ClientEarth

October 2021

Horizontal agreements between companies – revision of EU competition rules

ClientEarth and Simon Holmes' contribution to the Commission's consultation

Top Lines

- We find much to welcome in the Commission's Policy Brief of 9 September, 2021 on "Competition Policy in support of Europe's Green Ambition."

- However, the Commission can and must go further if it is to enable business to cooperate on sustainability issues to the extent necessary to fight climate change and put our economy on a sustainable basis in line with Article 3(3) TEU, Article 11 TFEU, Article 37 EU Charter of Fundamental Rights, the Green Deal and the Commission's call for a "green revolution."

- The principal modification required to the reflections which the Commission has set out as part of its evolving thinking is a move away from the (relatively recent) "full compensation" theory and towards the "fair share"/ polluter pays approach required by the treaties.

Introduction

We welcome the Commission's invitation to comment on the revision of the horizontal guidelines (HGs). In the light of ClientEarth's mission and the urgency of the climate crisis, **we will focus our comments on the sustainability aspects**. We have already commented extensively on state aid and sustainability[1] and will limit our comments today to antitrust, building on our previous recommendations in this field.[2] In the light of the publication on 10 September of the Commission's policy brief on "Competition Policy in Support of Europe's Green Ambition"[3] (the "Policy Brief") and the accompanying speech by Executive Vice-President Vestager on "Competition Policy in support of the Green Deal"[4], we will take these as the most up to date explanation of the Commission's evolving thinking.

We fully support the Commission's call for a "green revolution" in which **"everyone, private and public, must play their part"**. We also welcome most of the more specific "clarifications", such as the ways in which a sustainability agreement can deliver benefits to consumers (resulting in better products, consumers appreciating that they are "doing their bit" or helping society as a whole such as an agreement to cut pollution or carbon emissions from a product). Appreciating that the Commission is still reflecting on these issues we will focus our remarks on the (few) areas where we consider more needs to be done to be consistent with the Green Deal; the Commission's own stated ambition; and with the scale and urgency of the climate crisis.

We refer to the law where necessary, but our primary focus is on the implications of the Commission's chosen policy approach for the Green Deal and, in particular, for the ability of business (especially SMEs) to cooperate to fight the climate crisis, increase the sustainability of their products and services and, indeed, "play their part" in the "green revolution" for which the Policy Brief and the Commission call.

[1] ClientEarth, Agora Energiewende and Redeker, "A State Aid Framework for a Green Recovery: Mainstreaming climate protection in EU State aid law", September 2020
ClientEarth's contribution to the Commission's consultation "Competition policy and the Green Deal", November 2020
ClientEarth's response to the consultation on the revision of the CEEAG, August 2021

[2] ClientEarth's contribution to the Commission's consultation "Competition policy and the Green Deal", idem, pp. 6-8 and 31-44. See also Simon Holmes' contribution to the OECD's Roundtable of 1 December, 2020 on Competition Policy and Sustainability

[3] Competition Policy Brief 1/2021 - Policy in Support of Europe's Green Ambition

[4] https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en

1 Preliminary Remarks

Before turning to our specific policy comments, we would make the following preliminary remarks:

a. We agree that “antitrust enforcement contributes [or, at least is capable of contributing] to the pursuit of sustainability objectives by promoting and protecting competitive markets” and can ensure that “prices remain cost-reflective.”[5] However, they will not do so if those **prices do not reflect the true costs of production-leaving out costs** (such as pollution) imposed on society (so-called “externalities”).

b. We agree that competition/innovation can lead to the use of fewer and/or “less costly resources”. However, competitive pressures can often lead to the use of cheaper less-sustainable inputs and production processes-pressures which individual businesses cannot always resist on their own.

c. In our experience with sustainable fishing pre-competitive platforms such as the Sustainable Seafood Coalition or the Global Salmon Initiative[6], taking **a collaborative approach can encourage businesses to hold each other to account**. It speeds up the normalisation of higher standards / ‘good practice’, and exposes laggards. Businesses take responsibility for setting and implementing standards, and have a vested interest in calling-out ‘bad practice’. This is especially important when dealing with a shared resource such as fisheries – environmental improvements can all-too-easily be undermined by bad actors within the system (hence why fisheries are often used to illustrate the ‘Tragedy of the Commons’ perspective).

d. We support the use of economics and would emphasize the great strides that have been made in recent years to measure environmental effects and quantify the benefits of eliminating externalities.[7] We believe that when quantifications methods exist and are used in other context such as for quantifying reductions of greenhouse gases emissions, **companies should endeavour to quantify the sustainability benefits of their agreement**.

