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ANTITRUST CLIENT BRIEFING

Horizontal Reform: What Businesses Need to Know

A concise overview of the main changes to the draft horizontal guidelines and their potential implications for business.

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The Development

On 1 March 2022, the European Commission (Commission) launched a public consultation on the draft revised horizontal regime, encompassing draft horizontal guidelines (Draft Guidelines), a draft revised research & development block exemption regulation (Draft R&D BER), and a draft revised specialisation block exemption regulation (Draft Specialisation BER; together the Draft Horizontal BERs). Stakeholders are invited to comment during the public consultation until 26 April 2022. The Commission also published an explanatory note with an overview of the proposed changes and the results of its evaluation of the horizontal regime. The current block exemptions on research and development and on specialisation will expire on 31 December 2022, so the new rules are expected to enter into force on 1 January 2023.

The Draft Guidelines cover a range of topics, including agreements on R&D, specialisation and joint production, joint purchasing, joint commercialisation, standardisation, and standard terms. The most important amendment is the addition of a separate chapter on sustainability agreements; the chapter on information exchange contains additional guidance on exchanges in specific circumstances, for example in the context of acquisitions. Moreover, the Draft R&D BER renders the exemption of R&D agreements conditional upon the existence of at least three competing R&D efforts (*see* Article 6(3) Draft R&D BER).

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

Introductory Chapter

The structure of the Draft Guidelines is largely similar to the current version of the horizontal guidelines. The current chapter on standardisation agreements is, however, split into three parts in the Draft Guidelines: standardisation agreements (chapter 7), standard terms (chapter 8), and sustainability (chapter 9).

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

- ***Center of gravity of agreements*:** The method remains unaltered, but the Commission provides additional guidance in the form of specific examples of agreements (*see* para. 7).
- ***Liability of joint ventures and parent companies*:** According to recent case law, 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. 13-14).
- ***Potential competitors*:** These should be analysed on the basis of key criteria stemming from recent case law of the European 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. 17).

As regards competition concerns, the Commission provides much more guidance than in the current version of the horizontal guidelines.

- ***Competition concerns*:** The Commission provides guidance on each concern to determine whether the agreement could be problematic, which are organised under specific categories (loss of competition, risk of collusion, or anticompetitive foreclosure) (*see* paras. 21-27).

- ***Restriction by object*:** Such restrictions relate to agreements that present a "sufficient degree of harm to competition" as stated by the CJEU in recent rulings. The Commission reiterates the Court's findings in *Cartes Bancaires* (C-67/13 P), which were confirmed in subsequent judgments (*see* paras. 28-35).

- ***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. 39).

R&D (Chapter 2)

The evaluation confirmed that the current R&D BER is not sufficiently adapted to agreements for the development of new products, technologies, and processes, and for R&D efforts directed primarily towards a specific aim or objective. To address these issues, the Draft R&D BER proposes the following key amendments:

- **Scope**

    - To ensure continued effective protection of competition, the Draft R&D BER proposes to no longer exempt R&D agreements concerning innovation in which less than three competing R&D efforts would remain in addition to and comparable with the efforts of the parties to the R&D agreement (*See* para. 79 and Article 6(3) of the Draft R&D BER).

    - To ensure legal certainty, the Draft R&D BER clarifies the terms "competition in innovation" and "R&D poles". Innovation competition refers to R&D efforts for new products and/or technologies that create their own new market. R&D poles refer to R&D efforts directed primarily towards a specific aim or objective arising out of the R&D agreement (*see* para. 60).

- **Market share threshold**

    - To simplify cooperation in R&D agreements, the two-year grace period following the seven-year exemption is triggered when a 25% market share threshold is exceeded. Moreover, the complicated 25% to 30% market share range will be abolished (*see* para. 135 of the Guidelines and Article 6(5) of the Draft R&D BER).

    - The Draft R&D BER proposes 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.

