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The New Sustainability Chapter in the Horizontal Guidelines: Changes in the Final Version Compared to the Draft Version of March 2022

Martin Gassler (Wolf Theiss) · Wednesday, June 7th, 2023

On 1 June 2023, the European Commission ('Commission') [adopted](#) the new Horizontal Guidelines (together with the new Horizontal Block Exemption Regulations), which contain a new dedicated chapter for the assessment of sustainability agreements. The new Horizontal Guidelines will enter into force following their publication in the Official Journal of the EU (while the new Horizontal Block Exemption Regulations will enter into force as of 1 July 2023). Although the [version published on DG COMP's website](#) (to which the press release makes explicit reference) may be still subject to minor linguistic changes, this blog post refers (for reasons of readability) to this version as the final version.

The blog post gives an overview of the changes in the final version compared to the draft version, which was [published](#) over a year ago in March 2022. The draft version led to a fierce debate about how generously (or not) sustainability agreements should be assessed under EU competition law. During the public consultation, the Commission was criticised for taking a too cautious approach and some hoped for a fundamental change in how to assess sustainability agreements (see e.g. [Jan Blockx's blog post](#)).

Has the Commission fundamentally changed its position in the final version and given in to those demanding a 'greener' interpretation by the Commission? The short answer is NO. In particular, the Commission still insists that out-of-market benefits (i.e. benefits for consumers/citizens outside the relevant market) play a very minor role in the assessment, and thus disappointing those that hoped for a more generous approach towards out-of-market benefits (like in [Austria](#)). However, the final version still contains useful clarifications that are worth mentioning and discussed below.

The assessment under Article 101(1) TFEU

Some clarifications concern the general framework for assessing sustainability agreements under Article 101(1) TFEU. This also includes clarifications on how to assess sustainability standardization agreements.

First, the final version contains (in paras 524 and 525) more guidance on the interplay between chapter 9 and other chapters of the Horizontal Guidelines. The draft version merely stated (in para

547) that if sustainability agreements concern a type of cooperation described in one of the other chapters, their assessment will be governed by the principles in those chapters (i.e. not by the principles in the sustainability chapter). In the final version, this general principle still holds true, but it is now clarified that the sustainability chapter ‘should’ also be taken into account in such circumstances. For instance, if an R&D agreement pursues a sustainability objective, it should be assessed under Chapter 2 (R&D agreements), but Chapter 9 (sustainability agreements) should be taken into account. In fact, the final version even states that if there should be inconsistencies between chapter 9 and other chapters, the parties may rely on the more favourable guidance, the only exception to that rule being standardisation agreements (which should only be assessed by using the principles set out in chapter 9.3).

Second, there are two changes in chapter 9.2 that are worth mentioning, the latter being more important:

- While the draft version refers to situations that are ‘not raising’ competition concerns, the final version refers to situations that are ‘unlikely’ to raise competition concerns. Thus, the Commission is more cautious in the final version and wants (so it seems) to leave a door open for a different conclusion.
- The final version added a supplementary scenario (in para 528) that is unlikely to raise competition concerns, resulting in four scenarios in total (compared to the three scenarios in the draft version). The added scenario concerns sustainability agreements whose aim is ‘solely’ to ensure compliance with sufficiently precise requirements or prohibitions in legally binding international treaties, agreements or conventions (e.g. prohibitions on the use of child labour or the logging of certain types of tropical woods) that are not fully implemented or enforced by the signatory State. Such agreements may enable the parties to implement their sustainability due diligence obligations under EU or national law and therefore fall outside of the scope of Article 101(1) TFEU. Although this scenario has similarities to the scenario described in the [second draft](#) of the Sustainability Guidelines by the Dutch Authority for Consumers and Markets (para 27), it seems to be even wider and not just limited to international standards for doing business in countries outside of Europe. For some, this addition may be very important and may mitigate the Commission’s strict approach concerning out-of-market benefits.

Third, the final version also added (in para 535) the general factors that need to be taken generally into account when assessing the competitive effects of sustainability agreements: (i) the market power of the parties participating in the agreement; (ii) the degree to which the agreement limits the decision-making independence of the parties in relation to the main parameters of competition; (iii) the market coverage of the agreement; (iv) the extent to which commercially sensitive information is exchanged in the context of the agreement; and (v) whether the agreement results in an appreciable effect in the main parameters of competition (price, output, variety, quality or innovation). In the draft version, only the sub-section on sustainability *standardization* agreements contained some guidance (in para 575) on how to assess potential competitive effects, although it only focused on the market coverage of the products incorporating the sustainability standard. The final version now provides a more general economic framework for which factors the Commission may want to better understand to assess potential competitive effects.

