LATHAM & WATKINS

ANTITRUST CLIENT BRIEFING

Revised Horizontal Regime: What Businesses Need to Know

An overview of the main changes to the prior regime and their potential implications for business

30 June 2023

At a Glance

On 1 July 2023, the revised horizontal regime of the European Commission will enter into force. The legislative package encompasses the revised horizontal guidelines (Guidelines), the revised research and development block exemption regulation (R&D BER), and the revised specialisation block exemption regulation (Specialisation BER; together, the Horizontal BERs). The Commission also published an explanatory note with an overview of the changes in the Guidelines and Horizontal BERs. The Horizontal BERs will apply until 30 June 2035.

Horizontal agreements are agreements between actual or potential competitors that operate at the same level of production or distribution in the market.

The Guidelines cover a range of topics, including agreements on R&D, specialisation and joint production, joint purchasing, joint commercialisation, information exchange, standardisation, and standard terms. The most important change is the addition of a separate chapter on sustainability agreements, which contains an extended **soft safe harbour** compared to the draft guidelines. The chapter on information exchange contains additional guidance on exchanges in specific circumstances (e.g., in the context of acquisitions or data sharing). The R&D BER emphasises "competition in innovation"; the Specialisation BER now covers agreements with more than two parties and is applicable to all horizontal subcontracting agreements.

This briefing provides an overview of the main changes and their potential implications for business. To facilitate navigation, we have linked our summary to the original documents.

Contents

Introduction....3

Research and Development Agreements....3

Production and Specialisation Agreements....4

Purchasing Agreements....5

Commercialisation Agreements....6

Information Exchange....8

Standardisation Agreements....11

Standard Terms....12

Sustainability Agreements....12

Contacts....16

Introduction

The introduction of the Guidelines provides additional guidance for self-assessment under Article 101 TFEU[1] and clearer definitions of key concepts of these provisions:

- *Centre of gravity of agreements* (starting point of the cooperation and degree of integration of the various functions that are combined): The method remains unaltered, but the Commission provides additional guidance in the form of specific examples of combinations of agreements (*see* para. 7).

- *Liability of joint ventures and parent companies:* According to recent case law of the EU courts, parent companies and their joint ventures form a single undertaking under competition rules provided that the parent company exercises decisive influence over the joint venture on the given market. However, parent companies will be treated as independent on other markets (*see* paras. 12–13).

- *Potential competitors:* These should be analysed on the basis of key criteria stemming from recent case law of the EU courts. The most important criteria are the intention and ability to enter the market within a short period of time in the absence of insurmountable entry barriers (*see* box in para. 16).

As regards competition concerns, the Commission provides additional guidance on restrictions by object and restrictive effects. In addition, the Guidelines contain two paragraphs on advantages and concerns arising from horizontal cooperation (*see* paras. 20–21). As the draft guidelines elaborated on the types of competition concerns only, this change signals a less sceptical attitude towards horizontal cooperation than appeared in the draft guidelines.

- **Restriction by object:** The Commission confirms — based on recent case law of the EU courts, including *Generics UK* (C-307/18) — that the concept is to be interpreted strictly and can only be applied to certain agreements between undertakings which reveal in themselves a sufficient degree of harm to competition for the view to be taken that assessing their effects is unnecessary (*see* paras. 22–29).

- **Ancillary restraints:** For a restriction to be ancillary to the overall cooperation, it must be objectively necessary to implement the agreement and proportionate to pursue the legitimate objectives of that agreement in order to be compliant with Article 101(1) TFEU (*see* para. 34).

Research and Development Agreements

The R&D BER proposes the following key amendments:

- **Scope**

  - The R&D BER exempts R&D agreements concerning the development of products or technologies that would create an entirely new demand, or innovation efforts that are not yet closely related to a specific product or technology irrespective of market shares (*see* Article 6(2) R&D BER and paras. 98–99 Guidelines).

  - The R&D BER provides for a possibility to withdraw the benefit of the block exemption in cases where competition in innovation would be restricted as a result of the R&D agreement (*see* Article 10 (2)(e) R&D BER). The Guidelines state that negative effects are more likely if there are few competing R&D projects and the R&D agreement brings together independent R&D efforts that are close to the launch of the new products or technologies (*see* para. 151).

- **Powers of National Competition Authorities (NCAs)**

  - The R&D BER introduces new provisions that refer to the powers of the Commission and the NCAs to withdraw the benefit of the block exemption in individual cases if they find that the conditions of Article 101(3) TFEU are not met, including when an R&D agreement would substantially restrict innovation competition (*see* Articles 10 and 11 R&D BER).

- **Market share threshold**
  - To simplify cooperation in R&D agreements, the grace period — during which the agreement continues to benefit from the block exemption after the threshold is exceeded — is now two calendar years in all cases. This period follows the seven-year exemption and is triggered when a 25% market share threshold is exceeded. Moreover, the complicated 25% to 30% market share range is abolished (*see* para. 104 Guidelines and Article 6(5) R&D BER).
  - The R&D BER contains a new method of calculating market shares based on the average of the last three calendar years. This method applies when the immediately preceding calendar year is not representative. Examples include bidding markets and markets characterised by large, lumpy orders (*see* Article 7(3) R&D BER and para. 95 Guidelines).

