

Revised draft Horizontal Guidelines on Sustainability Agreements

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

Top Lines

- We find much to welcome in the Commission's new Chapter 9 on Sustainability Agreements – particularly the relatively broad definition of sustainability; clarification of where sustainability agreements may fall outside Article 101 TFEU completely; the guidance on standardisation agreements; the recognition of the broad benefits of sustainability agreements; and the improvements made to how consumers may receive a “fair share” of these (particularly the existence of out-of-market benefits in the form of collective benefits).
- 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, the Commission's call for a “green revolution”, and the Sustainable Development Goals.
- The principal modification required is a move away from the (relatively recent) “full compensation” theory and towards the “fair share”/ polluter pays approach required by the treaties. In particular, a more global approach would allow a better consideration of out-of-market benefits such as for

example the protection and restoration of biodiversity as a whole, the reduction of greenhouse gas emissions, the reduction of pollutants, the provision of clean air, the prevention of de-forestation – even when those would be located outside of the EU.

1. Introduction

Ensuring that the EU, and businesses in the EU, can combat climate change and help achieve sustainability objectives (particularly in line with the objectives of the Green Deal for the European Union) requires a supportive regulatory environment – and competition law has an important role to play in facilitating this.

ClientEarth therefore welcomes the re(introduction) of the chapter on sustainability agreements in the Horizontal Guidelines and the guidance provided therein for the assessment of agreements that pursue one or more sustainability objectives. This is a significant step forward for companies needing and wishing to collaborate to achieve sustainability goals and will ultimately benefit society and consumers and assist in the fight against climate change and biodiversity loss. While we recognise and support the progress the Commission has made in this area, we also consider that there are a number of elements of the Horizontal Guidelines that would benefit from further clarification or amendments, as outlined below.¹

2. Generally, the guidance on sustainability agreements is helpful and welcomed

We agree with the broad definition of sustainability used in the Horizontal Guidelines, and are encouraged by the fact that this goes beyond environmental factors, including respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, and ensuring animal welfare (*paragraph 543*). We also agree that many collaborations that pursue these aims will not effect competition and, therefore, will fall outside the scope of Article 101 completely (*paragraph 551*). Although the present submission focusses on the environmental aspects, ClientEarth would emphasise that the environmental and social dimensions of sustainability must go together and be considered equally given that they are interlinked.

While it is useful that the Commission has provided examples of agreements that fall outside the scope of Article 101, it would be helpful if the Commission outlined further categories of sustainability agreements that fall outside Article 101, for example by reference to the five categories set out in the Dutch Authority for Consumers & Markets' (the "**ACM**") Guidelines on Sustainability Agreements.²

In particular, ClientEarth believes that arrangements between businesses for ensuring that they and their suppliers comply with national or international statutory requirements should fall outside the scope of competition rules. Those types of collective agreements can be useful, for example, if, in certain countries, enforcement of those requirements is not entirely possible or not properly organised. This may concern, for example, social rights, such as the ban on child labour, or the protection of the environment and

¹ This supplements ClientEarth's response of October, 2021 to the Commission's previous invitation to comment on the proposed revision of the Horizontal Guidelines.

² See <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>, Section 4.

biodiversity (e.g. de-forestation in Brazil). Competition rules are not meant to protect competition between businesses that directly or indirectly violate the law. ClientEarth supports the response of the ACM on this point.³

3. Genuine sustainability agreements and greenwashing

We consider that the fact that an agreement genuinely pursues a sustainability objective may be taken into account in determining whether the restriction in question is a restriction by object or a restriction by effect within the meaning of Article 101(1) is helpful (*paragraph 559*).

Greenwashing is a serious and growing 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, ClientEarth would like to reiterate a few points:

- a. While greenwashing is a widespread issue 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 are usually 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 (e.g. 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) 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) ClientEarth has previously made various points/suggestions including:

1. 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”).
2. 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).

³ Response of the ACM to the “Public consultation on the revised Horizontal Block Exemption Regulations and Horizontal Guidelines” of 18 March, 2022 (at page 7/10).