- **Application of the Draft R&D BER**
    - To ensure legal certainty and thus a better understanding of the Draft R&D BER, the Draft Guidelines propose to introduce new sections on the agreements covered by the R&D BER and the conditions for exemption. The Draft R&D BER clarifies, inter alia, the definition of contract technology and contract products as well as research and development (*see* paras. 91 and 92 of the Draft Guidelines and Articles 1(3), 1(5), and 1(6) of the Draft R&D BER).
    - In order to facilitate application of the Draft R&D BER, the Draft Guidelines provide a detailed explanation of the conditions for block exemption. These include access to the final results, access to pre-existing knowhow and conditions linked to joint exploitation (*see* paras. 108-158 of the Draft Guidelines).
- **Transitional period:** The Draft R&D BER provides for a one-year transitional period covering agreements already in force on the expiry date (31 December 2022) that do not satisfy the new exemption conditions (*see* Article 12 of the Draft R&D BER).

Production and Specialisation (Chapter 3)

The results of the evaluation showed the need to further clarify the scope of the current Specialisation BER and to provide further guidance on its application. To this end, the Draft Specialisation BER proposes the following key amendments:

- **Scope**
    - The definition of "unilateral specialisation agreements" is expanded to cover more than two parties active on the same product market (*see* paras. 207-208 and 255-256 of the Draft Guidelines).
    - The block exemption is also extended to horizontal subcontracting agreements in general rather than just to those aimed at expanding production (*see* para. 209 of the Draft Guidelines).
- **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 downstream and upstream. A downstream product is defined as a "product for which a specialisation product is used as an input by one or more of the parties and which is sold by those parties on the market" (*see* para. 273 of the Draft Guidelines and Article 3 of the Draft Specialisation BER).
    - Like the Draft R&D BER, the Draft Specialisation BER proposes a new method of calculating market shares based on the average of the last three preceding calendar years and includes the additional example of supply or demand shocks in the calendar year preceding the agreement (*see* para. 275 of the Draft Guidelines and Article 4(2) of the Draft Specialisation BER).
- The two consecutive calendar years grace period applies following the year in which the 20% threshold was first exceeded (*see* para. 279 of the Draft Guidelines and Article 4(4) of the Draft Specialisation BER).

- **Mobile infrastructure sharing agreements:** The Draft Guidelines provide new guidance regarding mobile infrastructure sharing agreements. In order for a mobile infrastructure sharing agreement to be considered, prima facie, unlikely to have restrictive effects on competition, it would have to comply, at a minimum, with a set of listed conditions. For instance, operators would have to control and operate their own core network and no technical, contractual, financial, or other disincentives preventing the operators to deploy, upgrade, and innovate should exist. Furthermore, operators would have to maintain independent retail and wholesale operations and limit the exchange of information to what is strictly necessary for the agreement to operate. The operators would also have to implement walls to prevent information leakage (*see* para. 304 of the Draft Guidelines).

- **Transitional period:** The Draft Specialisation BER provides for a one-year transitional period covering agreements already in force on the expiry date (31 December 2022) that do not satisfy the new exemption conditions (*see* Article 8 of the Draft Specialisation BER).

Joint Purchasing (Chapter 4)

The Draft Guidelines clarify the framework for assessment, for example through updated guidance on the analysis of by-object and by-effect restrictions. Most notably, the Draft Guidelines introduce a definition of a buyer cartel and provide relevant guidance on how to distinguish a buyer cartel from legitimate joint purchasing agreements.

- **Scope:** Joint purchasing arrangements may consist of pooling actual purchases, but can also be limited to jointly negotiating certain pricing elements or other terms and conditions. A joint purchasing arrangement may also encompass additional services, such as joint distribution, quality control and warehousing, and avoiding duplication of delivery costs (*see* para. 312).

- **Restriction of competition by object:** Joint purchasing arrangements are distinguished from three other types of agreements that restrict competition by object: (a) a disguised cartel aiming at directly fixing relevant parameters of competition (*see* para. 321); (b) a collective boycott aiming at excluding an actual or potential competitor from the same level of the selling market (*see* para. 322); and (c) a buyer cartel.