- **Application of the R&D BER**
  - To ensure legal certainty and thus a better understanding of the R&D BER, the Guidelines introduce new sections on the agreements covered by the R&D BER and the conditions for exemption. The R&D BER clarifies, inter alia, the definition of “contract technology” and “contract products” as well as “research and development” (*see* paras. 58–60 Guidelines and Articles 1(3), 1(5), and 1(6) R&D BER).
  - To facilitate application of the R&D BER, the Guidelines provide a detailed explanation of the conditions for block exemption. These include access to the final results of joint R&D, access to pre-existing knowhow, and conditions linked to joint exploitation (*see* paras. 73–104).

- **Transitional period**
  - The R&D BER enters into force on 1 July 2023 and will remain valid for 12 years. There is a transitional period of two years, during which agreements that do not meet the conditions of the new R&D BER but which meet the conditions of the previous R&D BERs will remain block-exempted (*see* Article 12 R&D BER).

Production and Specialisation Agreements

The Specialisation BER and Guidelines provide further guidance on the assessment of horizontal production agreements. The following key amendments are introduced:

- **Scope**
  - Specialisation agreements concern cooperation where (i) one or more parties agree to give up the manufacture of a particular product or supply of a service so that they can source their requirements from the other parties, or (ii) two or more parties jointly manufacture a product (*see* paras. 174–177). The Guidelines now expand the definition of “unilateral specialization agreements” to cover more than two parties active on the same product market (*see* Specialisation BER, recital 8 and Art. 1–3). The block exemption is also extended to horizontal subcontracting agreements in general rather than just to those aimed at expanding production (*see* para. 178).

- **Market share threshold and duration of the exemption**
  - For intermediary products that the parties use captively for the production of certain downstream products that they sell, the benefits of the block exemption are subject to a 20% market share threshold both on the upstream market to which the specialisation product belongs and the downstream market (*see* para. 202 Guidelines and Article 3 Specialisation BER).
  - Similar to the R&D BER, the Specialisation BER provides a new method for calculating market shares based on the average of the previous three years when the market shares relating to the preceding calendar year are not representative (*see* Article 4 Specialisation BER and para. 205 Guidelines).
- **Mobile infrastructure sharing agreements**
  - The Guidelines cover mobile network infrastructure sharing and codify the Commission's and EU courts' decisional practice. The Guidelines now cover production agreements concerning mobile infrastructure elements (e.g., masts, antenna, etc.) and infrastructure sharing agreements. The Guidelines also clarify that infrastructure sharing agreements may lead to cost reductions and improvements in quality and choice (*see* para. 260). Whilst the Guidelines underline that infrastructure sharing agreements may result in restrictive effects on competition, they envisage a case-by-case assessment to ensure that network operators remain independent in their operation and decision making, and do not exchange commercially sensitive information (*see* para. 265).
- **Transitional period**
  - The Specialisation BER provides for a two-year transitional period covering agreements already in force on 30 June 2023 that do not satisfy the new exemption conditions (*see* Article 8 Specialisation BER).

Purchasing Agreements

The Guidelines introduce a definition of a "buyer cartel" and provide guidance on how to distinguish a buyer cartel from legitimate joint purchasing agreements. The latter may be permissible when the combined shares of the parties are below certain thresholds and/or joint purchasing achieves beneficial cost reductions (see below). The Guidelines specifically categorise joint wage-fixing as impermissible coordination.

- **Scope**
  - Joint purchasing agreements consist of the collective buying of products or services by several undertakings (i.e., through a collective purchasing organisation). The Guidelines clarify that these agreements can consist of pooling actual purchases through a joint purchasing agreement, but can also be limited to jointly negotiating prices, components of the purchase price, or other terms and conditions with a supplier (i.e., leaving the actual purchase transactions to be concluded by each party individually based on the jointly negotiated prices and/or terms and conditions) (*see* para. 273–274). A joint purchasing arrangement may also encompass additional services, such as joint distribution, quality control and warehousing (*Ibid*).
- **Joint purchasing**
  - Joint purchasing should be distinguished from **buyer cartels** aimed at directly fixing relevant parameters of competition (*see* para. 279).

- *Joint purchasing agreements:* generally permitted when the parties' combined market shares do not exceed 15% on either the buying or selling market — or both — and/or the joint agreement achieves beneficial price reductions and/or efficiency gains. A market share above that threshold in one or both markets is not an indication of illegality, but it requires a detailed assessment of the effects of the joint purchasing agreement on these markets (*see* para. 292).