Fourth, the sub-section on sustainability standardisation agreements also contains some changes and additions that are worth to be highlighted:

- The final version clarifies (in para 538) that agreements between competitors that limit the

participants' output of the products concerned by the agreement do not qualify as sustainability standardisation agreements. The draft version did not contain such a statement. The Commission seems to make clear that any form of output limitation by a sustainability standardisation agreement would deprive it of the benefits of the soft safe harbour (in para 549), although leaving the door open for assessing such agreements under the general principles of chapter 9.

- The final version also provides (in para 548) one additional example of when a sustainability standardisation agreement is considered as a restriction *by object*: when the agreement between competitors limits technological development to the minimum sustainability standards required by law, instead of cooperating to achieve more ambitious environmental goals. The Commission cited the *Car Emission case* for this.
- The conditions of the soft safe harbour have been changed slightly. The seventh condition of the draft version (concerning the mechanism or monitoring system to ensure compliance with the standard) has been removed from the conditions of the soft safe harbour and is now merely described outside the conditions (in para 553). Instead, the final version (in para 549) introduces a new seventh condition that is, furthermore, alternative to the sixth condition (i.e., either the sixth or seventh condition needs to be fulfilled). The new seventh condition introduces a market share threshold of 20%: the combined market share of all participating undertakings must not exceed 20% on any relevant market affected by the standard. The Commission clarifies (in footnote 384) that this 20% market threshold does not refer only to the specific products covered by the agreement, but to all products in the relevant market (i.e., also those products that are not covered by the agreement, but that are substitutes to the products covered by the agreement and are therefore part of the relevant market).

The individual exemption under Article 101(3) TFEU

The most important issue concerning the 'fair share' criterion upfront: the final version still requires that consumers *in the relevant market* are not worse off (see para 569). In other words, in-market benefits are crucial for the assessment of the 'fair share' criterion. Out-of-market benefits to a wider section of society (i.e., not consumers on the relevant market) can be considered in the assessment but are not capable to off-set the competitive harm. On the positive side though, the final version explicitly clarifies (in para 591) that benefits that materialise in the future can be considered in the assessment. However, in such circumstances the greater the time lag of the benefits, the greater the (discounted) benefits need to be in order to compensate for the harm.

The final version also contains some useful clarification concerning two conditions of the individual exemption under Article 101(3) TFEU:

- *Efficiency gains* (still referring to 'efficiencies' instead of 'benefits'): The final version contains (in para 558) only a minor addition insofar as one source of benefits of a sustainability agreement can be also that consumers are able to make a more informed purchasing decision. The draft version referred (in para 578) to improved consumer choice due to sustainability agreement, but this source of benefit is not mentioned in the final version anymore.
- *Indispensability*: The draft version (in para 583) already made clear that when undertakings are required by law to comply with specific obligations regarding sustainability objectives, agreements that merely ensure compliance with these obligations are not indispensable (see now para 564 of the final version). However, the final version clarifies further (in para 565) that even in the presence of regulation, sustainability agreements may be indispensable in two scenarios: (i)

if the regulation does not address all aspects of market failures (i.e., leaving potential material scope for cooperation agreements); and (ii) if cooperation agreements reach the goal in a more cost-efficient way or more quickly (the former, but not the latter, was already included in para 582 of the draft version, although not in the context of regulation but more generally).

Conclusion

Overall, the final version is not a fundamental change to the Commission's position set out in the previous draft version. It may disappoint those that hoped for a more radical 'greener' interpretation of EU competition law. The changes and additions are subtle and one needs to read the final version very carefully to even identify them. Still, these changes and additions are worth to be highlighted.

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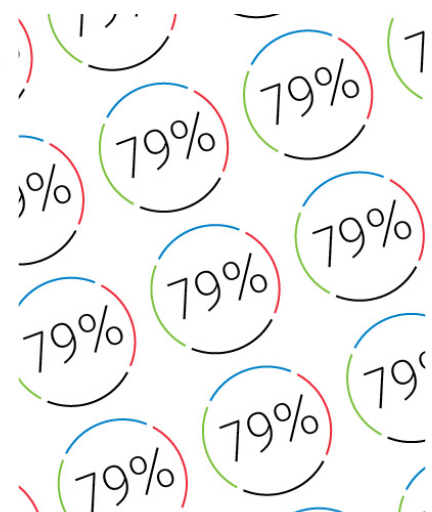
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