    - A buyer cartel is defined as an agreement that aims either at coordinating the purchasers' behaviour on the market or at influencing the purchasers' individual negotiations with, or individual purchases from, suppliers (*see* para. 316). A non-exhaustive list of factors that distinguish a legitimate joint purchasing agreement from a buyer cartel include: (i) whether the joint purchasing arrangement has made it clear to suppliers that it jointly negotiates and binds its members on terms and conditions of their individual purchases or purchases jointly for them; and (ii) whether the parties to the joint purchasing arrangement have defined the form of their cooperation, its scope, and its functioning in a written agreement so that its compliance with Article 101(1) can be verified ex-post (*see* para. 319).

    - Threats to abandon negotiations or to stop purchasing/supplying products do not usually amount to a restriction of competition by object and any negative effects arising from such collective threats are assessed in light of the overall effects of the joint purchasing arrangement (*see* para. 343).

- **Restrictive effects on competition:** Further guidance is provided on the assessment of restrictive effects on competition at upstream and downstream levels:

  - Upstream
    On the purchasing market, the restrictive effects resulting from buyer power extend beyond the reduction of range or quality of products to include also lessening of innovation efforts and lowering of investment incentives, especially for small suppliers who have made specific investments for supplying the members of a joint purchasing arrangement (*see* paras. 331-332).

    Purchasing agreements based on sustainability criteria, whereby a joint purchasing arrangement to no longer purchase products from certain suppliers of unsustainable products is concluded, do not in principle have the object to exclude suppliers producing unsustainable products from the purchasing market. The restrictive effects of such agreements must be assessed taking into account, inter alia, whether the suppliers concerned have customers other than those that are party to the joint purchasing agreement or can easily start producing sustainable products (*see* para. 333).

  - Downstream
    On the selling market, specific contractual restrictions, such as limiting (or disincentivising) the ability of the members of a joint purchasing arrangement to independently purchase additional volumes of the input in the purchasing market or the requirement to purchase all or most of their requirements through the arrangement, require an assessment of their restrictive effects on competition (*see* para. 335). Joint purchasing arrangements that restrict the independent ordering of additional volumes by its members provide an incentive to raise sales prices and are unlikely to lead to efficiencies (*see* para. 347).

    If competing purchasers who are not active on the same relevant selling market cooperate, the current guidelines recognise that "the joint purchasing arrangement is **unlikely** to have restrictive effects **on competition**", and that a strong position in the purchasing markets could be used to harm the competitive position of other players in their respective selling markets (*see* para. 212). The Draft Guidelines modify the assessment in two aspects by saying "the joint purchasing arrangement is **less likely** to have restrictive effects **on competition in the selling market**". But the potential concern appears to remain the same: joint purchasing may harm the competitive process for other players in the purchasing markets (for example by significantly harming investment incentives upstream) in case the joint purchasers have a significant position in the purchasing markets (*see* para. 337).

Commercialisation (Chapter 5)

The current framework of assessment is further clarified and new guidance on the assessment of bidding consortia is introduced.

- **Scope:** The exception of non-reciprocal distribution agreements from the application of the horizontal guidelines related to commercialisation agreements is extended to cover the wholesale and imports levels, in accordance with the draft revised Vertical Block Exemption Regulation (VBER) (*see* para. 357). Specific reference to the rules applicable to agricultural products is added (*see* para. 359).

- **Restrictions of competition by object:** Output limitations and market partitioning are added as further important competition concerns that can arise in commercialisation agreements, apart from disguised cartels. The risk of output limitations is deemed particularly high if commercialisation agreements are non-exclusive. Market partitioning is more likely to arise if the commercialisation agreement is reciprocal (*see* paras. 367-368).

- **Restrictive effects on competition:** The current applicable framework of assessment is further clarified and the parties' direct relation to customers is considered as a factor that increases the risk of anti-competitive effects (*see* para. 371).

