CPI Columns
Europe

December 2023

The Undue Reliance on Article 101(3) TFEU in the Assessment of Sustainability Agreements in the 2023 Horizontal Guidelines

By Jean-François Bellis | Van Bael & Bellis

Edited by Anna Tzanaki & Juan Delgado

The Undue Reliance on Article 101(3) TFEU in the Assessment of Sustainability Agreements in the 2023 Horizontal Guidelines

By Jean-François Bellis[1]

One of the major and most remarkable innovations in the 2023 European Commission Guidelines on Horizontal cooperation[2] (hereinafter "Horizontal Guidelines") was the introduction of a chapter devoted to sustainability agreements. While the 2000 version of the Horizontal Guidelines[3] contained a chapter on environmental agreements, this chapter was absent from the 2010 version of the Guidelines.[4] The Commission must be lauded for bringing back environmental issues as one of the key chapters of the latest iteration of its Horizontal Guidelines.

Yet, there is a feeling that the guidance on sustainability agreements provided in the 2023 Horizontal Guidelines leaves something to be desired. Sustainability agreements which may result in price increases for users are viewed with suspicion. The extent to which collective benefits to society generated by a sustainability agreement may be taken into account in the assessment of its compatibility with Article 101 TFEU is not clear and a heavy burden of proof seems to be imposed on those who claim such benefits. While business circles are generally welcoming of the Commission's initiative to address environmental issues in the Horizontal Guidelines, complaints about the timidity of the guidance being provided are heard. Some companies even publicly declare that the new Guidelines are discouraging them from considering any form of cooperation with competitors on sustainability projects.

The mixed signals sent by the new Horizontal Guidelines may have much to do with the nature of the analytical framework for the assessment of the legality of sustainability agreements applied in the Guidelines. This framework is based on that set out in the Commission Guidelines on the application of Article 81 (3) issued on 27 April 2004[5] which, as their title indicates, are based on paragraph 3 of what was then Article 81 EC after having first been Article 85 EEC and is now Article 101 TFEU.

The purpose of this note is to examine whether paragraph 3 is still suited to play such an important role in the assessment of sustainability agreements under EU competition law, bearing in mind the potential importance of such agreements in the context of the EU's ambitious environmental agenda.

Paragraph 3 has a long and prestigious history. For several decades, paragraph 3 had played a central role in the enforcement of EU competition law. In its first decisions under Article 85 of the Rome Treaty in the mid-1960s, the Commission had developed a very broad interpretation of what constitutes a restriction of competition within the sense of Article 85(1). According to the Commission, any restriction to the freedom of action of the parties to an agreement was *ipso facto* a restriction of competition which caused any agreement imposing such a restriction to fall under the prohibition of paragraph 1.[6] Thus, for instance, the mere grant by a manufacturer to a distributor of an exclusive right to sell the contractual products in a given area was regarded as a restriction of competition in so far as it prevented the manufacturer from appointing other distributors in that area.[7] As a result, the agreement infringed Article 85 (1) and was null and void under Article 85 (2). The only way to save the agreement from illegality was to claim

---

[1] Partner, Van Bael & Bellis, Brussels. Visiting professor, Institute for European Studies, Brussels (ULB).

[2] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2023 C259/1 ("*2023 Horizontal Guidelines*").

[3] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ 2001 C3/2.

[4] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. Text with EEA relevance, OJ 2011 C11/1.

[5] Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C101/118.

[6] *The EU Law of Competition*, Jonathan Faull & Ali Nikpay, 3rd Ed., Oxford, 2014, paras. 3.163 and 3.164.

[7] *Commentaire J. Megret, Droit de la CE*, M. Waelbroeck & A. Frigani, 2nd Ed., Edition de l'Université de Bruxelles, 1997, para. 171.

the benefit of an exemption under Article 85 (3) which the Commission had the exclusive power to grant under Regulation 17/62,[8] the first Regulation implementing the competition provisions of the EEC Treaty. As a rule, prior notification of the agreement to the Commission was an essential prerequisite for the grant of the exemption.