- *Buyer cartel:* illegal by object as it results in collusion on purchase prices (or related factors) or influences the buyer's individual negotiations with suppliers. A buyer cartel may exist when buyers agree to exchange commercially sensitive information about their individual purchasing intentions or negotiations with suppliers, outside of any genuine joint purchasing arrangement. The Guidelines also clarify that agreements fixing employees' wages are an illegal cartel-type practice (*see* para. 279).

- The Guidelines provide a non-exhaustive list of factors that distinguish a legitimate joint purchasing agreement from a buyer cartel, including:

  i. The joint purchasing agreement has made it clear to suppliers that the negotiations are conducted on behalf of its members and binds them to the agreed terms and conditions of their individual purchases or purchases jointly for them; and

  ii. The members of the joint purchasing agreement have defined the form, scope, and functioning of their cooperation in a written agreement so that its compliance with Article 101(1) TFEU can be verified *ex-post*. The Guidelines recommend concluding the agreement in writing, although this will not as such shield the agreement from competition law risk. (*see* para. 282).

- Joint purchasing agreements are distinguished from two other types of agreements that restrict competition by object: (a) a disguised cartel aimed at directly fixing relevant parameters of competition on downstream selling markets (*see* para. 283); and (b) a collective boycott aimed at excluding an actual or potential competitor from the same level of the selling market (*see* para. 284). Threats to abandon negotiations or stop purchasing and/or supplying products do not usually amount to a restriction of competition by object, and any negative effects arising from such collective threats have to be assessed in light of the overall effects of the joint purchasing agreement (*see* para. 304).

Commercialisation Agreements

- **Scope**

  - Commercialisation agreements involve cooperation between competitors in the selling, distribution, or promotion of their substitute products. This type of agreement can have a wide scope, from joint selling agreements covering all commercial aspects related to the sale of a product, including pricing, to more limited agreements, such as distribution, after-sales service, or advertising (*see* para. 317).

  - Distribution agreements, unless the parties are actual or potential competitors, are covered by the Vertical Block Exemption Regulation (VBER) and the Vertical Guidelines. The Guidelines clarify the interplay between horizontal and vertical rules (*see* para. 319 and fn. 215).

  - The Guidelines also introduce a new exclusion to the application of Article 101(1) TFEU to the commercialisation of agricultural products that aim to apply a sustainability standard higher than that mandated by the EU or national law *(see* para. 321).

- **Restrictions of competition by object**
  - The Guidelines specify that, apart from disguised cartels, any forms of price fixing, output limitations, and market partitioning in commercialisation agreements are likely to restrict competition by object. The only exception is when those restrictions are ancillary (i.e., directly related and necessary to the main aim of the agreement and where that main aim falls outside the prohibition of Article 101(1) TFEU) (*see* para. 328).
  - The Guidelines provide examples of analysis of commercialisation agreements such as internet selling, media distribution platforms, joint selling joint ventures, and bidding consortia (*see* paras. 360-365).
- **Restrictive effects on competition**
  - *Relevant markets:* The Guidelines explain how to define the relevant markets in order to assess the possible anticompetitive effects of commercialisation agreements (*see* para. 334 and fn. 217).
  - *Information exchange:* The Guidelines clarify that an information exchange that is ancillary to the agreement which itself does not fall within the Article 101(1) TFEU does not fall within that prohibition if the information exchange is **objectively necessary** to implement the agreement and is **proportionate** to the objectives thereof (*see* para. 338). If the information exchange goes beyond the above criteria, it should be assessed separately, under the guidance provided in Chapter 6 of the Guidelines.
  - *Parties' market power:* The Guidelines underline that commercialisation agreements only have restrictive effects on competition if the parties have some degree of market power (combined market share exceeding 15%), which must be assessed taking into account any possible countervailing buying power (*see* para. 339).
- **Bidding consortia**
  - A **new section on bidding consortia** provides more guidance to assess agreements when submitting a joint bid in public or private procurement processes (*see* paras. 347-359).
    - The Guidelines draw **a distinction between bidding consortia and unlawful bid rigging** (or collusive tendering) (*see* para. 348).
    - Bidding consortia will not be considered bid rigging if they enable the parties to participate in projects they could not have bid for individually (e.g., if the parties supply different services that are complementary for the purposes of participation in the tender, or due to the size of the contract or its complexity if the parties are active in the same markets) (*see* para. 352).
    - The parties' ability to compete in a tender procedure individually and thus rendering them competitors depends on the requirements included in the tender rules and the ability of each party to **realistically compete** (a mere theoretical possibility is not enough) for the contracts on its own (given the size, abilities, and capacities of the undertakings involved) (*see* para. 353).
    - The Guidelines specify the situations when bidding consortia are considered restrictions of competition by object or by effect. The Guidelines clarify that the information exchange should be limited to information that is strictly necessary for the formulation of the bid and the performance of the contract and should be circulated only within the relevant staff (*see* para. 357).
    - Even if Article 101(1) TFEU applies, a bidding consortium may still fulfil the conditions of Article 101(3) TFEU, in particular when:

i. the joint bid generates **a more competitive offer** related to price and quality (compared to the offer that would be submitted alone);

ii. the agreement **benefits the tendering authority and/or consumers** (not only the parties to the joint bid); and

iii. there is **no elimination of competition** (meaning other relevant competitors take part in the bidding process) (*see* paras. 358 and 359).