- **Efficiencies:** The types of efficiencies stemming from commercialisation agreements are expanded to include (i) environmental benefits, provided that they are certain, quantifiable, and documented; (ii) the ability of smaller producers or groups of independent retailers to take advantage of new distribution platforms in order to compete with global or major operators; and (iii) the mitigation of shortages and disruptions in the supply chain (*see* para. 380).

- **Bidding consortia:** Detailed guidance is provided on the assessment of cooperation agreements between parties to submit a joint bid in public or private procurement processes. Such cooperation in bidding can be realised either through subcontracting or through consortia. The only difference between these two forms of cooperation is the obligation to disclose immediately the names of the parties in the case of consortia (*see* para. 386).

    - Bid rigging: Bidding consortia must be distinguished from bid rigging, which relates to collusive tendering practices. Although that distinction may be less straightforward in cases of subcontracting in which the two tenderers get to know each other's offer by cross-subcontracting one another, no general presumption of collusion applies for that form of joint bidding (*see* paras. 387-388).

    - Restriction of competition: If excluding that the parties to the consortium agreement could each compete individually in the tender is not possible, or if there are more parties to a consortium agreement than necessary, the joint bid may restrict competition by object or by effect. The requirements included in the tender rules are particularly important to the assessment, as are size, abilities, and capacities of the undertakings involved. The ability to submit bids only on parts of the contract (lots) and not for the whole tender is sufficient for the parties to be considered competitors (*see* paras. 391-394).

    - Efficiencies: In tender procedures the criteria of Article 101(3) are often interlinked and can be fulfilled if the joint participation to the tender allows the parties to submit an offer that is more competitive than the offers they would have submitted alone — in terms of prices and/or quality — and the benefits in favour of the consumers and the contracting entity outweigh the restrictions to competition (*see* paras. 395-397).

Information Exchange (Chapter 6)

The Commission has clarified the structure of the current framework in order to facilitate companies' self-assessment of information exchange. The Commission has significantly developed the assessment of information exchange under Article 101(1), including recent case law on by object infringements. Most notably, the Draft Guidelines introduce additional guidance on exchanges in the context of acquisitions (*see* para. 410), on exchanges stemming from European regulatory initiatives (*see* para. 411), on indirect information exchanges, (*see* paras. 435-438) and on data pooling practices (*see* paras. 440-442 and 458).

- **Scope:** Information exchange consists of (i) raw and unorganised digital content that requires 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 data sharing between actual or potential competitors) (*see* para. 407).

- **Nature of the information exchange:** The Draft Guidelines propose a revised definition and an upfront identification of commercially sensitive information, including practical examples and recent case law aimed at offering guidance to companies in their self-evaluation of their related practices. Notably, companies are advised to take into account the sensitivity of the information, i.e., the ability of the information exchange to influence the commercial strategy of competitors. The Draft Guidelines specify that this is the case if information, once exchanged, 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* paras. 423-424). The Draft Guidelines also list examples of information that is particularly commercially sensitive, and the exchange of which is qualified as a "by object restriction": exchange with competitors on pricing and pricing intentions, current and future production capacities, intended commercial strategy, current and future demand, future sales, business strategy, future product characteristics that are relevant for consumers, positions on the market, and strategies at auctions for financial products. Companies must also take into account whether the information is genuinely publicly available (*see* paras. 425-427), the aggregated or individualised nature of the information (*see* paras. 428-429), and the age of the information (*see* paras. 430-431).

- **The characteristics of the information exchange:**

  - Unilateral disclosures: The Draft Guidelines now explicitly include as unilateral disclosures all available types of digital communication, i.e., posts on websites, (chat) messages, emails, phone calls, input in a shared algorithmic tool, 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. That presumption is however rebuttable by proving that the recipient did not receive the message or that they did not look at the section in question or did not look at it until some time had passed since the dispatch (*see* paras. 432-434).

  - Indirect information exchange and exchanges in mixed vertical/horizontal relations: The Draft Guidelines introduce guidance on hub and spoke scenarios and third-party facilitators such as online platforms, trade associations, suppliers/customers, or a shared algorithm. The level of awareness of the recipients/suppliers of the information will be considered case by case (*see* paras. 435-438).

