

Strelia Competition Newsflash

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Horizontal Guidelines 2023 : Taking a closer look at the key revisions

1. INTRODUCTION: WHAT & WHY ?

Following a rigorous evaluation and review of the 2011 Horizontal Block Exemption Regulations (HBERs) and the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Horizontal Guidelines), the European Commission adopted updated HBERs on Research and Development and Specialisation agreements on the first of June 2023.

These Block Exemption Regulations were accompanied by revised Horizontal Guidelines. The old HBERs and Horizontal Guidelines expired on June 30th, 2023, and the new HBERs and Horizontal Guidelines started to apply July 1st 2023. Keeping in mind that a transition period of two years was put in place. Agreements that do not meet the conditions of the new HBERs but which meet the conditions of one of the previous HBER will remain block-exempted until 30 June 2025.¹

With these means, clearer and up-to-date guidance is provided to help assess the compatibility of horizontal cooperation agreements with EU competition rules.

Given the Commission's decision of 10 October 2023 to not extend the Block Exemption Regulation for certain agreements, decisions and concerted practices between liner shipping companies (Consortia Block Exemption Regulation), the reviewed Horizontal Guidelines will now also be the go-to instrument to assess the compatibility of the cooperation agreements between liner shipping companies.²

Horizontal cooperation agreements are agreements between competing undertakings. Although such agreements may limit competition on relevant markets since they may result in collusion between parties or anti-competitive foreclosure, numerous substantial economic benefits may result from horizontal cooperation between undertakings³. The Horizontal Guidelines facilitate the self-assessment by businesses of the most common types of horizontal cooperation agreements. It is important to emphasize that the Horizontal Guidelines do not provide specific guidance for every possible scenario and that, therefore, each case must be assessed based on its own facts.⁴

2. WHAT'S NEW ?

The revised Horizontal Guidelines bring a couple of innovations to the table. First and foremost, an entirely new chapter is added for horizontal cooperation agreements pursuing a sustainability objective.⁵ Explicit guidance is also provided on how to calculate market shares for applying the R&D block exemption regulation (BER) as well as for applying the Specialisation BER.⁶ The scope of the latter has also been expanded to cover more types of production agreements (*e.g.* broader definition of unilateral specialisation agreements) and to also cover agreements that include more than two parties. It now also contains a specific section on mobile

¹ Article 12 Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 143/9; Article 8 Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 143/20.

² Communication to the Commission, 10 October 2023, *Expiry of Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 83(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies*, C(2023) 6700 final.

³ Communication from the Commission 27 July 2023, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal co-operation agreements*, OJ C 259/01, 21 July 2023 (Hereafter: Horizontal Guidelines), para. 20-21.

⁴ Horizontal Guidelines, para. 4.

⁵ Explanatory Note on the main changes proposed for the horizontal block exemption regulations and Horizontal Guidelines, para 22; Horizontal Guidelines, para. 515 and further.

⁶ Explanatory Note para. 10 and 13; Horizontal Guidelines para. 87 and 203

telecommunications infrastructure sharing.⁷ Commercialisation agreements now also include a section on bidding consortia.⁸ Standardisation agreements and agreements on the use of standard contract terms are now treated in separate chapters.⁹ The chapter on information exchanges has been entirely restructured and includes additional guidance on various types of information and information exchanges (such as hub-and-spoke scenarios and unilateral disclosure), on what constitutes object infringement and on the measures to limit/ control how data is used (such as the use of clean teams), and takes into account the changes related to the digitalisation of information.¹⁰

3. WHAT'S UPDATED

Besides new additions, the existing Horizontal Guidelines have received a polish in order to address the issues identified in the evaluation and to clarify specific agreements. Thus, the introductory chapter has been updated to align with the latest case law on key concepts, including new guidance on the application of article 101 TFEU to agreements between JVs and their parent companies as well as the determination of the centre of gravity for horizontal agreements covering more than one type of activity.¹¹ The chapter on purchasing agreements has been expanded to reflect recent case law. The revised guidelines also provide greater flexibility regarding the requirement of open participation in the standard-setting process.

The following section takes a closer look at the major revisions from the horizontal guidelines that are important when engaging in horizontal cooperation agreements with actual or potential competitors.

4. A CLOSER LOOK

4.1. Mobile telecommunications infrastructure sharing agreements

The guidelines regarding production agreements have been expanded with a section on mobile telecommunications network sharing agreements ('NSAs'). In doing so, the European Commission recognized the potential benefits resulting from cost reductions or quality improvements.¹² This section puts forward the relevant elements for the assessment of these agreements and contains a list of minimum conditions to reduce the risk of infringement of competition law.