   However, we urge caution as too narrow an approach, or an excessive focus on quantification, can lead to unintended (or even perverse) consequences and run counter to the objectives of the Green Deal.[8]

   The Commission itself has recognised this in several contexts - most notably in its 2004 Exemption Guidelines[9] where it referred to:

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[5] Policy Brief, page 5, top of columns 2

[6] See more details on those in our response to the questionnaire

[7] See, for example, Stern and Stiglitz, “The Social Cost of Carbon Risk, distribution market failures: an alternative approach”, 11 February, 2021, at: https://www.nber.org.

[8] See, the example of cooperative efforts to switch to cleaner aviation fuels discussed in point 2.3 below. Furthermore, too strict an approach may deter some smaller businesses from even *considering* the possibility of working with competitors (however, unlikely the impact on competition may be).

[9] The Commission has also taken a practical approach in relation to the quantification of damages for breaches of competition law. In that context it has recognised that that there are “considerable limits as to the degree of certainty and precision that can be expected” and that that this may mean “best estimates relying on assumptions and approximations”. This is necessary in the

- the need for a “value judgment” when looking at qualitative efficiencies and recognised that it is “difficult to assign precise values to dynamic efficiencies of this nature”[10];and noted that
- “in many cases it is difficult to accurately calculate the benefits to consumers such that it is only necessary to provide estimates and other data to the extent reasonably possible, taking into account the circumstances of the individual case”.[11]

This is particularly the case with benefits such as the loss of bio-diversity and where the businesses concerned are small enterprises.

It would be a tragedy if we were to fail to allow companies to take steps to counter climate change for some (real or perceived) difficulties in ascribing some monetary number to the benefits of doing so.[12] Nevertheless the parties to an agreement should still demonstrate in their self-assessment why their cooperation is necessary (as generally required) and quantify or estimate as far as reasonably possible what would be the added sustainability their agreement would bring.[13] When they fail to do so, or the added value is only minimal, this is likely to be an indicator that the agreement may not be justified, or may not qualify as a sustainability agreement.

e. We also agree that regulation is important – but as stressed in previous ClientEarth’s contribution[14], it is often too limited in scope (e.g. jurisdictionally), too slow coming, and frequently not ambitious enough. When business is keen and able to “play its part” and go *further and faster* than legislation, competition policy should, indeed, be a “vital part of the solution”.[15] It in turn needs to be more ambitious if we are to meet our agreed goals. In any case, **compliance with legislation must remain an individual obligation**. Competition policy should enable business cooperation for the purpose of improving their sustainability performance, for which they may have certain legal obligations, but cooperating merely for the purpose of satisfying individual legal obligations should in principle not be permitted.

f. While this note focusses on climate change and environmental sustainability in view of the existential nature of the climate crisis and the Green Deal, we must not lose sight of the **social aspects of sustainability**, such as an improvement of working conditions or increased wages throughout supply chains. [16] Agreements to tackle these must be assessed on their merits to see if, in fact, they fall within the Article 101(1) TFEU prohibition

light of the “EU law principle of effectiveness” so that the right to damages is “not made practically impossible or excessively difficult” [Commission Staff Working Document on “Practical Guide on Quantifying Harm in Actions for Damages based on Article 101 and 102”, C (2013) 3340 at paras 16 and 17)]

[10] Commission Guidelines on exemptions, 2004, para 103

[11] Ibid, para 94

[12] The Dutch ACM has also recognised that “when weighing the pros and cons of a sustainability agreement it is not always necessary to quantify them” [ACM draft guidelines on “Sustainability agreements-opportunities within competition law”, 26 January, 2021 at paras 53 to 56]

[13] The parties could be allowed and even encouraged to update their estimates when new, more reliable data or methodologies becomes available.

[14] ClientEarth’s contribution to the Commission’s consultation “Competition policy and the Green Deal”, idem, p.6

[15] Policy Brief page 7, bottom of column 2

[16] Besides their immediate benefits on worker’s standard of living, increased wages for adults often have the positive effect of reducing incentives for child labour in countries where this is a practice and from where products that enter the Union’s market are produced. See in respect of agreements on increasing garment workers’ wages and competition law issues that companies (thought they) were facing: Fair Wear Foundation, Why competition law shouldn’t stop collaboration on living wage - Business & Human Rights Resource Centre (business-humanrights.org)

at all and, if so, whether they meet the exemption criteria of Article 101(3) – which they will often do. Reflecting this, if, as we would support, the Commission includes in the revised HGs a separate section on climate change and environmental sustainability agreements, other sustainability agreements could still be assessed under other parts of the HGs (such as those on R&D, information exchange or standards[17]).