4. Protecting sustainable, not unsustainable competition

The Horizontal Guidelines should however be rebalanced in favour of more strongly protecting competition for sustainable, rather than unsustainable, goods:

- Competition principles such as the “As Efficient Competitor Test” recognise that consumers are not best served by protecting inefficient competitors – we believe the same applies for sustainability standards: just as competition policy should not protect inefficient competitors, it should also not protect unsustainable production and consumption – with “unsustainable” including the concept of “inefficient when externalities are taken into account” We would therefore suggest to nuance that “*foreclosure of alternative standards*” as an anti-competitive effect does not specifically refer to situations where those standards are unsustainable and competition for sustainable products within the standard remains (*paragraph 569*). We would however stress the importance for the Commission also to consider in its assessment the veracity and effectiveness of the standard / label at stake (e.g. in the timber sector, or the organic food industry, the quality of even mainstream labels is questionable).
- The Horizontal Guidelines suggest that the Commission does not consider that the *Albany*, *Wouters* and *Meca-Medina* case law can extend to sustainability agreements (*paragraph 548 and footnote 315*). However, these cases recognise that agreements fall outside Article 101 if the anticompetitive restrictions are inherent or necessary for a legitimate objective to be pursued. We think there are very strong parallels between sustainability and the objectives protected in these cases (such as, in *Meca-Medina*, rules to safeguard “*equal chances, [...] the integrity and objectivity of competitive sport and ethical values in sport*”). The concept of “ethical values in sport” could be said to be analogous to the values inherent in sustainability objectives. We would therefore encourage the Commission to at least indicate that it will consider if legitimate sustainable considerations exclude the application of Article 101 on a case-by-case basis. This might be the case, for example, where stakeholders other than competitors are part of the agreement, such as consumer associations, environmental organisations, or governmental agencies.

We would also suggest that the Horizontal Guidelines incorporate a more general recognition of the positive competitive impacts of sustainable collaborations beyond sustainability standards (similar to the effects recognised in *paragraph 568*).

5. Sustainability standardisation agreements and the soft harbour

With regard to sustainability standardisation agreements, the recognition that such agreements often have positive effects on competition is helpful (*paragraph 568*). Such standards are essential for businesses to reach sustainability goals and the guidance will provide a useful roadmap. There are also some key amendments to the Horizontal Guidelines that would assist businesses in agreeing such standards in practice.

While the cumulative conditions for the soft safe harbour to apply (in *paragraph 572*) are helpful, mandatory standards agreed by participants are critical for successful sustainable collaborations, notably where

investments in adherence to the standard are substantial; this is typically the case for the most impactful sustainability industry co-operations. We welcome the clarification that the sustainability standard should not impose on undertakings that do not wish to participate in it an obligation to comply with the standard, which means that those undertakings which do wish to participate in the standard *can be* obliged to comply with it. This is essential for the standard to work and should be articulated explicitly.

We note that there is a potential tension between the statement (in *paragraph 571*) that an agreement between parties to “*put pressure on third parties to refrain from marketing products that do not comply with the sustainability standard restricts competition by object*” and the positive statement in relation to industry-wide awareness campaigns discussed earlier (in *paragraph 554*), which are deemed to fall outside Article 101. In addition, we do not think that such conduct is anti-competitive by nature. For example, if “third parties” is a reference to competitors, having market-wide standards is not necessarily harmful where parties can compete on other parameters of competition. Further, free-riding can occur where sustainable and non-sustainable standards co-exist (as recognised in *paragraph 605*). Similarly, if “third parties” refers to distributors or suppliers, it can be imperative for companies to ask those parties to comply with the standard in order for the sustainable benefits of the agreement to manifest. In addition, paragraphs 571 and 572 should be clarified to explain that agreements not to purchase goods which do not comply with the sustainability standard are not necessarily in breach of competition law.