Information Exchange

The Guidelines introduce new or additional guidance on exchanges of information in the context of (i) other types of horizontal cooperation agreements (*see* para. 369); (ii) a vertical agreement (*see* para. 370); or (iii) acquisitions (*see* para. 371), but also on exchanges stemming from European regulatory initiatives (*see* para. 372), on indirect information exchanges through an online platform or facilitated by an algorithm (*see* paras. 401–404) or on data pooling practices (*see* paras. 408 and 418).

- **Scope**
  - An information exchange consists of (i) raw and unorganised digital content that may require processing in order to make it useful (raw data); (ii) pre-processed data that has already been prepared and validated; (iii) data that has been manipulated in order to produce meaningful information of any form; and (iv) any other type of information, including non-digital information (such as physical information sharing and digital data sharing between actual or potential competitors) (*see* para. 367).
- **Nature of the information exchange**
  - The Guidelines offer guidance on the concept and upfront identification of commercially sensitive information. Notably, companies are advised to consider the sensitivity of the information (i.e., the ability of the information exchange to influence the commercial strategy of competitors). The Guidelines specify that information is sensitive and leads to the application of Article 101(1) TFEU if, once exchanged, it reduces uncertainty regarding one or several competitors' future or recent actions in the market and regardless of whether the undertakings involved in the exchange obtain some benefit from their cooperation (*see* para. 384).
  - The Guidelines list examples of information that is generally commercially sensitive, such as information on pricing, production, capacity, quantities, or market shares (*see* para. 385). Conversely, the Guidelines contain a new paragraph citing examples of information that is generally not commercially sensitive, such as information relating to: (i) the general functioning or state of an industry; (ii) public policy or regulatory matters; (iii) standards or health and safety matters; (iv) general, non-proprietary technology and related issues; (v) general promotional opportunities relevant to the industry in general; (vi) non-strategic educational, technical, or scientific data that results in consumer benefits; and (vii) non-strategic information needed to build new business partnerships between undertakings (*see* para. 386).
  - To assess the sensitivity of the information exchanged, companies must consider the aggregated versus individualised nature of the information (*see* paras. 390–392) and the age of the information (*see* paras. 393–394). The Guidelines still acknowledge that information in the public domain is usually not commercially sensitive (*see* para. 388).
- **Characteristics of the information exchange**
  - *Unilateral disclosures:* The Guidelines explicitly include as unilateral disclosures all available types of digital communication (i.e., chat messages, emails, phone calls, inputs to a shared

algorithmic tool, meetings, etc.). Companies should be aware that the mere receipt of one such unilateral communication, if accepted by the recipient, can constitute a presumption of awareness of the content on the part of the recipient. However, that presumption is rebuttable by proving that the recipient has publicly distanced itself (e.g., by responding with a clear statement that it does not wish to receive such information) or reported it to the administrative authorities (*see* paras. 396–397). The Guidelines also include new guidance on unilateral disclosure of commercially sensitive information through a public announcement (in other words, signalling), for example, through a post on a publicly accessible website, a statement at a public event, or in a newspaper (*see* para. 398).

- *Indirect information exchange:* The Guidelines introduce new guidance on exchanges of information which take place via a third party. This includes hub and spoke scenarios and third-party facilitators such as online platforms, trade associations, suppliers and/or customers, or a shared algorithm. The level of awareness of the recipients and/or suppliers of the information will be considered case by case (*see* paras. 401–404).

- *Frequency of the exchange of commercially sensitive information:* The Guidelines give examples on what constitutes a frequent or infrequent exchange of information, which depends on the circumstances and the market at stake (*see* para. 405).

- *Measures to reduce the risk of competition law infringements:* The Guidelines emphasise that companies may deploy clean teams or trustees to process commercially sensitive information. Furthermore, data pooling is allowed provided that the participants have access only to their own data and to the aggregated data of the other participants, possibly under the supervision of a trustee. (*see* paras. 407–408).

- The Guidelines still recognise that foreclosure may be avoided if data is shared with all competitors when data represents a large part of the market and is of strategic importance (*see* para. 383). The Guidelines further specify in a practical example that shared databases may have the effect of restricting competition depending on the economic conditions on the relevant market(s) and the specific characteristics of the databases concerned. These characteristics include the purpose of the database and the conditions of access to and participation in it, as well as the type of information exchanged (e.g., public or confidential, aggregated or detailed, or historical, current, or future information, etc.). Fair, objective, transparent, and non-discriminatory access criteria may alleviate these competition concerns. (*see* para. 383).

- **Market characteristics**

  - The Guidelines clarify that the likelihood that an information exchange will result in collusion or foreclosure depends on the market characteristics. These characteristics include, among others, the level of market transparency and concentration as well as entry barriers (*see* para. 412).