As mentioned this note focusses on the key areas where in our view the Commission's guidance needs tweaking if we are to truly unlock the potential for the private sector to achieve its potential in fighting climate change and supporting the Green Deal. We cover:

- How, consistent with *existing* law, more sustainability agreements are exempt from the Article 101(1) prohibition than the Policy Brief suggests (section 2);
- The question of "greenwashing" (section 3);
- The need for more transparent guidance (section 4).

2 ARTICLE 101(3) TFEU AND THE POSSIBILITIES FOR SUSTAINABILITY AGREEMENTS TO BE EXEMPT

2.1 Introduction

ClientEarth's principal concern is that the Commission's comments in the Policy Brief on Condition 1 for an exemption under Article 101(3) (benefits) and Condition 2 (a "fair share" of those benefits for consumers) restrict the potential for vital sustainability agreements in a manner that is, not only not required by law, but is **inconsistent with the EU treaties, and inconsistent with both the Commission's own objectives** (as set out in the Policy Brief itself and in the Green Deal) **and the scale of the climate crisis that we face.**

However, before turning to Conditions 1 and 2, we would emphasize the vital role that Conditions 3 and 4 of Article 101(3) play in the overall balance that Article 101 carefully provides for.

Condition 3 means that before any sustainability agreement can possibly be exempt under Article 101(3), it must be **no more restrictive than is necessary**.

An agreement may be more restrictive than necessary where there is no market failure – for example where consumers have sufficient willingness to pay and businesses **can (and should) compete on the sustainability of their products** rather than cooperate.[18]

Similarly, where there is a clear legal obligation on a company to achieve a specific sustainability objective such as pollution reduction targets, there would not normally be any justification for companies to cooperate to achieve that objective[19] - although cooperation might be justified to go

[17] Indeed, particularly given the mixed nature of many sustainability agreements, such agreements could still be found to be consistent with Article 101 on the basis of different parts of the HGs. As with block exemptions, a section on climate change and environmental sustainability agreements should not be a straightjacket into which all sustainability agreements must fit.
[18] On willingness to pay see further Section 2.5 below
[19] For example the pooling of car manufacturers to achieve CO_2 reduction targets should no longer be allowed (see Article 6 of Regulation 2019/631) since it enables car manufacturers to formally comply with their fleet emissions reduction targets at a lower

beyond that objective and perhaps to achieve that objective more quickly.[20] In this regard, cooperation that merely facilitates performance of legal obligations, irrespective of whether those legal obligations serve environmental or sustainability goals, should not normally qualify and **cooperating parties should be required to demonstrate that their cooperation produces positive sustainability outcomes that go above and beyond what the law require**s.[21]

Conditions 3 and 4 are not the centre of the debate (and are largely uncontroversial) but it is important to remember that they are vital (and ever present) safeguards when considering the correct approach to the scope of Conditions 1 and 2--to which we now turn.

2.2. Condition 1: the benefits for an exemption

We would make only one brief comment here. The Policy Brief refers to some respondents and to its consultation discussing whether "the scope of relevant benefits needs to be extended to non-economic benefits"[22]. This is an odd question as, while Condition 1 of Article 101(3) refers to "economic progress" (and many sustainability agreements will result in "economic progress"[23]), Condition 1 contains three other limbs (or types of benefit) which can lead to an exemption (if the other conditions of Article 101(3) are met):

- "improving production" (e.g. using fewer or more sustainable resources);
- "improving distribution" (e.g. sharing logistics reducing transport emissions);
- "technical progress" (e.g. development of greener technologies)[24].

In other words, important as "economic progress" is, it is not necessary to try to squeeze every benefit of a sustainability agreement into some sort of "economic" box (and, to its credit, the Commission's discussion of relevant benefits to consumers recognises this).

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cost than they would incur individually and without having to actually develop themselves low or zero emissions vehicles. See for more details on our analysis of these pooling our contribution to the call for Competition Policy and the Green Deal, pp. 31-32

[20] This would be consistent with the position in State Aid Law that aid cannot be granted merely for complying with Union standards.