According to the European Commission, NSAs, in principle, do not constitute a restriction of competition by object within the sense of Article 101(1), unless it entails to engage in a cartel. These agreements, however, may amount to restrictive effects since they may limit infrastructure competition or limit the parties' decision-making independence and must therefore always be subject to an individual assessment under Article 101 TFEU. The Horizontal Guidelines set out certain factors relevant for the individual assessment, e.g. the type and depth of sharing, the scope of the shared services and technologies, the geographic scope and market coverage, the market characteristics and structure and the number of NSAs in the relevant market and the number and identity of participating network operators.¹³

For NSAs to be considered *prima facie*, as unlikely to have restrictive effects, it must comply with the following minimum requirements.¹⁴ The participating operators must:

- Control and operate their own core network;
- Maintain independent retail and wholesale operations;
- Maintain the ability to follow independent spectrum strategies; and
- Not exchange commercially sensitive information other than that which is strictly necessary.

Lastly, the section also provides general guidance for the various types of mobile infrastructure sharing agreements by explaining the pertinent factors for assessing the anti-competitive effects of passive, active and spectrum sharing agreements.¹⁵

⁷ Explanatory Note, para. 14; Horizontal Guidelines, para. 258.

⁸ Explanatory Note, para. 18; Horizontal Guidelines, para. 347.

⁹ Explanatory Note, para. 20-21; Horizontal Guidelines, para 436 and 490

¹⁰ Explanatory Note, para. 19; Horizontal Guidelines, para. 366

¹¹ Explanatory Note, para 16.

¹² European Commission, *Questions and Answers on adoption of the new Horizontal Block Exemption Regulations and Horizontal Guidelines*, 1 June 2023, https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3014

¹³ Horizontal Guidelines, para. 264.

¹⁴ Horizontal Guidelines, para. 265.

¹⁵ Horizontal Guidelines, para. 266.

4.2. Purchasing agreements

Clarifications to reflect recent case law have been made to the chapter relating to purchasing agreements and it now states that the guidance applies to all types of economic sectors and that it also covers joint negotiation agreements.¹⁶

The chapter also elaborates on the distinction between joint purchasing and buyer cartels. The latter, which are a restriction of competition by object, are agreements or concerted practices between two or more purchasers that, without engaging in joint negotiations towards the supplier, coordinate the purchaser's individual competitive behaviour on the purchasing market, that influence the relevant parameters of competition (e.g. agree not to pay a certain price for a product) or that influence the individual negotiations with or purchases from suppliers (e.g. coordinate purchases' negotiation strategies). A buyer cartel may also exist where purchasers (agree to) exchange commercially sensitive information outside of any genuine joint purchasing agreement.¹⁷ Buyer cartels are sufficiently harmful to competition that an assessment of the effects it may have on competition is redundant as they're perceived to be by object restrictions of competition.¹⁸

Joint purchasing agreements making clear to suppliers that the negotiations are conducted on behalf of its members and that the members will be bound by the agreed terms and conditions for their individual purchases or that the agreement purchases on behalf of its members and joint purchasing agreements with a defined form, scope and functioning of their cooperation in a written form, constitute elements brought forward by the European Commission as factors that make it less likely that a purchasing agreement will amount to a buyer cartel.¹⁹

The Horizontal Guidelines also distinguish horizontal boycotts (e.g. implementing industry norms and standards to prevent potential competitors from entering the market) and vertical boycotts (e.g. agreement not to buy from certain unsustainable suppliers). Whereas horizontal boycotts amount to a restriction of competition by object, this is generally not the case for vertical boycotts, and they must therefore be considered in their legal and economic context to assess their actual or likely effects on competition.²⁰

The market share thresholds for market power, namely a combined market share of 15% on the relevant purchasing markets as well as a combined market share of 15% on the relevant selling markets, are maintained. Exceeding this threshold in one or both markets on its own does not suggest that the joint purchasing agreement is probable to produce anti-competitive effects but requires a detailed assessment of its effects on the market.²¹

The guidance also elaborates on the potential upstream harm to suppliers where parties to a joint purchasing agreement achieve a high degree of buying power as well as on certain joint negotiation tactics including the threats to abandon negotiations and temporary order stops. The effects arising from such threats must be assessed under Article 101(1) in the light of the overall effects of the joint purchasing agreements.²²

Finally, the chapter clarifies the different conditions for the assessment under Article 101(3) TFEU. In this regard, there are only marginal additions.²³

4.3. Bidding consortia (commercialisation agreements)

Following the demand for clarification by stakeholders, the European Commission inserted a new section under the Commercialisation Agreement chapter regarding bidding consortia.²⁴

¹⁶ Explanatory Note, para. 17; Horizontal Guidelines, para. 273-274.