The general view expressed in the Horizontal Guidelines is that the potential anti-competitive effects of a sustainability standard increase with the market coverage of the agreement applying such standard (*paragraph 575*). We understand this point but, even where standards have a high market coverage (and thus potentially a particularly positive sustainability impact), they can remain competitively neutral if the standard leaves room to compete on at least another key parameter of competition, such as price, volume, manner of implementation of the standard, and other qualitative elements. Where more than one of those parameters is present, then cumulatively they place even greater competitive pressure on undertakings which comply with the standard. Equally (or perhaps, more) important is the fact that, the greater the market coverage, the greater the sustainability benefits and (other things being equal) the greater the likelihood that the agreement meets the criteria for an exemption.

However, as indicated in Section 4 above, it is also crucial for the Commission to consider in its assessment the veracity and effectiveness of the standard / label at stake (e.g. in the timber sector, or the organic food industry, the quality of even mainstream labels is questionable).

6. Assessment under 101(3) and benefits

The Commission’s discussion of the benefits of sustainability agreements is welcomed and rightly recognises the significant benefits they can bring to consumers and society more broadly.

Regarding the first condition of Article 101(3), the Horizontal Guidelines use the term “*benefits*” as well as “*efficiencies*”. We consider “benefits” to be more accurate – particularly in a sustainability context. It not only corresponds to the wording of the TFEU (while also encompassing “efficiencies”) but it also allows a wider range of improvements to be more readily recognised as relevant. This includes cleaner technology, less pollution, measures to preserve or restore biodiversity, improved conditions of production and distribution, more resilient infrastructure or supply chains, better quality products, etc. (*paragraphs 577 and 578*).

We welcome the Commission's recognition (consistent with the 2004 Exemption Guidelines) that it is not always necessary to carry out a detailed assessment (and still less attempt to quantify everything) where "*the competitive harm is clearly insignificant compared to the potential benefits*" (*paragraph 589*). This will often be the case particularly in relation to cooperation to fight climate change (See, for example, paragraphs 53 to 56 of the ACM draft guidelines cited in footnote 2).

7. Indispensability

In relation to initiatives that are indispensable (*paragraph 582*), we agree that collaborations may be indispensable to ensure that consumer-supported sustainable goals can be achieved in a more cost-efficient way. In addition, an agreement may also be indispensable where there is demand for sustainable products (i.e. not just where the sustainability goal can be reached in a more "cost efficient" way, but, most obviously, where current demand leads to insufficient market coverage or minimal economies of scale and there is a need to transform a whole sector of the economy to put it on a sustainable basis in line with the Green Deal).

We appreciate the Commission's view that an agreement may not be necessary to the extent there is already a specific EU or national law in place requiring companies to comply with concrete sustainability goals (*paragraph 583*). However, cooperation may be justified in order to achieve that goal either more quickly or to go beyond that goal.⁴ Therefore, the Horizontal Guidelines should be explicitly extended to include situations where collective efforts ensure that the improvements obtained are more effective or can be delivered sooner, or exceed the goals, as recognised by the ACM.⁵ Meaningful sustainability improvements often require scale not only to overcome first mover disadvantages related to costs increases, as the Commission recognises, but also in order for environmental or social benefits to materialise as broadly as possible. We would also encourage the Commission to avoid a narrow focus on "cost efficiencies".

That being said, the Commission and the wider public should remain cautious for the cynical behaviour some companies may have when concluding sustainability agreements on the basis that the law is not going far enough or is not applied soon enough, when those same companies are the ones who supported less ambitious laws in the first place. Hence, we would invite the Commission to review the feedback received from other stakeholders to this consultation with this comment in mind.

8. Fair share for consumers

The Horizontal Guidelines take important steps to reject a narrow view of pass-on benefits, by recognising collective benefits (*section 9.4.3.3*) and benefits to indirect users (*paragraph 588*). However, ClientEarth considers that the approach remains too limited, and that the concept of "consumers" is too narrowly defined.

⁴ A similar reasoning applies for State aid law.

⁵ See <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>, Section 5.

