

The Consumer Voice in Europe

HORIZONTAL BLOCK EXEMPTION REGULATIONS AND HORIZONTAL GUIDELINES

BEUC's response to the public consultation in relation to
Sustainability Agreements



Contact: Vanessa Turner and Agustin Reyna - competition@beuc.eu

BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND

Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • www.twitter.com/beuc • www.beuc.eu
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Why it matters to consumers

Sustainability is a critical issue for European consumers. Consumers are increasingly concerned about the impact their consumption has on the environment and on communities across the world. Many of them want to be sure that their purchasing decisions do not support businesses that operate in violation of basic human rights or harm the environment around the world. Consumers need sustainable alternatives that are not only available but also affordable, attractive and convenient. It is therefore essential that competition law plays its part in the urgently needed transition to a more sustainable economy. The review of the approach to sustainability agreements must uphold consumers' interests which have been a key objective of EU competition policy since its foundation. Consumers must be protected, in particular the most vulnerable consumers, against so-called 'greenwashing' or 'ethical washing' and unjustified price increases or restrictions of choice, quality or innovation. While business and consumers must play their part in the transition to a sustainable economy, competition law must continue to pursue its mission to protect consumers from bearing a disproportionate share of the costs of this indispensable transition.

Summary

Competition policy and private business initiatives have a role to play in Europe's achievement of its sustainability objectives, one of the world's key challenges today.¹ BEUC welcomes the Commission's review of the Horizontal Block Exemption Regulations and Horizontal Guidelines in this respect. Whilst it is of utmost importance that competition law does not stand in the way of achieving sustainability goals, and indeed actively supports these goals where possible, this review should not lead to distortions of competition law. Nor should it help facilitate green- or ethical washing in which cases not only consumers will suffer due to unjustified price increases or reductions in choice but also the environment and those in greater need of fairer wages and respect of human rights since the claimed benefits will not materialise. The transition to a sustainable economy must be a just one. Sustainability policies should therefore aim to make sustainable alternatives and lifestyles i) available, ii) affordable, iii) attractive, iv) convenient.²

Article 101 TFEU is sufficiently flexible to deal with sustainability challenges without distortions to its interpretation and application.³ In this regard, the revised draft Horizontal Guidelines:

- Are to be welcomed for their overall approach to sustainability agreements. The current balance should be maintained. We must not lose sight of the fundamental

¹ The consumer checklist on the upcoming EU due diligence legislation, https://www.beuc.eu/publications/beuc-x-2021-024_the_consumer_checklist_eu_due_diligence.pdf.

² Climate action as an opportunity for all – How the green transition should and can benefit consumers' daily lives, https://www.beuc.eu/publications/beuc-x-2021-098_how_the_green_transition_should_and_can_benefit_consumer_daily_lives.pdf.

³ BEUC, How Competition Policy Can Contribute to the European Green Deal: BEUC's Response to Public Consultation, BEUC-X-2020-113 (Brussels, November 2020), https://www.beuc.eu/publications/beuc-x-2020-113_green_deal_and_competition_consultation_20_november.pdf, (BEUC's Green Deal Response).

purpose of competition law to ensure effective competition in markets to the benefit of all participants, including ultimately consumers and indeed sustainable development itself.

- Should not distort competition law analysis or facilitate green- or ethical washing.
- Should be cautious in assuming that sustainability standards agreements will generally be beneficial and thus not fall within Article 101(1) TFEU. The safe harbour for such agreements should not be expanded beyond what is set out in the current draft.
- In reviewing sustainability agreements under the safety net of Article 101(3), sustainability benefits can readily be considered as efficiency gains.
- The strict interpretation of the indispensability and no elimination of competition requirements, in particular price competition, must be maintained.
- There is room for a nuanced interpretation of the “fair share” for consumers requirement. Nevertheless, this aspect of the draft Horizontal Guideline’s approach must be revised as the way the distinctions are currently drawn incites confusion.
- The Horizontal Guidelines should, where possible, include more detailed examples to better clarify the proposed approach.