¹⁷ Horizontal Guidelines, para. 278-281.

¹⁸ Horizontal Guidelines, para. 282.

¹⁹ Horizontal Guidelines, para. 282.

²⁰ Horizontal Guidelines, para. 284.

²¹ Horizontal Guidelines, para. 292.

²² Horizontal Guidelines, para. 300, 303-304.

²³ Horizontal Guidelines, para. 305-309.

²⁴ Horizontal Guidelines, para. 347-359.

A bidding consortium exists where two or more parties cooperate to submit a joint bid in a public or private procurement competition.²⁵ Given the thin line between bidding consortia and bid rigging cartels, additional guidance to distinguish both has been provided. Bid rigging, perceived to be one of most serious competition restrictions and constituting a by object restriction, consists in the manipulation of a tender procedure for the award of the contract.²⁶

A bidding consortium agreement will not restrict competition within the meaning of Article 101(1) TFEU if it allows the parties to bid for tenders that they would otherwise not be able to carry out individually. In such cases, the parties to the agreement are neither actual nor potential competitors for the implementation of the project. This is for example the case where the parties provide complementary services or where the undertakings are unable to carry out the project due to its size or complexity.²⁷

The assessment of the capability of an undertaking to compete individually in a tender procedure depends on the requirements in the tender rules. A mere theoretical possibility does not suffice, an assessment of the realistic capability of an undertaking to individually complete the project is necessary and must take into account the specific circumstances of the undertaking and the project (e.g., size and capabilities of the undertaking, the financial risk, level of investment required, etc.).²⁸

When it is possible to submit bids for lots, undertakings will be considered competitors and article 101(1) TFEU is in principle applicable when they can bid for one or more lots. The joint bid must then still satisfy the conditions of Article 101(3) TFEU.²⁹

When it cannot be excluded that parties to the bidding consortium could participate individually, or when the agreement contains more parties than necessary, the joint bid may restrict competition within the meaning of Article 101(1) TFEU, even if it only concerns one party that is capable of bidding individually.³⁰

Besides the general observations regarding restrictions of competition by object or by effect provided in paragraphs 328-340 of the Horizontal Guidelines, four additional remarks are made with regard to bidding consortia:

- Where individual bids are possible and there is no significant degree of integration of recourses and activities, a joint bid would in principle amount to a restriction by object;
- Where bidding consortium agreements contain more parties than necessary and there is one party that could bid individually, the mere fact that there are more parties than necessary, does not by itself suffice to find a restriction by object;
- When assessing the anticompetitive effects, it is required to examine how the competition would realistically play out in the absence of the bidding consortium agreement;
- Only strictly necessary information should be shared between members of the consortium on a 'need-to-know' basis.

Where Article 101(1) TFEU applies, the conditions of Article 101(3) may be fulfilled if the joint bid allows the parties to submit a more competitive offer than would otherwise be possible individually. The resulting benefits, to both the contracting party and the final consumers, must outweigh the competitive restrictions.³¹

4.4. Information exchanges

The chapter on information exchanges was subject to a thorough revision to reflect the latest case law and for the purpose of clarity when undertakings self-assess their exchanges of information. The new Horizontal Guidelines provide additional guidance relating to existing concepts as well as new concepts, especially regarding the digitalization of information and enhanced data sharing possibilities.

It is important to note that no safe harbor was implemented in this chapter since the exchange of commercially sensitive information, even by undertakings with relatively small market shares, may still have irreversible and significant effects on competition.³²

²⁵ Horizontal Guidelines, para. 347.

²⁶ Horizontal Guidelines, para. 348.

²⁷ Horizontal Guidelines, para. 350-351.

²⁸ Horizontal Guidelines, para. 352-353.

²⁹ Horizontal Guidelines, para. 354.

³⁰ Horizontal Guidelines, para. 355.

³¹ Horizontal Guidelines, para. 357-359.

