Authority for Consumers & Markets

Public

Submission

Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines

Response from the Netherlands Authority for Consumers & Markets

18 March 2022

Muzenstraat 41
2511 WB The Hague
www.acm.nl
+31 (0)70 722 20 00

Intro and summary

The Netherlands Authority for Consumers & Markets ("ACM") welcomes the Commission's draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines, as well as this opportunity to comment on them as part of the ongoing public consultation.[1] In general, ACM agrees with the proposed changes to both the draft revised Horizontal Block Exemption Regulations and the draft revised Horizontal Guidelines, including the chapter on sustainability agreements.

The Commission introduces specific guidance on the application of competition law to sustainability agreements. That introduction in itself is applauded by ACM. ACM also greatly welcomes the recognition in sections 9.2 and 9.3 that many sustainability initiatives fall outside of article 101(1) TFEU, as well as the introduction of a soft safe harbour for standardization agreements. ACM is equally pleased to see the Commission recognizes the existence of out-of-market benefits in the form of collective benefits.

For the time being, ACM believes that the proposed guidelines do not stand in the way of genuine pro-sustainability initiatives based on the cases reviewed by ACM in recent years, which is comforting. However, it remains to be seen to what extent sustainability initiatives that "push the boundaries" further and achieve more ambitious sustainability goals can be cleared under the draft revised Horizontal Guidelines. To ensure such initiatives can be deployed as well, among other reasons, ACM does have some suggestions for amendments to the draft revised Horizontal Guidelines.

The main suggestions are summarized here:

- Agreements aiming exclusively to respect national or international legal standards that apply to doing business in or outside Europe, particularly in developing countries, should fall outside Article 101 (1) TFEU.

- Consumers within the relevant market need only enjoy an appreciable objective advantage under Article 101 (3) TFEU. They need not be compensated in full. Hence, collective benefits that accrue to parties that are not (also) consumers within the relevant market can count towards the fair share for consumers.

- Future-generation costs and benefits of sustainability agreements should be taken into account and appropriately discounted as a rule, not just under shadow pricing.

- Quantification should not always be preferred to qualitative analysis. Under quantification, in addition to willingness to pay, other methods such as shadow prices based upon prevention costs should be covered.

- The requirement of indispensability should cover agreements to exceed or accelerate public targets, not exclude them.

ACM trusts the Commission will give due weight to these suggestions in light of the overall response to the consultation, and looks forward to the final text.

[1] As published on 1 March 2022 via https://ec.europa.eu/competition-policy/public-consultations/2022-hbers_en.

Outline

The outline of ACM's response is as follows:

1 Submission regarding the Horizontal Block Exemption Regulations

1.1 Introduction & Article 1 R&D Block Exemption Regulation

The introduction, paragraph 20, and Article 1, paragraph 1(14) both use the phrase 'fields of use'. More guidance with regard to the concept of 'fields of use' would be welcome.

1.2 Article 7 R&D Block Exemption Regulation

Article 7, paragraph 2, describes how to assess comparable, competing efforts (*'three or more competing R&D efforts in addition to and comparable with those of the parties to the R&D agreement'):*

> *'For the purposes of applying the threshold provided for in Article 6 paragraph 3, the assessment of comparability of competing R&D efforts shall be made on the basis of reliable information concerning elements such as (i) the size, stage and timing of the R&D efforts, (ii) third parties' (access to) financial and human resources, their intellectual property, know-how or other specialised assets, their previous R&D efforts and (iii) the third parties' capability and likelihood to exploit directly or indirectly possible results of their R&D efforts on the internal market.'*

Perhaps it can be clarified that it is only about the 'comparability' criterion, not about the 'competing' criterion.

2 Submission regarding the Horizontal Guidelines

2.1 Chapter 1 – Introduction

In section 1.2.4 '*Restrictions of competition by object',* it is described in paragraph 31 that an '*individual and detailed examination'* is necessary for determining a restriction of competition by object. ACM wonders if this examination should only apply to situations as those in the Sun vs. Commission ruling (ECLI:EU:C:2021:241); in cases where: '*the Commission has not, in the past, considered that a certain type of agreement was, by its very object, restrictive of competition'*.