Individual benefits

In relation to individual benefits, we agree that consumers value more than just their own individual benefit, and the recognition of individual non-use value benefits is therefore, in principle, very helpful. However, tying these benefits to the willingness-to-pay principle materially undermines their use.

While consumers are increasingly conscious of sustainability issues, an inherent challenge that is recognised by the Commission is that negative externalities, “*are not sufficiently taken into account by the economic operators or consumers that cause them*” (*paragraph 545*). As acknowledged by the Commission itself, willingness-to-pay is therefore an unsuitable measure to assess individual non-use benefits. This is further supported by the fact that the Commission also acknowledges that there is often a difference between what consumers say their preferences are and what their immediate purchasing behaviour may suggest (*paragraphs 597-598*), and that consumer statements change if they are adequately informed of the consequences their consumption choices have on society, the environment, ecosystems, or the climate.

Collective benefits

The most important issue to be addressed in the Horizontal Guidelines is the Commission’s treatment of collective benefits. While we commend the fact that the Commission has included collective benefits as a concept worthy of exemption under Article 101(3), the Commission’s apparent requirement that “full compensation” of the direct users in the relevant market is required (*paragraph 603*) is very limiting and contrary to the policy objectives of the Green Deal, the urgency of the climate crisis and the progressive position taken by other authorities (including the ACM) and the Commission’s own position in the CECED case⁶ and (most recently) in connection with agricultural agreements.

This is inconsistent with the “polluter pays” principle (Article 191 TFEU) and effectively introduces a “polluter-must-benefit” requirement – which is highly undesirable from a policy perspective and not supported by Treaty provisions. In our view it is only fair that those whose demand for a product or service is driving the harms to society (i.e. the costs it bears) should bear (at least) some of those costs-and should not be “fully compensated” for the harm they cause. That is the essence of the “polluter pays” principle” and basic social justice. A “full compensation” policy would disregard the protection of those who must pay the cost for unsustainable consumption but cannot reduce it.

The restrictive notion of collective benefits adopted by the Horizontal Guidelines would result, in many cases, in geographic and social boundaries being drawn around issues for which collective responsibility should be taken. We consider that collective benefits can also arise for consumers outside the relevant market thus benefits at global level should also be taken into account (e.g. prevention and reduction of deforestation, reduction of global CO² emissions and provision of clean air, protection of biodiversity as a whole). We think that it would be misleading to consider only the share of benefits allocated to EU consumers, in particular regarding agreements aiming at reducing greenhouse gas emissions. ClientEarth supports the response of the ACM (cited in footnote 3) at page 8 on this point. We expect the Commission to adopt an approach which would be less centred on the EU but instead reflecting the idea of global solidarity. The question is posed quite rightly by Jan Blockx on this point: “*If European competition law*

⁶ CECED 1999 L187/470 OJ 2000.

takes into account the reduction of air pollution as an efficiency, shouldn't clean air outside Europe count just as much as clean air in Europe itself?".⁷

As set out in the ACM's Legal Memo, following discussions of the text of Article 101(3) and the case law of the CJEU, the sustainability context "*is generally that of initially negative but potentially (once remedied) positive externalities affecting society as a whole. Where sustainability issues result from negative externalities, consumers in the relevant market are also polluters who have a choice to modify their behaviour or not. The out of market consumers share in the negative effects of the pollution without having this choice or the option of forcing in market consumers to modify their polluting behaviour.*"⁸ We agree with the ACM's conclusion that out-of-market benefits are relevant and full compensation of directly affected consumers is not required in all cases – and not supported by the text of Article 101(3) TFEU (which requires only "fair", not "full" share to consumers) and the case law of the Court of Justice in *Mastercard* requiring no more than "*appreciable objective advantages*" for the affected consumers. We strongly encourage the Commission to consider this and reflect it in the final Horizontal Guidelines⁹. We would also invite the Commission to consider the inclusion of future generation costs and benefits in its assessment – and support the response of the ACM (cited in footnote 3) at pages 8 and 9 on this point. By way of example, while today the direct tangible impact of deforestation outside the EU may be more limited on EU consumers, this will evolve in the future as the environmental effect of the rapid loss of biodiversity and carbon sinks will effect the global community at large.