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1. General remarks – the balanced approach in the draft Horizontal Guidelines is to be welcomed

BEUC welcomes the Commission's review of the Horizontal Block Exemption Regulations and Horizontal Guidelines in relation to sustainability agreements. Whilst it is of the utmost importance that competition law does not stand in the way of achieving sustainability goals, and indeed actively supports these goals where possible, this should not lead to distortions of competition law. History has taught us, for example in the 1930s or during the financial crisis of 2008, that abandoning tried and tested competition law principles to deal with a crisis can in fact do more harm than good in the long run.⁴ Horizontal agreements – agreements between competitors – which can lead to price fixing, sharing out of markets and customers or agreeing not to innovate or make quality improvements for example have the ability to be particularly harmful.⁵

The draft revised Horizontal Guidelines (HG) by and large strike the right balance between promoting beneficial sustainability agreements and not allowing such agreements to undermine competition and harm consumers. We therefore commend the Commission for its approach. It is nevertheless important to stress that while industry cooperation can provide targeted improvements to make the production and consumption of goods more sustainable, on its own, industry cooperation cannot and will not be enough to introduce the much-needed changes to make our economy more sustainable and just. Therefore, legislation and binding rules on companies should always be preferred to industry cooperation akin to self-regulation. This is, on one hand, because competition law by its very nature has its limits and, on the other hand, because these are basic elements of human survival (e.g. fight against climate change) and human dignity (e.g. respect for human rights) which are far too important to be left to the industry to handle alone.

Against this background, in the following, we set out the areas in which we see a need for some adjustment or improvement to the HG.

2. The treatment of horizontal sustainability agreements under Article 101 TFEU

Article 101(1) TFEU prohibits agreements, including horizontal agreements, which restrict competition unless they can be exempted under Article 101(3), essentially because the benefits they bring outweigh the harm caused by any restriction of competition.⁶ The HG set out guidance on both of Article 101(1) and (3).

3. Proposed Guidelines – an analysis from the consumer perspective

BEUC's comments in the following sections follow the corresponding sections in the HG.

⁴ Whilst the EU maintained its competition law principles, both antitrust and merger control, during the financial crisis, several Member States did not, and some of the consequences, for example the anticompetitive effects of banking mergers in the UK, took years to unwind.

⁵ For example, the cartel restricting competition on emission cleaning technology, Commission Decision of 8 July 2021, Case AT.40178 – Car emissions, https://ec.europa.eu/competition/antitrust/cases1/202146/AT_40178_8022289_3048_5.pdf.

⁶ See paragraph 548 HG.

3.1 Introduction

3.1.1 Concept of sustainability

The HG define sustainability (or sustainable development) in paragraphs 542-3. Whereas the previous consultation on sustainability issues focussed on the European Green Deal⁷, the HG now make reference to the United Nations sustainable development goals. This would enlarge the scope of sustainability covered by the HG materially to include not only environment-related issues but other values such as social sustainability.⁸

The concept of sustainable development is stated in the HG paragraph 543 to encompass activities that support economic, environmental and social (including labour and human rights) development. Sustainability therefore “includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), eliminating pollution, limiting the use of natural resources, respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, ensuring animal welfare, etc.”

While a broad and open-ended concept of sustainability is important to capture the different elements of the sustainable transition, different elements of sustainability may require a tailored analysis under competition law. This issue is considered further below in relation to the concept of “fair share” under Article 101(3).

3.1.2 Cooperation agreements or regulation

The HG note that negative externalities or market failures can be addressed by appropriate regulation or cooperation agreements (paragraphs 545-6, and 583). Competition law must however be careful not to overstretch its legitimacy here. Whereas democratically elected governments have legitimacy to weigh up different economic priorities, and benefits and harms to different groups, competition authorities do not have a mandate to do this beyond what is enshrined in the law. Unlike public measures whose aim is to serve the public good, cooperation agreements between private operators will first and foremost serve the private good of those that sign up to them. The imperative of most companies is generally to maximise profit. This, rather than maximising sustainability benefits (whether for the environment, labour or human rights) or minimising costs to consumers, will be the driver. Private agreements are thus second best to regulation. If public policy imperatives require particular measures to be taken, regulation can determine the optimal level of sustainability benefit whilst also, where necessary adopt mitigations: for example public measures to reduce the burden of transition on the most vulnerable members of society. Competition law’s only means to do this are the Article 101(3) conditions, which operate as a safety net for the affected consumers – in particular the no elimination of competition

⁷ European Commission, Competition Policy supporting the Green Deal: Call for contributions, 13 October 2020, available at https://ec.europa.eu/competition-policy/system/files/2021-08/2021_green_deal_conf_call_for_contributions_en.pdf.