ACM additionally wonders how this '*individual and detailed examination*' relates to other parts of the draft Guidelines:

- Footnote 28: '*For agreements for which the European Court of Justice has already held that they constitute particularly serious breaches of the competition rules, the analysis of the legal and economic context may be limited to what is strictly necessary in order to establish the existence of a restriction by object, see judgment of 20 January 2016, Toshiba, C-373/14 P, EU:C:2016:26, paragraph 29'*.

- Paragraph 320: '*A buyer cartel, provided that it affects trade between Member States, constitutes by its nature and independently of any concrete effects that it may have, an appreciable restriction of competition181. Therefore, the assessment of buyer cartels, contrary to that of joint purchasing arrangements, does not require a definition of the relevant market(s), consideration of the market position of the purchasers on the upstream purchasing market nor whether they are competing on the downstream selling market'*.

2.2 Chapter 2 – Research and Development Agreements

In section 2.4.1, '*Joint exploitation of the R&D results and concept of specialisation in the context of joint exploitation*', paragraph 102 states:

> *'This means that an R&D agreement can, for instance, restrict the exploitation rights of the parties for certain territories, customers or fields of use.'*

More guidance with regard to the concept of 'fields of use' would be welcome (see also the introduction, paragraph 20, and Article 1, paragraph 1(14) of the R&D Block Exemption Regulation).

2.3 Chapter 3 – Production Agreements

In section 3.5.1, '*Efficiency gains'*, in the chapter on the assessment under Article 101 (3), the following is mentioned in paragraph 288:

> '*Production agreements may provide efficiency gains by: (…) (d) enabling undertakings to improve production technologies or launch new products (such as sustainable products), which they would otherwise not have been able to do (for example, due to the parties' technical capabilities)'.*

With regard to the 101 (1) assessment, the following is mentioned in paragraph 227:

> '*Production agreements between undertakings which compete on markets on which the cooperation occurs are not likely to have restrictive effects on competition if the production agreement gives rise to a new market, that is to say, if the agreement enables the parties to launch a new product, which, on the basis of objective factors, the parties would otherwise not have been able to do (for example, due to the parties' technical capabilities)*'.

ACM wonders whether the relationship between these texts is sufficiently clear.

2.4 Chapter 6 – Information exchange

In section 6.2.3.3, '*Aggregated/individualised information and data'*, the following is mentioned in paragraph 428 – underling added by ACM:

> *'The commercially sensitive nature of information depends also on the usefulness it has to competitors. Depending on the circumstances, the exchange of raw data may be less commercially sensitive than an exchange of data that was already processed into meaningful information. Similarly, raw data may be less commercially sensitive than aggregated data, while it may allow undertakings to obtain more efficiencies by exchanging it. At the same time, the exchange of genuinely aggregated information where the recognition of individualised company level information is sufficiently difficult or uncertain, is much less likely to lead to a restriction of competition than exchanges of company level information.'*

ACM wonders whether the above texts may cause some confusion. With regard to the underlined part, ACM wonders whether or not the false impression is given that raw data, in general, is less commercially-sensitive than aggregated data. In ACM's view, raw data can only be less sensitive if the raw data does not contain any meaningful information that can be traced back to specific competitors.

2.5 Chapter 9 – Sustainability

2.5.1 General remarks

As indicated in the summary, in general, ACM appreciates the steps that the Commission is taking to stimulate sustainability initiatives with the draft revised Horizontal Guidelines. For instance, ACM highly welcomes the introduction of specific guidance on the application of competition law to sustainability agreements under the draft revised Horizontal Guidelines. It shows how important the topic is, and constitutes an important step towards speeding-up the energy transition from carbon to renewables. Or, as the Commission states in the draft revised Horizontal Guidelines: to attain 'the objectives of the Green Deal for the European Union'.[2] In order to attain the objectives of the Green Deal, ACM believes that the thinking should no longer be about which instrument should have a primary role, e.g. legislation *or* voluntary private individual or collective action. Both legislation *and* private action are necessary, and competition law should not hinder genuine private sustainability initiatives.