  - Measures limiting and/or controlling data usage: The Draft Guidelines emphasise that companies may deploy clean teams 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 (*see* para. 440).

- Access to information and data collected: The Draft Guidelines clarify that when data shared in a data pool represents a large part of and a valuable asset for the market, it needs to be shared with all competitors in order to avoid potential foreclosure (*see* paras. 441-442).

- **Restriction of competition by object:**

The Draft Guidelines clarify and develop with examples what constitutes an information exchange that amounts to a by object restriction. They specify that 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. The Draft 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. They further outline that an information exchange constitutes a cartel if it is an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market. The Draft Guidelines finally 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* paras. 448-450).

- **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. 451-456).

- **Efficiency gains:**

The Draft Guidelines streamline the efficiency section. They lay out, for example, that the market can benefit from information exchange as it helps undertakings organise a faster response to changes in demand and limit the impact of supply chain disruptions. Customers benefit from genuinely public information exchange as it reduces the time spent on searching for data both on their end and on the end of the undertakings, the latter leading to lower costs impacting the final price of the product. Further, exchange of consumer-related data may reduce consumer lock-in thereby promoting competition (*see* paras. 457-458.

Standardisation Agreements (Chapter 7)

Issues involving standards are now addressed in three separate chapters. Chapter 7 covers standardisation agreements, while standard terms are assessed separately in chapter 8 and environmental standards agreements are assessed in chapter 9.

The Draft Guidelines contain additional guidance on competition concerns, and specifically introduce a new form of anticompetitive conduct preventing access to standards. “Hold-out” is a reverse situation from “hold-up”, and is now also included as part of the main concerns and described as a situation in which the user of the standard draws out the negotiations. This could include, for instance,

a refusal to pay fair, reasonable, and non-discriminatory terms (FRAND) royalties or dilatory strategies (*see* para. 470.

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

- **Disclosure:** It 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 that could only be sufficient when the information is not yet available (*see* para. 483).

- **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. 486). The Commission also introduces the possibility to compare licensing terms across standards to determine whether the proposed license fee is FRAND. Overall, the Commission provides additional guidance on the basis of recent case-law in the area (especially the Court's ruling in *Huawei* and the Commission's decisions in *Motorola* and *Samsung*. The Draft Guidelines also underline that the analysis of the license terms should be made in light of sector and industry specificities (*see* paras. 484-488).

- **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 Commission provides 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. 492).

- **Participation in standard development:** Agreements in which the restriction on participation is only limited in time should not be seen as restrictive of competition provided that major steps of the process are shared with participants. The Commission also suggests that stakeholders' participation be improved through recognised procedures (*see* paras. 496-497).

- **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, similarly as it was already stated for agreements providing for the *ex-ante* disclosure of most restrictive licensing terms (*see* para. 500).

Regarding the assessment of efficiencies, the Commission maintains its previous guidance with a single update on the importance of open access and participation.

Standard Terms (Chapter 8)

Standard terms are analysed in a new chapter (chapter 8) of the Draft Guidelines, separately from standardisation agreements which are now analysed in chapter 7. However, no changes are made to the framework for assessing standard terms.

Sustainability Agreements (Chapter 9)

Environmental agreements featured in the 2001 horizontal guidelines, but were not included in the current version. The Draft Guidelines now contain a new chapter on sustainability covering all agreements that pursue a sustainability objective. The Commission states that sustainability agreements are not a distinct type of cooperation agreements. Rather, sustainability agreements refer to "any type of horizontal agreement that genuinely pursues one or more sustainability objectives" (*see* para. 547). The new chapter applies only when the agreement does not fall under the scope of another chapter of the Draft 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. 556). Thus, only sustainability standardisation agreements will be fully examined on the basis of chapter 9.

First, the Commission acknowledges that some sustainability agreements can fall outside the scope of Article 101(1) TFEU (*see* para. 551).