⁸ This contrasts with the approach taken in Austria where an amendment to the Austrian competition law was introduced in September 2021 relating only to environmental issues. The paragraph added to § 2 refers explicitly to “ecologically sustainable or climate-neutral economy” in relation to the “fair share” for consumers requirement for exemption of anticompetitive agreements. See Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen 2005 as amended by Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004174>. The UK CMA sustainability guidance also only refers to environmental sustainability, see <https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government>.

requirement.⁹ Overriding these safeguards could thus have significant societal consequences and the Commission would have no legal authority to do this.

3.2 Sustainability agreements not raising competition concerns

Paragraph 551 notes that not all sustainability agreements between competitors are caught by Article 101 TFEU. Where such agreements do not affect parameters of competition, such as price, quantity, quality, choice, or innovation, they are not capable of raising competition law concerns. The HG go on to provide illustrative (non-exhaustive) examples of such sustainability agreements.

BEUC agrees that it is possible for certain sustainability agreements to fall entirely outside the scope of Article 101. Nevertheless, it is important to remain cautious. The HG provide two examples of agreements that do not raise competition concerns: first, agreements on the creation of a database containing information about suppliers that have sustainable value chains (paragraph 553), and second, agreements between competitors relating to the organisation of industry-wide awareness campaigns (paragraph 554). Whilst such agreements would not appear to raise any competition concerns, it is essential that they are subject to safeguards against anticompetitive spill-over effects such as collective boycotts, discriminatory access or competitively sensitive information exchange.

3.3 Assessment of sustainability agreements under Article 101(1)

This section of the HG focuses on sustainability standardisation agreements. For the Article 101(1) analysis of all other types of sustainability agreement, reference is made to other sections of the HG. This is consistent with paragraph 547 which notes that agreements that pursue sustainability objectives are not a distinct type of cooperation agreement.

3.3.1 Establishing sustainable standards

The HG state that sustainability standardisation agreements have particular features such as often leading to establishing a green label, logo or brand name for products that meet certain minimum requirements. Paragraph 568 purports that such agreements can have positive effects as they empower consumers to make informed purchase decisions and therefore play a role in the development of markets for sustainable products.

In BEUC's experience, this view is not always backed up by the evidence. Compared to public regulatory initiatives to determine sustainability standards and labelling, private agreements between competitors run significant greenwashing risks. The Chicken of Tomorrow case is a good example of this.¹⁰ Consequently, sustainability standardisation agreements should not always be assumed to be beneficial but rather carefully reviewed under Article 101.

Another example is the Roundtable on Sustainable Palm Oil (RSPO). The RSPO is a voluntary initiative by palm oil producers, processors and traders, consumer goods manufacturers, retailers, banks and investors as well as some environmental and social NGOs. It was set up to develop and implement global standards for sustainable palm oil. However, according to a coalition of NGOs, the RSPO does not live up to its commitment of ending deforestation and violation of human rights.¹¹ By contrast, the EU legislative proposal for deforestation-free products,¹² which sets mandatory due diligence rules for

⁹ As set out below in section 3.4, fourth condition, the elimination of all price competition should be dealt with by public intervention and should not be permissible under private agreements.

¹⁰ BEUC's Green Deal Response, p. 5.

¹¹ <https://www.greenpeace.org/southeastasia/press/3337/joint-ngo-statement-on-failure-of-rspo-to-meet-the-demands-of-global-climate-crisis/>.

¹² https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5919.

operators which place specific commodities on the EU market that are associated with deforestation and forest degradation, is likely to be much more effective at tackling imported deforestation. The Commission ruled out options such as voluntary private certification and other similar initiatives as it considered that “soft measures [...] have already been implemented for years by some companies, with little success in terms of preventing deforestation and fostering deforestation-free supply chains. In addition, the feedback from stakeholders, the general public and the European Parliament all pointed to the need of binding measures”.¹³

The primary vehicle for standard setting should thus remain regulation or, at minimum, private standard setting followed by public accreditation and monitoring.¹⁴

3.3.2 Soft safe harbour

As regards the soft safe harbour proposed in paragraph 572 HG, the safeguards against greenwashing and spill-over effects should be considered essential elements of any soft safe harbour.