In this respect, ACM welcomes in particular sections 9.2 and 9.3 on the assessment under article 101(1) TFEU. As the Commission rightly points out: 'not all sustainability agreements between competitors are caught by Article 101'.[3] In fact, competition rules generally do not stand in the way of genuine sustainability initiatives. The introduction of the soft safe harbour for sustainability standardisation agreements is therefore much welcomed. After all, such agreements often have positive effects on more sustainable production methods without having negative effects on competition. ACM would like the Commission to include an explicit caveat for agreements aiming exclusively to respect national or international legal standards that apply to doing business in or outside Europe, particularly in developing countries, as those should fall outside Article 101 (1) TFEU.

With regard to the assessment of sustainability agreements under article 101(3) TFEU, addressed in section 9.4, ACM is pleased to see that the Commission recognizes the existence of out-of-market benefits in the form of collective benefits. ACM would have preferred such benefits to be included to the fullest extent possible, as elaborated on further below. Under the current proposal, ACM is concerned that companies will remain reluctant to invest resources in new sustainability initiatives, depriving the EU of sustainability benefits in the timely manner that is required, for example, to make our economy less dependent on fossil fuels, which will prevent dramatic climate change and will foster energy independency. The public consultation may further illustrate whether this concern is justified.

As regards ACM's response to the public consultation, ACM in previous instances has taken a clear stance in the discussions about how competition law can contribute to combating climate change and has already set out its position extensively.[4] Given that – for the time being – the approach set out in the Commission's draft revised Horizontal Guidelines appears to provide sufficient scope for dealing with the sustainability cases that ACM is currently aware of, for the purpose of this public consultation, our comments are limited to the most important remaining points.

Please note that ACM will continue to apply its own draft Guidance on sustainability agreements[5] until the revised Horizontal Guidelines are adopted. Once the Horizontal Guidelines have been adopted, ACM will re-evaluate its own draft Guidance in light of the final version of the Horizontal Guidelines, making a clear distinction between its interpretation of competition law and its priority-setting powers.

[2] Communication from the Commission, the European Green Deal, COM (2019) 640 final. Par. 3 of the draft revised Horizontal Guidelines.
[3] Draft revised Horizontal Guidelines, par. 551.
[4] See for example ACM's Guidelines: Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law (acm.nl) and ACM's note on the fair-share criterion https://www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf.
[5] Idem.

2.5.2 Specific remarks

As set out above, for the purpose of this consultation, ACM limits its comments to the most important remaining remarks on the draft revised Horizontal Guidelines that, if addressed, could improve the draft version in the opinion of ACM.

- **Article 101(1) TFEU**

  - **Restriction of competition below national or international legal standards** Agreements whose sole purpose is to respect national or international legal standards that apply to doing business in or outside Europe, particularly in developing countries, should fall outside Article 101 (1) TFEU.[6] Such agreements are particularly important for undertakings that have difficulties checking for themselves whether their business partners comply with the rules. By concluding agreements with their competitors to restrict below-standard competition, they can ensure compliance and are able to make the necessary arrangements, allowing them to perform checks. The legal standards in question often concern fundamental social rights (for example, banning child labour, paying a living wage, the rights of indigenous peoples, and respecting the right to unionize), protecting natural resources (such as restricting the logging of certain types of tropical wood), and respecting fair-trade rules (such as a ban on bribery). These standards usually follow from international conventions or treaties. They are subsequently laid down in local legislation or in legislation of the country where the importer or processor is officially registered. However, it is also possible that these international standards have not or not sufficiently been laid down in national legislation, that compliance with such standards is not adequately monitored by local authorities, or that the parties to the agreement intend to expedite compliance with those standards before they officially enter into force. Agreements to restrict below-standard competition can therefore be necessary in order to achieve these goals. Hence, ACM believes that competition below national or international legal standards does not deserve protection by our competition laws. In this regard, ACM also refers to the Commission's proposal for a Directive on corporate sustainability due diligence and the obligations of companies to ensure compliance with human rights and environmental protection.