- **Some agreements would typically not raise any competitive concerns:** Agreements that do not concern competitors' economic activity but only their internal corporate conduct; agreements that entail the creation of a database containing information about suppliers that have sustainable value chains, production processes, and provide sustainable inputs; and agreements that relate to the organisation of industry-wide campaigns about sustainability (*see* paras. 551-554).

- **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. 548).

Second, all sustainability agreements that affect one or more parameters of competition should be assessed as follows (*see* paras. 555-556):

- **If the agreement falls under the scope of another chapter:** A genuine sustainability objective of 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. 559).
    - Undertakings must show that the agreement pursues a **genuine sustainability objective** such as "to justify a reasonable doubt as to the anti-competitive object of the agreement" (*see* para. 560 and footnote 319)
    - 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. 560)
- **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 pursuing a genuine sustainability objective cannot be considered as restrictive by object as long as they do not cover up hard core restrictions (*see* paras. 570-571)

- **Assessment of effects**: the Commission creates a presumption that the agreement does not fall under the scope of Article 101(1) TFEU if seven cumulative conditions are met; if not, the agreement's effects must be assessed
    - The **"soft safe harbour" presumption**: agreements fulfilling the following seven cumulative conditions will be considered as falling outside the scope of Article 101(1) TFEU (*see* para. 572):

- *First*, standard development must be transparent and participative
- *Second*, the standard should be adopted on a voluntary basis and access should be open to all market participants
- *Third*, undertakings should be able to adopt stricter standards
- *Fourth*, the parties should not exchange sensitive commercial information
- *Fifth*, access to the outcome should be effective and non-discriminatory
- *Sixth*, sustainability standards should not lead to a significant increase in price or a significant reduction in the choice of available products on the market
- *Seventh*, there is a mechanism or monitoring system for compliance with the standard's requirements

- **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* para. 575).

Third, the Commission provides for detailed guidance on the inclusion of sustainable benefits in the analysis of agreements under Article 101(3) in order to benefit from an exemption (*see* paras. 576-614).

- **Efficiency gains:** the Commission recalls that they should be understood in broad terms, including both **quantitative and qualitative efficiencies,** and long-term for the improvement of technologies or production or distribution channels (*see* paras. 577-578). As regards the standard of proof, undertakings must provide evidence of exactly how the claimed benefits will occur and provide an estimate of their impact (*see* para. 579).

- **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. 581). For instance, sustainability agreements could be indispensable in order to reach such benefits in a more cost-efficient way (*see* paras. 582-583); to solve market failures (with issues such as free-riding and the "first-mover disadvantage") (*see* paras. 584-585); 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. 586).

- **Pass-on to consumers:** "Consumers" are "all direct and indirect users 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 (*see* para. 591).

    - **Individual non-use value benefits** refer to consumers' appreciation of the impact of their sustainable consumption on others for which consumers may be willing to pay a higher price for a lesser adverse impact on sustainability (*see* paras. 594-596). Such indirect benefit may be proven by showing consumer preferences (usually through willingness-to-pay surveys) that should be drawn up for a representative share of all consumers in the relevant market (*see* paras. 597-600).

    - **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 the larger group of beneficiaries (*see* para. 601). This analysis ensures the inclusion of negative externalities in the assessment.

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

    - In practical terms, undertakings must (*see* para. 606):

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

        (ii) define clearly **all the beneficiaries**;

        (iii) demonstrate that the consumers in the relevant market **substantially overlap** with the beneficiaries or are **part of them** and;

        (iv) demonstrate what part of the collective benefits **accrue to consumers of the product** in the relevant market.

- **Absence of elimination of competition:** the Commission recalls that there should remain residual competition on the market concerned, even when the agreement covers an entire industry (*see* paras. 610-614).

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 constitute in itself a sufficient reason to exempt such an agreement from Article 101(1) TFEU (*see* para. 615). However, undertakings will not be liable provided that the authorities have obliged them to conclude the agreement or when authorities reinforce the effects of the agreement (*see* para. 616).

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:

Lars Kjølbye
lars.kjolbye@lw.com
+32.2.788.6252
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

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