Authority for Consumers & Markets

Public

Submission

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

Reply from the Netherlands Authority for Consumers & Markets

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Intro

The Netherlands Authority for Consumers & Markets ("ACM") welcomes the Commission's draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines and this opportunity to comment on them as part of the ongoing public consultation.[1]

The outline of ACM's reply is as follows:

1 Submission regarding the Horizontal Block Exemption Regulations
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1 Submission regarding the Horizontal Block Exemption Regulations

1.1 Introduction & Article 1 R&D Block Exemption Regulation

In de inleiding, paragraaf 20 en artikel 1 paragraaf 1(14) wordt gesproken over ''fields of use'
Meer guidance met betrekking tot het begrip 'fields of use' zou welkom zijn.

1.2 Article 7 R&D Block Exemption Regulation

In artikel 7, paragraaf 2 is omschreven op welke wijze moet worden beoordeeld of er sprake is van vergelijkbare concurrerende inspanningen (*'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.'*

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

Mogelijk kan duidelijker worden gemaakt dat het enkel gaat om het 'comparability' criterium en niet om het 'competing' criterium.

2 Submission regarding the Horizontal Guidelines

2.1 Chapter 1 – Introduction

In sectie 1.2.4 '*Restrictions of competition by object'* wordt in paragraaf 31 beschreven dat een '*individual and detailed examination'* noodzakelijk is om een strekkingsbeperking vast te stellen. De ACM vraagt zich af of deze toets niet enkel zou moeten zien op situaties zoals aan de orde in het arrest Sun vs. Commission (ECLI:EU:C:2021:241); in zaken waar: '*the Commission has not, in the past, considered that a certain type of agreement was, by its very object, restrictive of competition'*.

De ACM vraagt zich daarnaast af hoe deze '*individual and detailed examination*' zich verhoudt tot andere passages in de concept Richtsnoeren:

- voetnoot 28, waarin wordt bepaald dat: '*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'*.
- Paragraaf 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 sectie 2.4.1, '*Joint exploitation of the R&D results and concept of specialisation in the context of joint exploitation*', paragraaf 102 staat:

> *'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.'*

Meer guidance met betrekking tot het begrip 'fields of use' zou welkom zijn.
(zie ook introductie paragraaf 20 en artikel 1 paragraaf 1(14) van de R&D Block Exemption Regulation).

2.3 Chapter 3 – Production Agreements

In sectie 3.5.1, 'Efficiency gains', in het hoofdstuk over de assessment under Article 101 (3) staat in paragraaf 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)'.

In het kader van de 101 (1) beoordeling staat in paragraaf 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)'.

De ACM vraagt zich af of voldoende duidelijk is hoe deze passages zich tot elkaar verhouden.

2.4 Chapter 6 – Information exchange

In sectie 6.2.3.3 '*Aggregated/individualised information and data*', paragraaf 428 staat het volgende:

'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.'

De ACM vraagt zich af of bovenstaande passages onduidelijkheid opleveren. Met betrekking tot de onderstreepte passage vraagt de ACM zich af of niet ten onrechte de indruk wordt gewekt dat ruwe data in het algemeen wel minder concurrentiegevoelig is dan geaggregeerde data. In de ogen van ACM kan ruwe data enkel minder gevoelig kan zijn dan geaggregeerde data, als de ruwe data geen zinvolle informatie bevat die herleidbaar is naar specifieke partijen.

2.5 Chapter 9 – Sustainability

2.5.1 General remarks

In general terms, the ACM appreciates the steps that the Commission is taking to stimulate sustainability initiatives with the draft revised Horizontal Guidelines. ACM for instance highly welcomes the introduction of specific guidance on the application of competition law to sustainability agreements under the draft revised Horizontal Guidelines. It shows in our opinion how important the topic is and is a good first step in the direction of 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 one should no longer think about which instrument should have a primary role, e.g. legislation *or* competition law, but that both legislation *and* competition law must be used to the extent necessary and possible.

In this respect, ACM also 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 also much welcomed. After all, such agreements often have positive effects on competition.

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. ACM would have preferred out of market benefits to be included to the fullest extent possible, as

[2] Communication from the Commission, the European Green Deal, COM (2019) 640 final. Par. 3 of the draft Horizontal Guidelines.
[3] Draft revised Horizontal Guidelines, par. 551.

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 by events such as climate change. The public consultation may further illustrate whether this concern is justified.

As regards the ACM's reply to the public consultation, in previous instances ACM 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 Commission's draft revised Horizontal Guidelines appears to provide sufficient scope for dealing with the sustainability cases the 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. After the Horizontal Guidelines have been adopted, ACM will consider reevaluating its own draft Guidance in the light of the final version of the Horizontal Guidelines.