- **Restriction of competition by object**

  - An information exchange will be considered a restriction by object when the information is commercially sensitive and the exchange is capable of removing uncertainty between participants as regards the timing, extent, and details of the modifications to be adopted by the undertakings concerned in their conduct on the market (*see* para. 413).

  - Specific instances of information exchanges which have been qualified as a “by object restriction” include exchanges with competitors on future pricing intentions, intended commercial strategy, current and future demand, forecasts of future sales data, or future product characteristics that are relevant for consumers (*see* para. 414). The Guidelines explicitly state that the decisive criterion to assess whether an information exchange constitutes a restriction by object is the nature of the contacts, not their frequency (*see* para. 415).

   - Signalling or public disclosure that signals a company's future intentions on key competition parameters (for instance, prices or quantities) will, depending on the particular legal and economic context, be considered a restriction by object (*see* para. 416).

   - The Guidelines outline that an information exchange constitutes a cartel if the exchange is an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market. The Guidelines stipulate that an information exchange may also facilitate the implementation of a cartel by enabling undertakings to monitor whether the participants comply with the agreed terms. Those types of exchanges of information will be assessed as part of the cartel (*see* para. 417).

   - The Guidelines recognise that data sharing that has demonstrable, genuine pro-competitive objectives and effects (i.e., when it enables companies to become more efficient and serve customers better) will in most circumstances not amount to a restriction "by object". (*see* paras. 418–419).

- **Restrictive effects on competition**

   - The assessment of restrictive effects is based on the following cumulative elements: (i) the nature of the information exchanged; (ii) the characteristics of the exchange; and (iii) the characteristics of the relevant markets (a sufficiently large part of which needs to be covered). The Commission specifically highlights that information exchanges significantly increasing the transparency of the market(s) in question will be more likely to result in restrictive effects (*see* paras. 420–424).

- **Efficiency gains**

   - The Guidelines give examples of efficiencies that may be considered (*see* para. 426). For example:

      - The market can benefit from the information exchange as it helps undertakings organise a faster response to changes in demand and limits the impact of supply chain disruptions.

      - Both consumers and businesses can benefit from the information exchange as it allows them to compare product prices and quality, such as through the availability of best-selling lists or price comparison data. Consequently, this information aids consumers and businesses in making more informed decisions, thereby reducing search costs.

      - Exchange of consumer-related data may reduce consumer lock-in, thereby promoting competition.

      - The Guidelines highlight that an information exchange in the form of data sharing may be essential for the development of new products, services, and technologies. Furthermore, pooling data on producers supplying sustainable products or producers using sustainable production processes may help undertakings fulfil their sustainability obligations under EU or national law (*see* para. 426).

   - Interestingly, the Guidelines do not include a safe harbour for information exchange. To help companies self-assess their information exchange practices, the Guidelines provide a number of practical examples and scenarios involving information exchanges (*see* paras. 429–433). The Guidelines also include a flowchart setting out steps to follow for companies wishing to engage in an information exchange (*see* para. 434).

Standardisation Agreements

Issues involving standards are now addressed in three separate chapters. Chapter 7 covers standardisation agreements, Chapter 8 assesses standard terms, and Chapter 9 examines environmental standards agreements. The aim of standardisation agreements is to define technical or quality requirements with which current or future products, production processes, value chain due diligence processes, services, or methods may comply.

The Guidelines address the risk of exclusion of (potential) competitors through standardisation that (i) has not been established in a transparent procedure open to all, or (ii) does not grant competitors unrestricted and non-discriminatory access. The changes to the chapter on standardisation agreements are intended to provide more flexibility regarding the requirement for open participation in the standardisation process. The Guidelines also clarify that disclosure of a maximum cumulative fee rate by the parties to a standardisation agreement is not anticompetitive. In addition, the Guidelines now include a requirement for participants to be transparent about relevant intellectual property rights (*see* para. 474).[2]

The Guidelines contain additional guidance on competition concerns and introduce a new form of anticompetitive conduct preventing access to standards. “Hold-out” — described as a situation in which the user of the standard draws out the negotiations — is a reverse situation from “hold-up” and is now included as part of the main concerns . A “hold-out” situation could include, for instance, a refusal to pay fair, reasonable, and non-discriminatory terms (FRAND), royalties, or dilatory strategies (*see* para. 444).

The Guidelines introduce more guidance on the assessment of effects on competition:

- *Disclosure*

Disclosure should be specific (with the patent number or the application number) and should enable the industry to make informed choices and to participate in the standard development. This is not the case for blanket disclosure, which could only be sufficient when the information is not yet available (*see* para. 457).

- *FRAND royalties*

The economic value of intellectual property rights (IPR) can be assessed in different ways but should be unrelated to the market success of related products (as already stated in the Commission communication on standard essential patents (*see* para. 460)). The Guidelines introduce the possibility to compare licencing terms across standards to determine whether the proposed licence fee is FRAND. Overall, the Guidelines provides additional guidance on the basis of recent case law in the area (especially the CJEU’s ruling in *Huawei*). The Guidelines also underline that the analysis of the licence terms should be made in light of sector and industry specificities (*see* paras. 458–461).