³² European Commission, *Questions and Answers on adoption of the new Horizontal Block Exemption Regulations and Horizontal Guidelines*, 1 June 2023, https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3014

Pursuant to the Horizontal Guidelines, Article 101(1) TFEU applies “where an exchange of commercially sensitive information is likely to influence the commercial strategy of competitors, thereby creating or being capable of creating conditions of competitions which do not correspond to the normal conditions of the market in question.”³³

The notion ‘information’ in the Horizontal Guidelines is defined as raw data, pre-processed data, data which is manipulated to produce meaningful information and any other type of information including non-digital information.³⁴ By doing so, the European Commission has broadened the scope of information to include all types of data.

The Horizontal Guidelines provide further guidance on what generally can be considered as commercially sensitive information, namely, information on pricing, costs, capacity, production, quantities, market shares, customers, plans to enter or exit the market or regarding other important elements of an undertaking’s strategy that undertakings active in a genuinely competitive market would not have an incentive to reveal to each other.³⁵ The sharing of such information may be considered a restriction of competition by object, without the need to prove a direct connection between the exchanged information and the consumer prices.³⁶

On the other hand, information that is generally not considered as commercially sensitive includes information relating to the general functioning of a state or industry, public policy or regulatory matters, non-confidential technical issues relevant to the industry in general, general non-proprietary technology and related issues, general promotional opportunities relevant to the industry in general and non-strategic technical or scientific data that results in consumer benefits and non-strategic information needed to build new business partnerships between undertakings.³⁷

The revised Guidelines furthermore provide further guidance on concepts relevant to the assessment of the commercially sensitive nature of information such as the aggregation or the age of the information. Additionally, it also provides further guidance on the characteristics of the exchange of information such as unilateral disclosure or indirect exchanges of information.

Unilateral disclosures may result in an infringement (i) where a competitor either requests or accepts commercially sensitive information, (ii) where this competitor acts upon it and (iii) where there is a link of cause and effect between the disclosure and the subsequent market behaviour from the competitor.³⁸ There is a presumption that all the conditions are satisfied where an undertaking receives commercially sensitive information during a meeting or other contact, unless it publicly distances itself or reports it to the administrative authority.³⁹ Even where the unilateral disclosure takes place through a public announcement, e.g. through unilateral advertising, it may in some cases constitute a concerted practice within the meaning of Article 101(1) TFEU.⁴⁰

Exchanges of commercially sensitive information between competitors may also take place indirectly through a third party. The notion of ‘third party’ has been clarified in the revised Guidelines and includes trade associations, a third-party service provider, a common agency, a supplier or customer or a shared algorithm. In these circumstances, to assess whether the exchange constitutes an anti-competitive agreement or concerted practice and who is liable for the collusion necessitates a case-by-case analysis of the role of each participant.⁴¹

The Horizontal Guidelines provides new guidance on the use of algorithms. They can generate efficiencies for example by reducing costs and barriers to entry. On the other hand, they may be used to increase market transparency, to detect price deviations and to implement punishment mechanisms for such deviations. Algorithms can be employed to facilitate collusion, so-called ‘*collusion by code*’, which can amount to a cartel and thus be a restriction of competition by object.⁴²

Specifically for pricing algorithms, two principles were set forth. In the first place, pricing practices that would be illegal offline, are highly probable to also be illegal online. Secondly, liability cannot be avoided by arguing that prices were determined by algorithms. Undertakings remain liable since the algorithms are under the control of the undertaking just like an employee.⁴³

³³ Horizontal Guidelines, para. 384.

³⁴ Horizontal Guidelines, para. 367.

³⁵ Horizontal Guidelines, para. 385.

³⁶ Horizontal Guidelines, para. 413-415.

³⁷ Horizontal Guidelines, para. 386.

³⁸ Horizontal Guidelines, para. 396.

³⁹ Horizontal Guidelines, para. 397.

⁴⁰ Horizontal Guidelines, para. 398.

⁴¹ Horizontal Guidelines, para. 401-402.

⁴² Horizontal Guidelines, para. 379.

⁴³ Horizontal Guidelines, para. 379.