9. The examples of sustainability agreements

The practical examples elaborated (in *section 9.6*) of the Horizontal Guidelines are a useful start to frame the analysis of certain types of sustainability agreements but we think that they could benefit from some clarifications, as discussed below. In addition, as a more general point, we note that the examples are very focussed on manufacturing and would benefit from also considering other areas of the economy such as sustainable finance and the insurance sector, but also the social dimension of sustainability.

Example 2: While this example is useful, we would argue that the Commission should come to the same conclusion in this example even if the market share were higher, including because the parties are free to

⁷ See Jan Blockx' blog post in Kluwer Competition Law Blog, 1 April 2022, "Should European competition law only care about clean air for Europeans? – A comment on paragraph 604 of the European Commission's draft Guidelines on horizontal co-operation agreements", available at <http://competitionlawblog.kluwercompetitionlaw.com/2022/04/01/should-european-competition-law-only-care-about-clean-air-for-europeans-a-comment-on-paragraph-604-of-the-european-commissions-draft-guidelines-on-horizontal-co-operation-agreements/>. We share the views of this article specifically regarding the requirement of "full compensation". The only comment we would add is that IF the author intends to suggest (which we do not think is his intention) that a literal interpretation of the fair share requirement could lead to a failure to take account (for example) of clean air outside Europe, we would not agree. As he says this would be a "glaring injustice", or, in other words, it would be unfair. Consumers would therefore be receiving more than the "fair share" of the benefits-which is what a literal interpretation of Article 101 (3) requires.

⁸ ACM Legal Memo, 27 September 2021, What is meant by a fair share for consumers in Article 101(3) TFEU in a sustainability context?

⁹ At the very least we would encourage the Commission to conform paragraph 602 (which refers only to "the group of consumers affected by the restriction and benefitting from the efficiency gains [being] substantially the same") and paragraph 604 (which refers to "substantial overlap") with the better expressions in paragraphs 603 and 606(c) – which helpfully refer to the in-market consumers substantially overlapping or being "part of" the larger group of beneficiaries. Paragraph 601 should also be consistent and refer to both concepts (substantial overlap and part of).

compete outside the standard if they wish. As discussed above, a mandatory standard (for ensuring that minimum conditions are respected) can be very impactful from a sustainability perspective, and the parties are still free to compete on other parameters of competition.

Example 5: We consider that this example takes a step back from the CECED case for a number of reasons: (i) not all machines are being phased out; (ii) the net benefit on price/costs on its own is positive (even before the collective benefits are taken into account); and (iii) only the collective environmental benefits to these consumers are taken into account – which is narrower than the CECED case¹⁰.

Furthermore, we note that there was specific evidence that less restrictive efforts to move to a more sustainable basis had failed – this might have been implied from the fact that inefficient washing machines were still widely prevalent in the market (if there had been competition on sustainability criteria). This is relevant to the indispensability of the cooperation.

10. Process

We note Executive Vice-President Vestager’s statements that the Commission would be willing to provide guidance to businesses on specific initiatives.¹¹ We would hope that the Commission will be open to providing comfort letters (and where appropriate Article 10 Decisions) to businesses in this developing area.

We would also be grateful if the Commission could publish regular insights into its thinking as its practice in this area develops. As we previously indicated, the publication of individual guidance, either positive or negative, would be extremely helpful for businesses to better understand what it *can* do, not only what it cannot do. Transparency wherever possible for both general and individual guidance being provided by the Commission is indeed as important as (if not more important than) the interpretation of the rules in itself.

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¹⁰ In CECED the Commission held that “the environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers” (emphasis added). [CECED 1999 L187/470 OJ 2000]

¹¹ Commissioner Vestager, Speech “*The Green Deal and competition policy*”, 22 September 2020.