[21] ClientEarth sees a possible risk in allowing companies, including SMEs, sharing resources to comply with legal obligations such as supply chain due diligence obligations, for example. They might be encouraged to also 'share responsibility' or see themselves as only partially responsible for ensuring their supply chain is legally compliant (ie, shared approaches to compliance risk encouraging the perception of shared responsibility and potentially limited or no individual responsibility). In other words, common approaches risk diluting individual responsibility and reduce the quality of due diligence at the individual business-level.

[22] See Policy Brief page 2 half way down the 2nd column.

[23] For example, we would consider it to be "economic progress" if a sustainability agreement results in an equally efficient product being produced using half the resources of its predecessor.

[24] See Case IV.F.1/36.718.*CECED*, 24/1/1999, para. 56 according to which collective environmental benefits are to be taken into account besides lowering consumer energy bills; and Case IV/34.252, *Philips/Osram*, 21/12/1994, para 25 and 27 according to which the concept of "technical and economic progress" includes the use of cleaner facilities resulting in "*less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities*".

2.3. Condition 2: "Fair Share" of the benefits for Consumers

As many commentators have pointed out, the principal weakness of the approach set out in the Policy Brief is the notion that consumers "in the market" must be "fully compensated"[25]. This approach:

- is inconsistent with Article 101(3) itself;
- is not required by the case law; and
- would have perverse results in the context of the Green Deal and the fight against climate change.

The first point to note is that Article 101(3) itself says that, for an agreement to benefit from an exemption, it must allow "consumers a fair share of the resulting benefit": i.e. a "fair share", not a "full share", of the benefits-which makes it very clear that "full" compensation is *not* what is required.

That consumers whose demand for a product results in pollution (or other harms to society and the planet) should bear (at least some) of any increased costs of dealing with that pollution is "fair" and in line with the "polluter pays" principle and the requirements of Article 11 TFEU.[26]

What is *not* "fair" is a situation where producers and consumers of polluting (or other unsustainable) products are allowed to impose costs on consumers who do *not* consume those products. Why should agreements to reduce the (social) costs of pollution and climate change not be allowed if as a consequence of those agreements the polluter(s) pay (at least some) of the costs they are causing?

The second point is that , in our view, there is nothing in the recent case law[27] to prevent the Commission continuing (or reverting to) the approach taken pre about 2004 in cases like CECED [28] which held that the "environmental results for society would adequately allow consumers a fair share **even if** no [in-market] benefits accrued to individual purchasers" (emphasis added). This approach is not only consistent with the "fair share" requirement of Article 101(3) referred to above, but is much more in line with the Commission's own stated ambitions set out in the Green Deal (and repeated in the Policy Brief) for a "green revolution".

Our third point is that the Commission's restrictive approach (requiring "in market" consumers to be "fully compensated") would seem to have serious and (hopefully) unintended consequences for efforts to combat some of the most polluting activities.

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[25] For an up to date discussion of the "fair share" issue see blogs by Maurits Dolmans on 7th and 16 September, 2021 in Chillin' Competition. See also Simon Holmes, "Climate Change, Sustainability and Competition Law" in the Oxford Journal of Antitrust Enforcement at pages 21 to 28.

[26] Article 11 TFEU says: "Environmental protection requirements must be integrated into the definition and interpretation of the Union policies and activities, in particular with a view to promoting sustainable development" (emphasis added).

[27] This case law (up to and including Mastercard) has been clearly set out in a note by the Dutch ACM provided to the Commission and ClientEarth is happy to adopt its analysis [https://www.acm.nl/en/publications/what-fair-share-consumers-article-1013-tfeu]

[28] CECED, 1999, L187/47 OJ 2000

The Commission recognises that there are circumstances where “benefits achieved on separate markets” can be taken into account. This must certainly be the case with benefits like the reduction of greenhouse gases as this affects all “markets” – indeed every living person or animal on the planet.

However, the Commission suggests that the consumers affected must be “substantially the same”. This limitation is neither required by the law nor consistent with the Commission’s own policy in the Green Deal.