Using publicly available data to feed algorithmic software is legal. However, aggregating commercially sensitive information into a pricing tool offered by a single IT company to which several other competitors also have access, may amount to horizontal collusion.⁴⁴ Alternatively, it is also possible to group data-holders which share their data without restricting competition (see below). The revised Guidelines explicitly state that data sharing also includes data pools.⁴⁵

Specific measures are proposed to mitigate the risks of competition law infringements, for example by limiting the access of a participant to its own information and the final aggregated information of other participants and to ensure that the exchange of information is necessary and proportionate to a legitimate pro-competitive aim and takes place in a transparent manner.⁴⁶ Other measures consist of limiting the exchange to what is strictly necessary, using a clean team, carefully reviewing agendas and purposes of meetings with (potential) competitors, be accompanied by a competition lawyer for meetings and/ or calls or ensuring that, when commercially sensitive information is shared, your objections are recorded or noted in the meeting minutes. If the objections are ignored the undertaking must immediately leave the meeting whilst clearly stating its reason for departure and publicly distance themselves.⁴⁷

Specific guidance, albeit fairly limited, is also provided with regards to information exchanged in the context of merger and acquisition transactions (concentrations). As a principle any information exchange that is not directly related to and necessary (*i.e.*, ancillary) for the implementation of a concentration remains subject to Article 101 TFEU. Given that what is directly related and necessary for a concentration may vary depending on the stage of the process, the assessment must be made throughout the entire acquisition process.⁴⁸

The chapter on information now also concludes with a step-by-step self-assessment decision tree and a liability table which will prove particularly useful for undertakings to determine (i) if they infringe Competition law by exchanging information and (ii) what could be their liability in this respect.

4.5. Standardisation agreements and agreements on the use of standard contract terms

The guidance on standardisation agreements, relating to the definition of technical or quality requirements with which current or future products, production processes, value chain due diligence processes, services or methods may comply and the guidance on standard terms, relating to the use of standard terms and conditions of sale or purchase elaborated by a trade association or directly by the competing undertakings have been separated to improve clarity and readability and now form two distinct chapters.⁴⁹

The chapter on standard terms has not received any substantial changes. The chapter on standardisation agreements on the other hand, has been revised to increase flexibility to restrict participating in the development of a standard under the effect-based assessment. The guidance clarifies that the restriction of participation may not have restrictive effects within the meaning of Article 101(1) TFEU when:

- There is competition between several standards and standard development organisations;
- In the absence of a participation restriction, the adoption of a standard would have been impossible or unlikely; or
- The restriction is temporary and intends to accelerate the progress.⁵⁰

The guidance now states that undertakings participating in the development of a standard should be required to make specific and good faith disclosures of intellectual property rights that may be essential for the implementation of the standard (*e.g.* standard-essential patents) to ensure that industries are able to make informed decisions about the technology to be included in a standard and to ensure effective access to that standard.⁵¹

⁴⁴ Horizontal Guidelines, para. 402.

⁴⁵ Horizontal Guidelines, para 367 and footnote 228.

⁴⁶ Horizontal Guidelines, para. 408 and 418.

⁴⁷ Horizontal Guidelines, para. 406-410.

⁴⁸ Horizontal Guidelines, 46 and 371

⁴⁹ Horizontal Guidelines, para. 436 and 490.

⁵⁰ Horizontal Guidelines, para. 470.

⁵¹ Horizontal Guidelines, para. 455-457.

Regarding the assessment of the restrictive effects of standard development agreements providing for the disclosure prior to the adoption of the standard of the most restrictive licensing terms (including a maximum accumulated royalty rate to be charged), the revised Guidelines state that they will in general not restrict competition within the meaning of Article 101(1) TFEU since they enable parties to take an informed decision based on the (dis)advantages of various alternative technologies.⁵²

4.6. Sustainability agreements

In an attempt to implement the United Nations' sustainable development goals and in line with the European Green Deal, a new chapter was introduced in the Horizontal Guidelines to demonstrate that antitrust rules do not prevent agreements between competitors that pursue a sustainability objective.⁵³

The chapter covers any horizontal cooperation agreement that pursues a sustainability objective (such as, economic, environmental and social development, reducing pollution, upholding human rights, etc.) irrespective of the form of the cooperation.⁵⁴ The chapter furthermore contains a non-exhaustive list of examples of sustainability agreements that are unlikely to raise competition concerns such as (i) agreements that aim to ensure compliance with international treaties, agreements or conventions, (ii) agreements regarding the internal corporate conduct (and not the economic activity of the undertaking), (iii) agreements to set up database containing general information about the (un)sustainable characteristics of suppliers and/or distributors or (iv) agreements relating to the organisation of industry-wide or customers' awareness campaigns of the environmental impact of their production/consumption behaviour.⁵⁵