2.5.2 Specific remarks

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

- **Article 101(1) TFEU**

    - **List of examples** ACM appreciates that the Commission included a list of types of agreements which would not fall under article 101(1) TFEU as this is helpful in identifying which agreements are unobjectionable from a competition perspective (see section 9.2 par. 552-554). The fact that it regards a non-exhaustive list shows that other types of agreements also do not fall under the cartel prohibition. It may be useful to provide such further examples. Therefore, in order to improve the draft revised Horizontal Guidelines and to provide market parties with further guidance, ACM suggests to include several other types of agreements which would not fall under article 101(1) TFEU. Reference is made to those included in the ACM's own draft Guidance.[6]

      For example, agreements whose sole purpose is to respect the national or international standards that apply to doing business in countries outside Europe, particularly in developing countries.[7] Such agreements are particularly important for undertakings that have difficulties checking for themselves whether their business partners comply with the rules. By concluding covenants, they are able to make the necessary arrangements, allowing them to perform such checks. The standards in question often concern respecting labor laws and other fundamental social rights (for example, banning child labor, paying a minimum wage, the rights of indigenous peoples, and respecting the right to unionize), protecting natural resources (such 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.

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

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 and such gaps need to be addressed by agreements.

- **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 standards. However, agreements can also be made between undertakings to apply an existing standard. As agreeing to jointly apply an existing sustainability standard (e.g. a particular certification model) also seems to be (even more) unproblematic from a competition law perspective than 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.

Commented [[redacted]]: Ter info: we hebben dit punt gisteren opgebracht bij de Commissie tijdens een bespreking over de [redacted]-casus van het [redacted]

- **Article 101(3) TFEU**

  - **Pass on to consumers – out of market benefits** With regard to the fair share condition 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 shared 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. Out of market 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 as constituting 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.

Commented [[redacted]]: We hebben wat moeite met de formulering hier, omdat we voor onszelf alle interpretatiemogelijkheden open willen houden, maar tegelijkertijd dit punt niet willen laten gaan.

Alternatief zou kunnen zijn: "The ACM assumes that the law as it stands will be reflected in the application of the draft revised Horizontal Guidelines". Dan laten we onze interpretatie van de huidige bewoordingen (wat meer) open.

Graag jullie kritische blik hierop.

  - **Pass on to consumers – which part of the benefits?** For the sake of legal certainty, the ACM suggests to clarify the Commission's 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, which 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 EU consumers, such as: (i) all global collective benefits, (ii) the EU share of those global benefits and (iii) the EU consumers' specific 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.

[8] See footnote 4.

- **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 therefore 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 of 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 discounting of such interests should take place, and which timeframes are considered relevant, is therefore desirable.

  For example, by allowing undertakings to demonstrate how far into the future the benefits 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 as for the benefits of current users as long as the uncertainty for achieving or the magnitude of the benefits does not become too great. Also, 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 can be difficult and burdensome. In the first place, it would therefore be beneficial to avoid extensive quantitative analyses where they are not strictly necessary. The draft Horizontal Guidelines speak in undefined terms about the need to asses effects of agreements such as "appreciable" or "significant" effects.[9] ACM is of the opinion it would help to provide more guidance as to what the Commission would consider an appreciable or significant anti-competitive effect. ACM would welcome a safe harbor based on a clarification of what constitutes an insignificant price increase or reduction in choice.

  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.[10] 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. A method ACM believes can monetize certain environmental gains 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 adds guidance on how to use shadow prices. ACM's draft Guidance contain various elements that may be useful in this respect.[11]

- **Indispensability – exceeding 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". This appears to be erroneous at least in relation to agreements that aim to exceed public targets. ACM suggests bringing this statement in line with Example 5 in paragraph 621 of the draft revised Horizontal Guidelines, which clarifies when CO2 reducing agreements in the EU may not be indispensable in the presence of public standards "The reduction in electricity consumption leads to less pollution from electricity production and this benefits consumers, to the extent

Commented [[redacted]]: Martijn, nav wat we eerder deze week bespraken over de betekenis van "significance" in de soft safe harbour, weten we niet of we dit punt nog een keer willen maken. Dit kan er wellicht ook uit?

[9] See for example par. 575 of the draft revised Horizontal Guidelines.
[10] See for example par. 597.
[11] See ACM draft Guidance, par. 57 and further.

that the pollution-related market failure is not already addressed by other regulatory instruments (e.g. the European Emissions Trading System, which caps carbon emissions)".

- **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 indispensable 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 labour standards. In addition to the alternative route of addressing this issue via the soft safe harbour for standard-setting, it would be useful if an explicit caveat regarding this situation is 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.