This approach resulted in tens of thousands of agreements being notified to the Commission in the mid-sixties.[9] Since it was effectively impossible to adopt individual decisions exempting each of them, the Commission sought and obtained from the Council the power to issue Block Exemption Regulations enabling it to exempt categories of agreements. The agreements which met the conditions set out in the relevant Block Exemption Regulation were automatically exempted from the prohibition laid down in Article 85(1) of the Rome Treaty without any need to have them notified to the Commission.

This made it possible for the Commission to determine which clauses included in an agreement would make it ineligible for an exemption. The Block Exemptions, with their "whitelists" of exempted clauses, "blacklists" of clauses ineligible for exemption and "grey lists" of clauses of intermediate status, became a characteristic feature of EU competition law with no equivalent in any other jurisdiction. The number of agreements covered by Block Exemption Regulations gradually increased over the years. Following Regulation 67/67 on exclusive dealing agreements, the Commission adopted Block Exemption Regulations covering exclusive purchasing agreements, specialisation agreements, franchise agreements, technology transfer agreements and research and development agreements.

The broad interpretation of the scope of Article 85(1) embraced by the Commission allowed it to take full advantage of its exclusive power over the grant of exemptions under Article 85 (3) to constrain businesses to amend their contracts in order to make them consistent with European competition policy objectives, such as, for instance, in the early years of the European Community, European market integration. A legal scholar described this as a form of "contractual engineering."[10]

This way of interpreting the concept of restriction of competition within the sense of Article 85(1) and, as a corollary, the role of Article 85 (3) in the application of competition law, radically changed following the publication in 1999 of the Commission's White Paper on modernisation of European competition law.[11] In the White Paper, the Commission explained that the centralized authorization system based on prior notification and the Commission's exemption monopoly had run its course. The Commission thus proposed the abolition of the notification and exemption mechanism set up by Regulation 17/62 and its replacement by a new enforcement regime under which national competition authorities and courts would be empowered to apply the third paragraph of Article 85 directly without a prior decision by the Commission.

The new approach set out in the White Paper was fully implemented in Regulation 1/2003, which entered into force on 1 May 2004.[12] The notification system for agreements was abolished and so was the Commission's exclusive power over the grant of individual exemptions. The Commission, however, retained its exclusive power to issue block exemptions. This revolution in the way EU competition law is applied is referred to as the "modernisation" of EU competition law.

In the process, the Commission abandoned its broad interpretation of the concept of restriction of competition, under which any restriction on the freedom of action of a party to an agreement was a restriction of competition, and developed

[8] Regulation No. 17, First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962 204/62.

[9] Commission White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, OJ 1999 C132/1, paras. 24-25.

[10] *Droit européen de la concurrence*, N. Petit, L.G.D.J., Paris, 2013, para. 557.

[11] Commission White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, OJ 1999 C132/1.

[12] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1, Article 45.

the concepts of restriction of competition "by object" and "by effect."

As a result, the balancing of the pro-and anti-competitive merits of an agreement which had previously been conducted under paragraph 3 could now be performed under paragraph 1.

As a matter of fact, after the entry into force of Regulation1/2003, on 1 May 2004, the Commission stopped adopting decisions based on paragraph 3. That paragraph continued to form the official legal basis for the adoption of the post-modernisation block exemptions and continued to be referred to in the Guidelines accompanying those "modernised" block exemptions. But no individual Commission decision applying Article 101 TFEU since 2004 has ever been based on paragraph 3 which has thus become in effect a dead letter.

It is in that context that the Commission issued the Guidelines on the application of Article 81 (3) on the basis of which the analysis of sustainability agreements in the 2023 Horizontal Guidelines rests. In retrospect, given that the adoption of those Guidelines coincided with the time when Article 81 (3) stopped being used, it would have been more accurate to name them Guidelines on the non-application of Article 81 (3).