  - **List of examples** ACM appreciates that the Commission included a list of types of agreements that would not fall under article 101(1) TFEU as this is helpful in identifying what agreements are unobjectionable from a competition perspective (see section 9.2 par. 552-554). The fact that it is not an exhaustive list shows that other types of agreements do not fall under the cartel prohibition either. It may be useful to provide further such examples. Therefore, in order to improve the draft revised Horizontal Guidelines and to provide market participants with further guidance, ACM suggests including several additional types of agreements that would not fall under article 101(1) TFEU. Reference is made to those included in ACM's own draft Guidance[7] with the most important example being the one set out above regarding applying national or international legal standards.

  - **Soft safe harbour – new or existing standards** As stated above, ACM much welcomes the introduction of the soft safe harbour for sustainability standardisation agreements. The current wording of the seven conditions in paragraph 572 of the draft revised Horizontal Guidelines seems to imply that the soft safe harbour only applies to the creation of new sustainability

[6] See ACM's draft Guidelines: Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law (acm.nl) Chapter 4, par. 27-29.
[7] Idem.

standards. However, undertakings may also conclude agreements to apply an existing standard. As agreeing to jointly apply an existing sustainability standard (e.g. a particular certification model) seems to be equally (or even more) unproblematic from a competition-law perspective as agreeing to jointly creating and applying a new standard, ACM assumes those agreements could also benefit from the soft safe harbour. To avoid any misunderstandings, ACM suggests to explicitly include this in the draft revised Horizontal Guidelines and/or revise the wording of the seven conditions of the soft safe harbour accordingly.

- **Article 101(3) TFEU**

  - **Pass on to consumers – out-of-market benefits** With regard to the fair-share criterion of article 101(3) TFEU, the draft revised Horizontal Guidelines state that 'consumers receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the same agreement, so that the overall effect on consumers in the relevant market is at least neutral' (Section 9.4.3, par. 588). According to our analysis of the consistent case law of the CJEU as discussed previously, full compensation of consumers within the relevant market is not required in order for consumers to receive a fair share.[8] Instead, only an appreciable objective advantage must be enjoyed by consumers within the relevant market, and this can only be assessed on a case-by-case basis taking into account the relevant context. As a result, collective benefits can count towards the fair share for consumers where they accrue to parties that are not (also) consumers within the relevant market. This could include, for instance, the benefits of preventing or reducing deforestation for people outside the EU and benefits of reducing carbon emissions at a global level. To the extent that the position in the draft revised Horizontal Guidelines regarding out-of-market benefits is narrower, ACM understands this to be the Commission's preferred policy perspective, not a reflection of the law as it stands. ACM would welcome a broader policy reading of the term 'fair share' that fully reflects the case law.

  - **Pass on to consumers – what part of the benefits?** For the sake of legal certainty, ACM suggests the Commission clarify its approach to the fair share within the framework of use value, non-use value, and collective benefits. For example, concerning agreements to reduce carbon emissions, what part of the related benefits can be taken into account for the 101(3) TFEU compensation analysis? Reductions in carbon emissions typically generate collective global benefits. Therefore, there are several alternatives for allocating these benefits to the consumers in the relevant market, such as: (i) all global benefits, (ii) the EU's population's share of those global benefits, and (iii) the EU consumers' share of these benefits within the relevant market. Because the choice between these options would have significant implications, it would be helpful if this could be specified more clearly in the draft revised Horizontal Guidelines within this framework of use value, non-use value, and collective benefits. It goes without saying that limiting the allocation of the global benefits of CO2 reduction to the in-market EU consumers' share of those benefits would make the application of 101 (3) TFEU to CO2-reducing agreements among European producers unfeasible.

