



Sustainability agreements under EU competition law: Draft revised Guidelines on horizontal cooperation agreements

DG Competition, European Commission

Disclaimer: all views are personal

Art. 210a CMO vs. HBERs & HGL

- Art. 210a CMO Reg. applies only to agricultural products and covers both horizontal and vertical cooperation
- Horizontal Block Exemption Regulations (“**HBERs**”) comprise: Research & Development Block Exemption Regulation & Specialisation Block Exemption Regulation → exempt from the prohibition of Art. 101(1) TFEU those R&D & specialisation agreements that presumably fulfil 101(3) TFEU
- Guidelines on horizontal cooperation agreements (“**HGL**”): provide guidance for the interpretation of the HBERs and for the application of Art. 101(1) & (3) TFEU to other common horizontal agreements (i.e. agreements between actual or potential competitors): purchasing, commercialisation, standardisation, information exchange, etc.
- Hence, HGL comprise the general competition rules and are the fall-back option in case of horizontal cooperation where Art. 210a is not applicable
- VBER and VGL are fall-back option in case of vertical cooperation!

Background

- European Green Deal announced by the Commission
 - Revision of the 2011 Guidelines on horizontal cooperation agreements (HGL)
- } end of 2019
- Broad public consultation on the interplay between competition policy (antitrust, mergers & state aid) and the Green Deal objectives (October 2020)
 - Launch public consultation on draft revised HGL (1 March 2022) including new chapter on agreements pursuing sustainability objectives

Sustainability agreements not affecting parameters of competition fall outside Article 101 TFEU

Non-exhaustive list of examples

- Agreements to create a database containing information about sustainable suppliers or distributors without requiring the parties to necessarily purchase from, or sell to them
- Agreements relating to the organisation of industry-wide awareness campaigns or campaigns raising customers' awareness
- Agreements that do not concern the economic activity of competitors, but their internal corporate conduct

Sustainability agreements falling within 101(1)

Sustainability agreements only raise competition concerns under Art. 101(1) if they lead to restrictions by object or if they produce appreciable negative effects.

Non-exhaustive list of examples where agreements affect parameters of competition:

- An agreement between the parties to a sustainability standard to put pressure on third parties to refrain from marketing products that do not comply with the sustainability standard
- An agreement between competitors to jointly develop a production technology that reduces energy consumption
- An agreement between competitors to jointly purchase products having a limited environmental footprint as an input for their production

Assessment under Article 101(1) TFEU – Sustainability

Chapter HGL

- Pursuit of sustainability objectives relevant for determining whether by object or by effect:
 - Genuine sustainability aim or cover-up of price fixing/market sharing/output limitation, etc.?
 - If price fixing etc. (by object) and no real sustainability aim: prohibited/contrary to Article 101(1)
 - If genuine sustainability aim: need to assess effects and whether appreciable
- Sustainability agreements assessed under Article 101(1) TFEU in line with chapter of Horizontal Guidelines specifically dealing with type of cooperation agreement concerned
- Sustainability chapter focuses on agreements setting sustainability standards:
 - Such often have positive effects on competition and allow consumers to make informed decisions

Assessment under Article 101(3) TFEU

- Sustainability agreements restricting competition can still be exempted under Article 101(3) TFEU if four cumulative conditions are met
- First condition – improving production/distribution of goods or promoting technical or economic progress:
 - Broad concept covering sustainability benefits both in terms of qualitative efficiencies as well as cost-savings (e.g. reduction in production costs, increase in variety/innovation)
- Second condition – consumers (direct/indirect) receiving fair share of benefits
 - a) Individual use value benefits/traditional efficiency assessment (improved quality/variety or price decrease) – improve consumers' experience with/use of product
 - b) Individual non-use value benefits (indirect qualitative benefits) – no direct improvement of consumers' experience with product but consumers willing to pay for the beneficial impact on others

Assessment under Article 101(3) TFEU

- Second condition (continued) – consumers receiving fair share of benefits
 - c) Collective benefits from collective action (instead of individual consumer's perspective) – positive externalities/benefits accruing objectively to consumers – apportioning of benefits (if part of wider group of beneficiaries) – significant coverage
 - d) Any combination of these types of benefits
- Third condition – indispensability: agreement reasonably necessary to cure market failures (overcome first mover disadvantage; achieve economies of scale; nudge consumer preferences)
- Fourth condition – no elimination of competition: some degree of residual competition left – even if agreement covers entire industry, parties continue to compete vigorously on at least one important aspect of competition (price, quantity, quality, variety & innovation)

Thank you



© European Union 2020

Unless otherwise noted the reuse of this presentation is authorised under the [CC BY 4.0](https://creativecommons.org/licenses/by/4.0/) license. For any use or reproduction of elements that are not owned by the EU, permission may need to be sought directly from the respective right holders.

