definitions used in the [EU Taxonomy Regulation](#)): (i) contribution to climate protection (e.g. reduction of CO<sub>2</sub> emissions), (ii) contribution to adaptation to climate change, (iii) contribution to the transition to a circular economy (e.g. improve the durability, repairability, retrofittability, reusability or recyclability of products), (iv) contribution to pollution prevention and control (e.g. improve air, water or soil quality), (v) contribution to the protection and restoration of biodiversity and ecosystems (e.g. achieving better conditions for natural and semi-natural habitats or species), and (vi) contribution to the sustainable use and protection of water and marine resources (e.g. reuse of water or the reduction

of contaminants). Importantly, the Guidelines explain that these ecological/environmental benefits can be taken into account even when these benefits do not occur on the relevant market (i.e. when they are out-of-market benefits). This is in stark contrast to the Commission's draft Horizontal Guidelines according to which out-of-market benefits (collective benefits in the terminology of the draft Horizontal Guidelines) can be only considered to the extent that there is a substantial overlap with the consumers on the relevant market. This rather complex search of 'hybrid consumers' (which are in the market and outside the market at the same time) is thus avoided. Instead, the assessment focuses on the total welfare regarding ecological/environmental benefits.

- *Significance of the contribution*: The agreement also needs to 'significantly' contribute to an ecologically sustainable or climate-neutral economy. The Guidelines explain that this means that from a total societal perspective (not just from the perspective of the consumers on the relevant market) the positive effects need at least compensate the negative effects. It is not decisive that the consumers on the relevant market need to be (partially or even fully) compensated. Instead, the total welfare perspective matters, which includes in-market as well as out-of-market benefits. The Guidelines also explain that positive and negative effects of the agreement can be weighed up quantitatively or qualitatively. A purely qualitative balancing may be sufficient if the relationship between the restriction of competition and ecological/environmental benefits is "clear in advance". When this is not "clear in advance" and thus a quantitative balancing is required, the Guidelines offer some guidance on various quantification issues in a dedicated chapter.
- *No elimination of competition*: Regardless of the size of the benefits, some degree of residual competition must remain on the market concerned (similar to the condition under Art 101(3) TFEU). The Guidelines explain that this condition may be fulfilled as long as the participating undertakings continue to compete vigorously in at least one important aspect of competition or sufficient competition exists from undertakings not participating in the cooperation (essentially following the Commission's draft Horizontal Guidelines).

Finally, the Guidelines explain that the FCA is willing to offer informal guidance if doubts remain after self-assessing using these Guidelines.

## Conclusion

Overall, the Guidelines are welcomed as they clarify how to assess ecological/environmental sustainability agreements under the new Austrian sustainability exemption. In particular, the prominent role of out-of-market benefits (collective benefits) by using a total welfare approach in the assessment is welcomed. However, the practical challenge of these Guidelines will be their relevance in practice given that they can be only applied in situations where only Austrian competition law (but not EU competition law) applies. Nevertheless, they may be used as an inspiration at EU level for those that argue that out-of-market benefits should indeed have a more prominent role in the assessment of the individual exemption of Art 101(3) TFEU, at least for certain types of sustainability agreements (similar to the Dutch Draft Guidelines on Sustainability Agreements with regard to environmental-damage agreements).

To make sure you do not miss out on regular updates from the *Kluwer Competition Law Blog*, please subscribe [here](#).

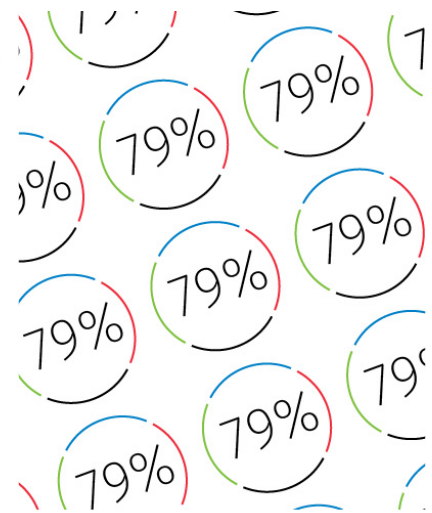
## Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

**Discover how Kluwer Competition Law can help you.**  
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT  
The Wolters Kluwer Future Ready Lawyer  
Leading change

This entry was posted on Thursday, June 2nd, 2022 at 12:20 pm and is filed under [Austria](#), [Competition law](#), [Guidelines](#), [Sustainability](#)  
You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.