The wording of the second condition listed in paragraph 572 seems to be inconsistent with paragraphs 477 and 490 (on other standardisation agreements) in that it does not unequivocally state that there should be no obligation for participants to a standards agreement to comply with the standard. This does, however, seem to be implied in the third condition.

The HG should provide an indication of how to assess a “significant increase in price” in the sixth condition. Similarly, for a “significant reduction in the choice of products available on the market”, which must presumably at least mean that a voluntary agreement entered into by all market players would fall outside the safe harbour.

3.3.3 Calls to go further in the HG

Given the inherent risks of competitor cooperations, the soft safe harbour should not be expanded as has been suggested by some due to the risk of green or ethical washing for consumers.

The ACM would like the Commission to state that agreements aiming exclusively at respecting national or international legal standards on, for example, human rights, child labour or agreements to pay the living wage, that apply to doing business in or outside Europe, particularly in developing countries, should fall outside Article 101 (1) TFEU.¹⁵

One must, however, ask the question why competitors should need to agree to comply with the law in Europe? Either such an agreement would do nothing beyond what a company is legally required to do, but then why the need to agree to do it? Or the agreement goes beyond this and then needs scrutiny. Every agreement between competitors, including those with sustainability aims, risks having harmful spill-over effects.¹⁶

¹³ Commission Staff Working Document (Part I). Impact assessment. Minimising the risk of deforestation and forest degradation associated with products placed on the EU market. SWD(2021) 326 final.

¹⁴ Cf. the ACM view that there should be no primary role for legislation over voluntary private collective action, “Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines Response from the Netherlands Authority for Consumers & Markets” p.6, [acm-respons-to-the-european-commission-proposal-with-particular-regard-to-sustainability-agreements.pdf](#) (ACM Response).

¹⁵ Ibid p.7.

¹⁶ See for example, the detergents cartel, Commission Decision of 13 April 2011, COMP/39.579 – Consumer Detergents https://ec.europa.eu/competition/antitrust/cases/dec_docs/39579/39579_2633_5.pdf. See also the recent findings by the Bundeskartellamt that a proposed agreement in relation to milk production did not have a sustainability but rather a price-fixing purpose,

Arguments could possibly be considered for international standards which have not or not sufficiently been laid down in national legislation of third countries with serious human and labour rights issues, or where compliance with such standards is not adequately monitored by local authorities. However, the safety net of Article 101(3) would still be necessary in these cases to avoid any ethical washing or anticompetitive spill-over effects.

Agreements to expedite compliance with national or international legal standards before they officially enter into force should also not be found to be outside Article 101(1) as the timing of legal obligations is the legislator's decision. Such agreements could again however be evaluated under Article 101(3).

It is noted that agreements to comply with national or EU law would not, as the HG rightly recognise in paragraph 583, be indispensable under Article 101(3). The final sentence of that paragraph may however suggest greater leeway for the implementation of international legal standards in third countries when it proposes that "cooperation agreements may be indispensable only for reaching the goal in a more cost efficient way".

Overall, we would counsel caution in relation to the scope of Article 101(1). In this light, we strongly welcome the confirmatory statement in paragraph 548 that "agreements that restrict competition cannot escape the prohibition of Article 101(1) for the sole reason that they are necessary for the pursuit of a sustainability objective" and that the Commission is not proposing to extend the *Wouters* line of cases on restrictions which are inherent to the legitimate objectives pursued by certain professions to the broad area of sustainability agreements between private companies.¹⁷

Finally, it would be helpful to make clear that the statement in paragraph 559 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)" should not be interpreted as a presumption that sustainability agreements will not be 'by object' agreements but rather that each agreement will continue to be analysed with regard to the content of its provisions, its objectives and the economic and legal context in line with case law (footnote 318).

3.4 Assessment of sustainability agreements under Article 101(3)

In considering Article 101(3), from the consumer perspective a distinction must be drawn between, on the one hand, the first and second conditions of Article 101(3), where sustainability considerations can be reflected, and on the other hand, the third and fourth conditions which must be rigorously maintained to protect consumers.¹⁸

First condition: Efficiency gains

BEUC agrees with the approach set out in the HG on the first condition of Article 101(3). Sustainability benefits can readily lead to objective efficiency gains, assuming that they can be clearly substantiated.