It is to be hoped that, even on the Commission’s approach, where large numbers of consumers buy the products benefiting from a sustainability agreement (and bear any increased cost that may arise), the Commission would accept that the benefits (to those consumers) of a sustainability agreement significantly contributing to a reduction in greenhouse gases would exceed any such increase in costs.[29]

However, the difficulty of the Commission’s unduly narrow approach is revealed when one considers an agreement resulting in huge reductions in emissions but where relatively few consumers bear the cost. An example given by Maurits Dolmans illustrates the issue very well- an agreement by airlines to switch to cleaner fuels (benefitting society and the planet as a whole) but where the majority of any increase in costs would be borne by the relatively few frequent fliers and users of business class[30]. But what is wrong with that? What the sustainability agreement would be doing here is ensuring that those consumers whose demand is driving a polluting activity bear a fair share of the costs of reducing that pollution.

2.4. Conclusion on “Fair Share”

We are of the opinion that the Commission should stick to the “fair share” approach required by Article 101(3) and not pursue a theory of “full compensation.” Not only is this inconsistent with the clear wording of Article 101(3), second condition, and the polluter pays principle, it is the right approach if business is to be allowed to play its part in the fight against climate change as required by the climate crises- and as it is called upon to do by the Commission.

If, contrary to our view, the Commission retains some element of the “full compensation” theory, then, at the very least, we would support the approach taken by the Dutch ACM which proposes to deviate from that theory if two criteria are met:

- The agreement is an “environmental-damage” agreement (ClientEarth would enlarge this to social sustainability goals); and
- The agreement helps, in an efficient manner, comply with an international or national standard, or it helps realize a concrete policy goal (to prevent such damage)[31]

[29] Maurits Dolmans gives the example where shifting to carbon free production results in an increase in costs of E50 per unit of the good produced but saves a ton of greenhouse gas emissions at a social cost saving of E60-100 (in 2021, depending on estimates). He asks rhetorically whether such an agreement would be exemptable? In our view it should be.[Maurits Dolmans blog of 16 September in Chillin’ Competition].

[30] Maurits Dolmans, Blog of 16 September.

[31] Under the reservation, we would add, that it does not merely aim at complying with a specific legal obligation on the businesses in question.

If both these criteria are met then the ACM believes that users do not need to be compensated in full (outside this users must be fully compensated by the benefits of the sustainability agreements for any harm that they may suffer as a result of a restriction of competition).[32]

If the Commission does not fully accept the view expressed by ClientEarth and others that the Commission should stick to a "fair share," not a "full" share, approach to the benefits that must accrue to consumers, then the approach proposed by the ACM would seem to be a sensible compromise and a pragmatic way forward.

2.5. Willingness to pay

We would invite the Commission to clarify its position on willingness to pay (WTP).

At the top of page 6 (1st column) of the Policy Brief, the Commission suggests that, if consumers are willing to pay a higher price for sustainability benefits, then such benefits can be taken into account. However, where there is a willingness to pay it may be that companies can compete on the sustainability of their products and cooperation may not be necessary (such that the 3rd condition of Article 101(3) is not met – i.e. any such agreement would be more restrictive than necessary).

How do we reconcile these ideas? We would make **2 comments**:

a. We agree with the Commission that there needs to be some evidence that consumers appreciate the sustainability of a product. However, this may take several forms (such as attitudinal surveys, voting patterns etc) especially as that "appreciation" may not translate (at least not in the short term) into a willingness to pay a higher price.[33]

b. Even where there is *some* WTP, cooperation may still be necessary to get the market as a whole to move to more sustainable production/consumption - and in the time scale needed in the light of the growing climate crisis. For example if 5% of consumers are already willing to pay 20% more for a product manufactured with zero greenhouse gases it may be profitable to place it on the market. However, even if 10% of consumers are expected to be willing to pay that higher price in 5 years time, that is insufficient in the context of the climate crisis. If, by cooperating, producers could move the market such that (say) 80% of consumers were buying the more sustainable product (quite possibly with a lower price increase or even none in view of economies of scale) then cooperation may well be justifiable (and condition 3 met).

[32] ACM draft guidance cited at footnote 12 at paras 45 to 52.
[33] There are many reasons for this recognised by behavioural economists (hyperbolic discounting, information asymmetry etc).