- *Access to the standard*

The Commission reinforces its views on discriminatory access to standards by adding a reference to the likelihood of restrictive effects in case of discriminatory or excessive conditions for access. However, the Guidelines stipulate that agreements providing for the disclosure of information regarding characteristics and value-added standards will not in principle be restrictive of competition, since such information improves transparency (*see* para. 466).

- *Participation in standard development*

According to the Guidelines, the restriction of participation and influence in standard setting is likely to restrict competition in most cases (*see* paras. 467 and 470). Under certain circumstances, however, a restriction of competition can be avoided if the stakeholders are informed and influence remains possible (*see* para. 471).

- *Discrimination*

The Guidelines now recognise explicitly that standard development agreements which clearly discriminate against participating or potential members could lead to a restriction of competition. For example, if a standard development organisation explicitly excludes upstream-only undertakings (i.e., undertakings that are not active on the downstream production market), potentially better upstream technologies could be excluded (*see* para. 473).

- *Ex-ante disclosure of royalty rates*

Agreements providing for the ex-ante disclosure of a maximum accumulated royalty rate by all IPR holders will not in principle be considered restrictive of competition, similar to what the 2010 guidelines had already stated for agreements providing for the ex-ante disclosure of most restrictive licencing terms (*see* para. 474).

Regarding the assessment of efficiencies, the Commission maintains its previous guidance with a single update on the importance of open access and participation (*see* paras. 475–478).

Standard Terms

The Guidelines analyse standard terms in a new chapter (Chapter 8). (Standardisation agreements are now analysed in Chapter 7.) However, the Guidelines do not make any changes to the framework for assessing standard terms. Standard terms agreements cover standard terms and conditions of sale or purchase elaborated by a trade association or directly by the competing undertakings which are used in some industries.

Sustainability Agreements

The Guidelines contain a new chapter on sustainability covering all agreements that pursue a sustainability objective. The inclusion of this chapter is intended to show that competition policy does not stand in the way of horizontal cooperation agreements that pursue genuine sustainability objectives (see Commission's explanatory note, para. 22). The Commission commits to provide informal guidance on novel or unresolved questions regarding sustainability agreements through its Informal Guidance Notice (*see* para. 515).

The Commission states that sustainability agreements are not a distinct type of cooperation agreements. Rather, sustainability agreements refer to "any horizontal cooperation agreement that pursues a sustainability objective, irrespective of the form of the cooperation" (*see* para. 521). The additional requirement for a sustainability objective to be *genuine* — which was included in the draft guidelines — has been omitted, as it had created legal uncertainty. The new chapter applies only when the agreement does not fall under the scope of another chapter of the Guidelines, in which case guidance on sustainability will be applied only regarding the assessment of a possible exemption under Article 101(3) TFEU (*see* para. 523). Thus, only sustainability standardisation agreements will be fully examined on the basis of Chapter 9. The scope should also exclude sustainability agreements involving producers of agricultural products that could benefit from an exclusion from the scope of Article 101(1) TFEU under the draft guidelines on sustainability agreements of agricultural producers.[3]

First, the Commission acknowledges that **certain sustainability agreements may fall outside the scope of Article 101(1) TFEU** (*see* para. 527).

- **Certain agreements are unlikely to raise competition concerns:** These include agreements that solely aim to ensure compliance with sufficiently precise legally binding requirements; agreements that do not concern competitors' economic activity but only their internal corporate conduct; agreements that entail setting up a database containing general information about suppliers that have (un)sustainable value chains or production processes or supply

(un)sustainable inputs; and agreements that relate to the organisation of industry-wide campaigns about sustainability (*see* para. 528-531).

- **But the Commission is not prepared to apply the *Wouters* doctrine more generally to sustainability agreements:** Sustainability agreements cannot escape Article 101 TFEU solely because they are considered necessary to pursue legitimate sustainability objectives (*see* para. 521).

Second, all sustainability agreements that **affect one or more parameters of competition** should be assessed as follows (*see* para. 532).