  - **Pass on to consumers - future generation benefits** In the context of assessment of all three types of benefits (use, non-use, and collective), ACM also wishes to raise the issue of how to appropriately account for, and possibly how to discount, future benefits when these have to be balanced against present costs. This issue of future benefits is relevant also because, in our view, the benefits for future generations – not just more broadly, but even

[8] See footnote 4.

concerning consumers within the relevant market – should play a role in the fair-share assessment of sustainability agreements. In our view, this cannot be subsumed under non-use benefits as they have currently been presented in paragraph 596 of the draft revised Horizontal Guidelines. Some guidance on how to account for such benefits should take place and what timeframes are considered relevant is therefore desirable. ACM suggests that the incorporation of future costs and benefits can be guided by the principles of *social cost-benefit analyses*, a method used in public policymaking. This method prescribes that future costs as well as benefits are discounted in a consistent manner, by using a common discount rate and taking into account uncertainty.

For example, by allowing undertakings to demonstrate how far into the future the benefits and costs of the sustainability initiative extend and to take that into account when weighing the pros and cons of an initiative. The same approach can be used for the benefits of current users as long as the uncertainty for achieving or the magnitude of the benefits does not become too great. When shadow prices are used for environmental-damage agreements, the (deviating) needs and benefits for future generations have generally already been taken into account, meaning that it only needs to be determined how far future benefits extend in time.

- **Pass on to consumers - quantification** In the experience of ACM, quantification is indeed possible but it can be difficult and costly for the undertakings involved. First, it would therefore be beneficial to avoid quantitative analyses where such are not strictly necessary. Second, where quantification is deemed necessary, the draft revised Horizontal Guidelines could be improved by providing more detail on different ways to quantify. The emphasis of the draft revised Horizontal Guidelines is on performing a willingness-to-pay analysis.[9] Based on ACM's experience with willingness-to-pay analyses, we do not think it is always the most appropriate method. Yet, the draft revised Horizontal Guidelines do not go into other methods such as shadow prices based upon prevention costs, which is a method ACM believes can express certain environmental gains in monetary terms in an objective manner. As shadow prices may vary between Member States, and different approaches to shadow prices are possible, it would be helpful if the Commission added guidance on how to use shadow prices. ACM's draft Guidance contain various elements that may be useful in this respect.[10]

- **Indispensability** – **exceeding or accelerating public targets** Paragraph 583 of the draft revised Horizontal Guidelines states that 'where EU or national law requires undertakings to comply with concrete sustainability goals, cooperation agreements and the restrictions they may entail, cannot be deemed indispensable for the goal to be achieved'. If such an agreement falls under Article 101 (1) TFEU at all, this statement appears to be erroneous, especially in relation to agreements that aim to exceed or accelerate public targets. ACM is of the opinion that such agreements can be indispensable for the goal to be achieved.

- **Indispensability** – **bolstering local compliance** Finally, as ACM has previously argued, cooperation agreements among direct or indirect importers in the EU bolstering local compliance could be necessary, for example in relation to products from developing countries where public sustainability goals are not reliably enforced. Examples are the agreements regulating use of tropical wood or setting supply-chain standards for the production and use of environmentally risky substances, or for fair labour standards. Such agreements to restrict below-standard competition should fall outside the scope of 101(1) TFEU in the first place. An alternative route of addressing this issue is via the soft safe harbour for standard-setting.

[9] See for example par. 597 of the draft revised Horizontal Guidelines.
[10] See ACM draft Guidance, par. 57 and further.

However, it would be useful if an explicit caveat regarding this situation were added to the section on indispensability of the draft revised Horizontal Guidelines.

The rationale behind our remarks is to remove unnecessary burdens for sustainability agreements and to make sure the draft revised Horizontal Guidelines are improved to provide as much guidance as possible for undertakings. We are looking forward to seeing and working with the final version.