Four conditions must be met for paragraph 3 to apply. First, the agreement must contribute to improving the production or distribution of goods or promoting technical or economic progress. Second, the agreement must allow consumers a fair share of the resulting benefit. Third, the agreement must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives. Fourth, the agreement must not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Prior to modernisation, those four conditions were applied in a relatively loose fashion. This was especially clear in the block exemptions in which the classification of a particular clause as a "black," a "white," or a "grey" one was based on a value judgment about the merits of the clause at issue rather than on a systematic evaluation of whether it met each of the four conditions. But the same was also true of the individual exemption decisions in which the Commission perfunctorily checked whether the conditions were met without engaging in any elaborate economic analysis.

The approach followed in the Guidelines on the application of Article 81 (3) issued on 27 April 2004, a few days prior to the entry into force of Regulation 1/2003, was completely different. The Guidelines establish a rigid analytical framework for the application of what is now called "*the exception rule of Article 81 (3),*" the new name for the exemption under Article 81 (3) based on economic analysis and couched in economic language.

- The first condition about the contribution to the improvement of production, distribution, technical or economic progress is analyzed as a condition relating to efficiency gains. A distinction is made between two types of efficiencies: cost efficiencies, on the one hand, and new or improved products, on the other hand.
- The second condition relating to the "fair share of the benefits" which consumers must enjoy is now understood as referring to the passing on of efficiencies to consumers.
- The third condition about the indispensability of individual restrictions is understood as referring to the question of whether a given restriction is reasonably necessary to produce the efficiencies.
- The fourth and last condition relating to "elimination of competition" is the only one that is presented in terms that do not materially differ from how this concept had been understood in pre-modernisation times.

This is the approach that the 2023 Horizontal Guidelines have applied to assess the compatibility of sustainability agreements with Article 101 TFEU.

Apart from the fact that, as noted above, the Commission has never applied the approach set out in the 2004 Guidelines to authorize an agreement under Article 101 (3), the Guidelines' narrow focus on "efficiencies" for the benefit of consumers makes it difficult to apply them to sustainability agreements inspired by concerns

over less sustainable products which often lead to price increases for consumers.

This unsuitability of the 2004 Guidelines to properly address sustainability agreements that produce collective benefits is especially visible in the context of the second condition of paragraph 3 relating to the "fair share of the benefits" which is equated with the passing on of efficiencies to consumers. The 2004 Guidelines indeed make it clear that the benefits resulting from the agreement must accrue to the consumers of the products covered by that agreement.

On that basis, two types of individual consumer benefits are identified in the 2023 Horizontal Guidelines: use value and non-use value benefits.

Individual use value benefits derive from the consumption or the use of the products covered by the agreement and take the form of improved product quality or variety or of a price decrease as a result of cost efficiencies.

Individual non-use value benefits derive from consumers' appreciation of the impact of their sustainable consumption on others, such as, for example, the willingness of consumers to pay a higher price for furniture made from wood that is grown sustainably because they want to stop de-forestation.

The Horizontal Guidelines accept that non-use value benefits may be taken into account, but they require that they be quantified, for instance, by investigating consumers' willingness to pay through consumer surveys. The Horizontal Guidelines warn the parties that they should avoid projecting their own preferences onto consumers. They must always discharge their burden of proof by providing evidence of the actual preferences of consumers.[13]

Even though the Guidelines indicate a willingness to consider collective benefits that accrue to society, the bias in favor of consumers of the product concerned engrained in the 2004 Guidelines causes the Commission to impose a number of strict conditions for collective benefits to be taken into account.