3. GREENWASHING

Greenwashing is a serious issue but the term is often misunderstood, misused in good faith, or even misused deliberately to create an unwarranted reluctance to take a more robust approach in relation to sustainability agreements. In view of this we would like to clarify a few points:

a. As already mentioned, greenwashing is a widespread issue but it is nearly always a *consumer protection* issue (although in some cases unjustified sustainability claims can distort competition between those making unfounded claims and those incurring the costs of sustainability and making genuine sustainability claims-or not making them at all as they do not want to green wash).

b. Efforts to cooperate on sustainability issues can be very genuine (there is sometimes scope for disagreement as to whether they do, or do not, fall within Article 101(1), or meet the exemption criteria — but that is not greenwashing).

c. There is also a possibility that genuine efforts on sustainability could lead on to illegal agreements on other things (eg price fixing). However, there is nothing specific to sustainability agreements about that (there is the same risk in relation to lawful trade association meetings, conferences or a simple drink in a bar). Again, that is not greenwashing.

d. Finally, if there is an agreement to restrict competition on environmental issues (à la AdBlue[34]) that is a straight forward cartel to which the full force of competition law applies-not greenwashing.

Indeed, in support of the Commission's potential concerns over greenwashing (and perhaps as a counterbalance to the more progressive approach which we advocate for genuine sustainability agreements) we would make **4 points/suggestions:**

1. As emphasised at point 2.1 above, any sustainability agreement must be **no more restrictive than necessary** for an exemption to be available (otherwise the 3rd condition of Article 101(3) will not be met).

2. The parties to a potential sustainability agreement should have to demonstrate that the agreement is **genuinely expected to bring about sustainability benefits** (more quickly than and/or going further than, what they are already required to bring about by law), as we explained in point 1(e) above.[35]

[34] Case AT.40178 *Car Emissions*

[35] Sustainability labels or certifications do not always require their affiliates to comply with the law. For example this is the case of some wood-sourcing labels used in the timber sector that do not certify that the affiliates individually comply with the EU Timber Regulation. Those labels may mislead consumers on the true sustainability of the labelled products. In ClientEarth's opinion, agreements that do not require that the parties comply with their legal obligations should not benefit from a favourable regime for sustainability agreements. See ClientEarth EUTR Newsletter March-May 2021, "Analysis of the role of certification schemes in the context of EUTR obligations"

3. The Commission could make it clear that an overt restriction on competition on environmental criteria is likely to amount to a **restriction "by object"** and that this will be reflected in the level of fines that the Commission will impose (perhaps in the proportion of sales taken into account or in the deterrence factor/"entry fee"[36]).
4. Where there is evidence of greenwashing (in the sense of a cartel like arrangement disguised as a genuine sustainability agreement) this might also amount to a **restriction "by object"** in some instances and the Commission could make it clear that this will also be reflected in the level of fines imposed (as above and perhaps as an **aggravating factor**).[37]

4. GUIDANCE

We are grateful that the Commission recognises the need for both general and individual guidance –both in the form of individual guidance letters and (where appropriate) Article 10 Decisions. We already proposed several forms of guidance in our previous contribution to this debate[38] and completed these proposals in our response to the questionnaire under question 141.

The only point we would add is a request for greater transparency wherever possible (and bearing in mind genuine commercial confidentiality). Thus, where the Commission gives individual guidance it should publish that guidance (or a non-confidential version of it) within a short timeframe[39], whether it is positive or negative[40]. Business (quite rightly) hears a lot about what it *cannot* do; it needs to hear more about what it *can* do.

Nonetheless, we find it important that the Commission retains and uses its full investigation and sanction powers[41] when agreements on which the Commission would have given guidance, but that have not followed the Commission's guidance, have been concluded nonetheless.

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[36] See ClientEarth's paper of November, 2020 "Competition Policy supporting the Green Deal-our call for a sustainable competition policy" at paragraph 3.1.2.
[37] There is a clear distinction between this situation and that set out in the draft Dutch guidelines where the ACM proposes that it will not fine the parties if they enter into a sustainability agreement *"in good faith" and* follow the ACM's guidelines but, on close analysis the agreement does not meet the requirements of the law (para 72 of the ACM guidelines –cited in footnote 12).
[38] ClientEarth's contribution to the Commission's consultation "Competition policy and the Green Deal", pp. 41-43
[39] The publication of the non-confidential decision in case AT.40178 *Car Emissions*, for example, is expected since the Commission suggests in its press release that it gave guidance on why types of practices are not considered restrictive of competition. The Commission could also have made a public statement at the time the opinion on a living wage was issued on behalf of the Fair Wear Foundation.
[40] The US practice in relation to Business Review Letters provides an interesting perspective.
[41] This is inclusive of the possibilities to take account of the good faith of the companies.