- **If the agreement falls under the scope of another chapter of the Guidelines:** A sustainability objective pursued by the agreement may still be taken into account in the assessment of restrictions to determine whether it is restrictive by object or by effect (*see* para. 533). In case of inconsistency between two applicable chapters, the parties to the agreement may rely on the guidance in the chapter that is the more favourable to them (*see* para. 525).
  - Undertakings must show that the agreement pursues a **sustainability objective** such as "to justify a reasonable doubt as to the anti-competitive object of the agreement" (*see* para. 534 and footnote 372).
  - Once that is established, the **effects of the agreement on competition** will be analysed under the framework of the relevant chapter and sustainability benefits can be taken into account under Article 101(3) TFEU (*see* para. 536). In particular, the following criteria should be assessed: market power of the participating undertakings, degree of independency in decision making, market coverage of the agreement, whether commercially sensitive information is shared, and whether the agreement results in an appreciable price increase or reduction in output, variety, quality, or innovation (*see* para. 535).
- **If the sustainability agreement does not fall under the scope of another chapter:** Sustainability *standardisation* agreements will be analysed solely on the basis of this framework.
  - **Absence of "*by object*" restrictions:** Agreements that are used to disguise hard-core restrictions will be considered as restrictive by object even if they pursue a sustainability objective (e.g., agreements limiting technological development to the minimum sustainability standards required by law) (*see* paras. 547-548).
  - **Assessment of effects:** The Commission creates a presumption that the agreement does not fall under the scope of Article 101(1) TFEU if six cumulative conditions are met. If not, the agreement's effects must be assessed.
    - **The "soft safe harbour" presumption:** Agreements fulfilling the following six cumulative conditions will be considered as falling outside the scope of Article 101(1) TFEU (*see* para. 549):
      - *First*, standard development must be transparent and participative.
      - *Second*, the standard must be adopted on a voluntary basis and access should be open to all market participants.
      - *Third*, undertakings should be able to adopt higher sustainability standards even if binding requirements can be imposed on the participating undertakings.

      - *Fourth*, the parties must not exchange sensitive commercial information unless objectively necessary and proportionate for the implementation, adoption, or modification of the standard.

      - *Fifth*, access to the outcome of the standard-setting process should be effective and non-discriminatory and must be ensured.

      - *Sixth*, the sustainability standard must meet at least one of the following conditions:

        - The sustainability standard must not lead to a significant increase in price or a significant reduction in the quality of the product concerned; or

        - The combined market share of the participating undertakings must not exceed 20% on any relevant market affected by the standard.

    - Initially included as a seventh condition in the draft guidelines, the existence of a monitoring system is an additional factor that can be considered to support the procompetitive effects of the agreement (*see* para. 553).

    - The revised "soft safe harbour" constitutes a significant change in comparison to the draft guidelines, which made it almost impossible for undertakings to benefit from its exemption. The six cumulative conditions described above instead seem to allow for additional legal certainty, at least for undertakings with market shares below 20%.

  - **Assessment of effects of sustainability standardisation agreements:** The Commission provides limited guidance regarding the assessment of competitive effects of sustainability *standardisation* agreements and remains silent on all other types of sustainability agreements (*see* paras. 554-555).

Third, the Commission provides for detailed guidance on the inclusion of sustainable benefits in the analysis of agreements under Article 101(3) TFEU in order to benefit from an exemption (*see* paras. 556-557).

- **Efficiency gains:** The Commission recalls that efficiency gains should be understood in broad terms, including both **quantitative and qualitative efficiencies** and long-term efficiencies for the improvement of technologies or production or distribution channels (*see* paras. 557-558). As regards the standard of proof, undertakings must provide evidence of exactly how the claimed benefits will occur as well as an estimate of their impact (*see* para. 559).

- **Indispensability:** Restrictions must be **reasonably necessary** for the claimed benefits to occur, without any other economically practicable and less restrictive means of achieving such benefits being available (*see* para. 561). For instance, sustainability agreements could be indispensable in order to reach such benefits in a more cost-efficient or quicker way (*see* para. 562); when consumers fail to appreciate the value of future benefits to assess (*see* para. 563); to solve market failures that is not addressed by existing regulation or to achieve regulatory objectives in a more cost-efficient way or more quickly (*see* paras. 564-565); to solve market failures (with issues such as free-riding and the "first-mover disadvantage") (*see* para. 566); to reach sufficient market coverage to allow actual benefits; or to compensate for the customers' insufficient information or knowledge preventing them from estimating properly benefits (*see* para. 567).

- **Pass-on to consumers:** "Consumers" are "all direct and indirect customers of the products covered by the agreement". Three types of benefits are assessed, and these must all be

somehow linked to these consumers on the relevant market: individual use-value benefits, individual non-use value benefits, and collective benefits.

- **Individual use-value benefits** refer to quantitative and qualitative efficiencies at the individual level resulting from the use of the product by the individual consumer. Already at this stage, qualitative efficiencies brought by the agreement might compensate the harm done caused by a price increase. For example, vegetables that are cultivated using organic fertilisers may have better taste and/or be healthier for consumers than vegetables produced with non-organic fertilisers (*see* paras. 571-572).

- **Individual non-use value benefits** refer to consumers' appreciation of the impact of their sustainable consumption on others for which the consumers may be willing to pay a higher price for a lesser adverse impact on sustainability (*see* paras. 575-577). Such indirect benefit may be proven by showing consumer preferences (usually through willingness-to-pay surveys) that should allow to address the overall effect on consumers on the relevant market (as opposed to individual assessment for each consumer). For instance, consumers may be willing to pay a higher price for furniture made from wood that is grown sustainably, not because of the better quality of the furniture but because they want to stop deforestation and the loss of natural habitats (*see* paras. 578-581).