Thus, the parties to a sustainability agreement must demonstrate that "*the consumers in the relevant market substantially overlap with the beneficiaries or form part of them.*"[14] But it is specified in a footnote that "*where collective benefits are dispersed among a large section of society, it is less likely that the overlap with the consumers will be substantial.*"[15] In addition, the parties must also demonstrate that "*the share of the collective benefits that accrue to the consumers in the relevant market, possibly together with individual use and non-use benefits accruing to those consumers, outweigh the harm suffered by those consumers as a result of the restriction.*"[16]

The Horizontal Guidelines also indicate that the collective benefits must be quantified. Recognizing that there is currently little experience with measuring and quantifying collective benefits, the Commission states that it aims to provide more guidance on this issue when it has gained sufficient experience of dealing with concrete cases.[17]

The complexity of the analysis imposed on the parties, coupled with the reluctance to consider societal benefits that do not necessarily accrue to consumers of the products covered by the agreement, make the guidance provided by the Horizontal Guidelines difficult to use in practice.

This raises the question of whether guidance with respect to sustainability agreements should continue to rely so much on a provision, paragraph 3, which has de facto been rendered obsolete by the modernisation that occurred 20 years ago and on an analytical framework which has never been applied in any actual Commission decision.

Another important question is whether, in any event, paragraph 3 is suited to address the compatibility with EU competition law of agreements that pursue aims of a non-economic nature, such as the reduction of CO2

[13] 2023 Horizontal Guidelines, para. 580.

[14] *Ibid*. para. 587(c).

[15] 2023 Horizontal Guidelines, footnote 409.

[16] 2023 Horizontal Guidelines, para. 587(d).

[17] 2023 Horizontal Guidelines, para. 589.

emissions, which would seem rather to come within the purview of the *Wouters* case law.[18] This is the case law in which the Court of Justice recognized that not all competition deserves to be protected. Restrictive agreements that pursue legitimate objectives can be found to fall outside the scope of Article 101 (1) TFEU. This would seem to be a more promising avenue for taking into account collective benefits produced by sustainability agreements.

One of the purposes of guidelines issued by the Commission is to assist companies in the self-assessment of the legality of agreements into which they are considering to enter. The chapter on sustainability agreements in the 2023 Horizontal Guidelines is of no assistance to companies that envisage to participate in ambitious cooperative projects that generate mostly collective benefits.

Legal certainty for such projects can only come from an interaction with the Commission of the type that was common in pre-modernisation times in which the Commission formally confirmed the conformity of agreements with European competition law. The Commission stayed away from any such interaction after the abolition of the notification system in 2004. The time has come to revive this process as the Commission appears to have admitted in recent years.

That there is another path forward has just been shown by the recent adoption of the Commission guidelines on the exclusion from Article 101 TFEU of sustainability agreements of agricultural producers[19]. Admittedly, these new guidelines are based on a specific provision of Regulation 1308/2013, Article 210a, establishing a common organization of the markets in agricultural products[20] that applies exclusively to sustainability agreements entered into by agricultural producers. Nevertheless, these new guidelines provide food for thought on how to devise a pragmatic approach for assessing the compatibility of sustainability agreements with EU competition that is free from the constraints imposed by the reliance on paragraph 3 of Article 101 TFEU applied in the Horizontal Guidelines. Thus, there is no requirement to provide evidence of the elusive existence of a “fair share” of benefits accruing to the consumers of the agricultural products concerned in order for the sustainability agreement to qualify for exclusion.

There is no reason why the benefit of a more pragmatic and realistic approach for the assessment of sustainability agreements under EU competition law should be reserved for agricultural producers. Sustainability issues transcend all sectors. Regardless of the products concerned, genuinely virtuous collective private initiatives in line with the green transition objectives should not be unduly restrained by EU competition law.

A revision of the sustainability chapter in the 2023 Horizontal Guidelines should not wait for the expiry of the two block exemptions which they accompany which is only due in 2035.

[18] Case C-309/99, *Wouters and Others*, EU:C:2002:98.

[19] Communication from the Commission-Commission guidelines on the exclusion from Article 101 of the Treaty on the functioning of European Union for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation (EU) No 1308/2013.

[20] Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regula tions (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) 1234/2007, OJ L 347, 20.12.2013, p. 671.