Where sustainability agreements negatively affect one or more parameters of competition, an assessment under Article 101(1) TFEU is required.⁵⁶ When such agreements restrict competition within the meaning of Article 101(1) TFEU, either by object or by effect, they could benefit from the exception supplied by Article 101(3) TFEU.⁵⁷ The chapter also provides guidance on the factors to examine when determining whether a sustainability agreement constitutes a restriction by object or by effect, such as the extent to which commercially sensitive information is exchanged, the market coverage of the agreement, market power of the participants and the limitations on decision-making independence.⁵⁸

The chapter, furthermore, provides guidance on the application of the four cumulative conditions from this exception as well as several examples of each condition with regards to the sustainability agreements:

- The agreement must contribute to objective efficiencies. They must be objective, concrete, verifiable and substantiated. They cannot simply be assumed.⁵⁹
- The agreement may not impose competition restrictions that are not indispensable to the attainment of the benefits. They may not impose obligations that go beyond what is necessary to achieve the objective of the agreement.⁶⁰
- A fair share of the benefits must be passed on to the consumers, whether it be individual use benefits (*e.g.* enhanced product quality or variety), individual non-use benefits (*e.g.* the perceived higher quality caused by the benefits accruing to others) or certain collective benefits (*i.e.* objective benefits to a wider part of society rather than solely consumers in the relevant market) provided that the consumers in the relevant market substantially overlap with the beneficiaries outside the relevant market.⁶¹
- The agreement may not eliminate competition. There must remain a degree of residual competition on the relevant markets.⁶²

⁵² Horizontal Guidelines, para. 474.

⁵³ European Commission, *Questions and Answers on adoption of the new Horizontal Block Exemption Regulations and Horizontal Guidelines*, 1 June 2023, https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3014

⁵⁴ Horizontal Guidelines, para. 521 ; EC Q&A.

⁵⁵ Horizontal Guidelines, para. 527-531.

⁵⁶ Horizontal Guidelines, para. 532.

⁵⁷ Horizontal Guidelines, para. 536.

⁵⁸ Horizontal Guidelines, para. 533-535.

⁵⁹ Horizontal Guidelines, para. 557-559.

⁶⁰ Horizontal Guidelines, para. 560-568.

⁶¹ Horizontal Guidelines, para. 569-591.

⁶² Horizontal Guidelines, para. 592-596.

The guidance also introduces a soft harbour for sustainability standardisation agreements which satisfy certain criteria, since they are perceived as being unlikely to produce appreciable negative effects on competition.⁶³ Six cumulative criteria are laid out:

- A transparent standard setting procedure;
- No imposed obligation to comply with the standard;
- Binding requirements on participating undertakings can be imposed, but they must retain discretion to apply higher sustainability standards;
- Unless objectively necessary and proportionate, there must not be exchanges of commercially sensitive information;
- Ensured effective and non-discriminatory access to the outcome of the standard-setting process;
- The sustainability standard must satisfy at least one of the following two conditions: (i) no significant price increase or quality reduction or (ii) the combined market share must not exceed 20 % on any relevant market affected by the standard.

Where sustainability standardisation agreements fall outside of the soft safe harbour, the agreement may nonetheless fulfil the conditions of Article 101(3) TFEU and the criteria listed above should be taken into account, as well as the ability for third parties to participate in the agreement, when assessing the effects of the agreements.⁶⁴

Lastly, the chapter lays out the interaction between sustainability agreements and other horizontal cooperation agreements. As often will be the case, many sustainability agreements will also fall into the category of other horizontal cooperation agreements. In such cases, the guidance from chapter on sustainability agreements must be assessed together with the guidance of the relevant chapter(s).

5. CONCLUSION

The Horizontal Guidelines of 2023 came to replace the Horizontal Guidelines of 2011.

The revision pursued legal clarity through elaborating and clarifying the various forms of horizontal cooperation agreements. Clearer and up-to-date guidance, reflecting the most recent cases, allow businesses to facilitate their self-assessment.

It is important to emphasize that horizontal cooperation between undertakings may provide many benefits, for the undertakings involved, for innovation, for sustainability and for the final consumer. For this reason, the Commission provided new and more detailed guidance on sustainability agreements and the exchange of information in light of the digitalisation of data.

For any additional information, please do not hesitate to contact us or your usual Strelia contact person.



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⁶³ Horizontal Guidelines, para. 549

⁶⁴ Horizontal Guidelines, para. 554-555.