- **Collective benefits** refer to benefits occurring regardless of consumers' individual appreciation of the product and can be included in the analysis as long as consumers in the relevant market are part of a wider section of society (*see* para. 582). This analysis ensures the inclusion of negative externalities in the assessment. For example, drivers purchasing less-polluting fuel are also citizens who would benefit from cleaner air, if less-polluting fuel were used. To the extent that a substantial overlap of consumers (the drivers in this example) and the wider beneficiaries (citizens) can be established, the sustainability benefits of cleaner air can be taken into account, provided that the benefits compensate the consumers in the relevant market for the harm suffered (*see* para. 585).

  - Two types of benefits **outside the relevant market** are possible: (i) benefits on another market if the two markets are related and the groups of consumers are substantially the same (*see* para. 583); and (ii) benefits outside the relevant market if the customers in the relevant market substantially overlap with or are part of the beneficiaries and these collective benefits are significant enough to compensate consumers in the relevant market for the harm suffered (*see* para. 584).

  - In practical terms, undertakings must (*see* para. 587):

    - describe clearly **the claimed benefits** and provide evidence that they have occurred or are likely to occur;

    - define clearly **all the beneficiaries**;

    - demonstrate that the consumers in the relevant market **substantially overlap** with the beneficiaries or form **part of them**, and;

    - demonstrate that the share of the collective benefits **outweighs the harm suffered by consumers in the relevant market**, possibly together with other individual use and non-use value benefits.

  - The Commission reiterates that sustainability agreements may be exempted on the basis of Article 101(3) TFEU by relying on any or all types of consumer benefits defined (*see* para. 590). When solely relying on benefits that will likely occur in the future, these future benefits will have to be discounted by reference to the time period during which consumers will suffer harm without any compensation (*see* para. 591).

- **Absence of elimination of competition:** The Commission recalls that residual competition should remain on the market concerned, even when the agreement covers an entire industry (*see* paras. 592-596).

Finally, the Commission provides additional guidance on the involvement of public authorities confirming that the involvement of authorities in the conclusion of sustainability agreements does not in itself preclude the application of Article 101(1) TFEU (*see* para. 597). However, undertakings will not be liable under Article 101 TFEU provided that the authorities have obliged them to conclude the agreement or when authorities reinforce the effects of the agreement (*see* para. 598).

Contacts

If you have questions about this briefing, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Luca Crocco
luca.crocco@lw.com
+32.2.788.6212
Brussels

Lars Kjølbye
lars.kjolbye@lw.com
+32.2.788.6252
Brussels

Axelle Aubry
axelle.aubry@lw.com
+32.2.788.6251
Brussels

Constance Dobelmann
constance.dobelmann@lw.com
+33.1.40.62.20.17
Paris

Florence Eicher
florence.eicher@lw.com
+32.2.788.6290
Brussels

Sarah Miller
sarah.miller@lw.com
+44.207.866.2676
London

Alice Noguier
alice.noguier@lw.com
+33.1.4062.2152
Paris

Romain Perrois
romain.perrois@lw.com
+32.2.788.6199
Brussels

Werner Berg
Knowledge Management Counsel
werner.berg@lw.com
+32.2.788.6151
Brussels

France-Hélène Boret
Knowledge Management Counsel
france-helene.boret@lw.com
+32.2.788.6323
Brussels

The authors would like to thank Nigina Zahedi, Adam Paucek, and Tetiana Lavrenchuk for their contributions to this briefing.

Antitrust Client Briefing is published by Latham & Watkins as a news reporting service to clients. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice.

Latham & Watkins operates worldwide as a limited liability partnership organized under the laws of the State of Delaware (USA) with affiliated limited liability partnerships conducting the practice in France, Hong Kong, Italy, Singapore, and the United Kingdom and as an affiliated partnership conducting the practice in Japan. Latham & Watkins operates in Israel through a limited liability company, in South Korea as a Foreign Legal Consultant Office, and in Saudi Arabia through a limited liability company. Under New York's Code of Professional Responsibility, portions of this communication contain attorney advertising. Prior results do not guarantee a similar outcome. Results depend upon a variety of factors unique to each representation. Please direct all inquiries regarding our conduct under New York's Disciplinary Rules to Latham & Watkins LLP, 1271 Avenue of the Americas, New York, NY 10020-1401, Phone: +1.212.906.1200. © Copyright 2023 Latham & Watkins. All Rights Reserved

Endnotes

[1] Treaty on the Functioning of the European Union, consolidated version in Official Journal C 326 , 26/10/2012, p. 1 - 390

[2] Commission press release, “Antitrust: Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines” (1 June 2023).

[3] On 10 January 2023, the Commission published draft guidelines providing guidance on the exemption set out in Article 210a of the Regulation establishing a common organisation of the markets in agricultural products. The draft guidelines provide that sustainability agreements between agricultural producers that apply a higher standard than the standard mandated by EU or national law shall be excluded from the application of Article 101(1) TFEU, provided their agreement and the restrictions of competition are indispensable to achieve the sustainability objectives.