Third condition: Indispensability

As regards the third condition of Article 101(3), there is no reason to deviate from well-established indispensability analysis.

https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2022/25_01_2022_Agrardialog.pdf?__blob=publicationFile&v=3.

¹⁷ BEUC's Green Deal Response, p.6-7.

¹⁸ BEUC's Green Deal Response, page 7.

Paragraph 586 HG states that an agreement may be indispensable where “consumers in the relevant market find it difficult, due to, for example, lack of sufficient knowledge or information about the product itself or the consequences of its use, to objectively balance the future benefits they obtain from an agreement, against the immediate harm they suffer from the same agreement and that, as a result, they overestimate the importance of the immediate effect. For example, consumers may not be able to appreciate future benefits in the form of improved quality and innovation, if the immediate effect is a price increase of the product.” While this may be a valid approach in some limited circumstances, it would seem to be open to abuse and greenwashing. It would be essential to substantiate and quantify the future benefits in comparison with the immediate harms to establish indispensability.

Furthermore, if the problem is information asymmetry, this could be addressed by providing more information to consumers about the sustainability characteristics of products, which is something foreseen in the proposed Directive on empowering consumers for the green transition through better protection against unfair practices and better information.¹⁹ If additional measures are needed, as paragraph 554 recognises, industry-wide awareness campaigns are less competition-distorting than coordinated commercial behaviour.

This scenario could be resolved more appropriately under the “fair share” requirement. Where the consumer benefits arise in a different market but in relation to substantially the same group of consumers e.g. saving electricity costs as a result of more efficient household appliances, or in a predictable future, the fair share criterion could also be considered fulfilled because the consumers affected by the appliance price increase ultimately benefit from lower energy bills. Such consumers would also benefit from improved quality and innovation, provided this occurs within a reasonable timeframe.

Second condition: Pass on to consumers

The second condition of Article 101(3) requires that consumers receive a fair share of the benefits purported to result from the cooperation agreement. Paragraph 588 HG explains that consumers will receive a fair share of the benefits when the benefits deriving from an agreement outweigh the harm caused by the same agreement. The overall effect on consumers in the relevant market should at least be neutral. Therefore, sustainability benefits that result from the agreement have to be related to the consumers of the products covered by those agreements.

To assess whether this condition is fulfilled, the HG identify three categories of benefit:

- Individual use value benefits: these result from the use of the product and directly improve the consumer’s experience with the product in question;
- Individual non-use value benefits: these comprise indirect benefits, resulting from the consumer’s appreciation of the impact of their sustainable consumption on others; and
- Collective benefits: these benefit a larger group of society than the users of the product.

In the analysis of each of these categories, there seems to be some confusion and inconsistencies as regards:

¹⁹ https://ec.europa.eu/info/publications/proposal-empowering-consumer-green-transition-and-annex_ro.

1. The examples used – notably, despite different approaches, pollution is used as an example in each case. Not including clear examples for each category risks undermining the categorisation.
2. The mention of positive/negative externalities is unclear in individual use value benefits. Externalities do not seem to be relevant to the analysis for this category of benefits, unlike for the other two. If externalities are relevant, what is the distinction between this category and the others?
3. If the first and second categories are economically the same (paragraph 597), does this imply that the test (willingness to pay) should also be the same?

These points should be clarified.

In relation to **individual use value benefits**, i.e. benefits which result from the consumer's use of the product and directly improve the consumers' experience, BEUC agrees with the principles set out for this category, including the existence of potential positive externalities in paragraphs 592-593. Nevertheless, it is unclear why positive externalities are mentioned here and to what extent, if any, the Commission is suggesting that they should be taken into account in deciding whether the benefits of the agreement at issue outweigh the harms caused by the restrictive agreement. Paragraph 602 suggests that the balancing of negative effects with the benefits resulting from a restrictive agreement is normally made within the relevant market to which the agreement relates. For this category of benefit, it would seem sufficient to stop the analysis here.

As regards the second category, **individual non-use value benefits**, i.e. indirect benefits accruing to consumers within the relevant market via their personal/individual valuation of the effect of their consumption on others, including on non-users outside the relevant market, the HG note that the consumer's use experience with the product is not directly improved but consumers may be willing to pay more for a sustainable than an unsustainable product in order for society or future generations to benefit.²⁰

The HG then state in paragraph 597, however, that "Consumers who are ready to pay more for such products perceive them to be of a higher quality, precisely because of the benefits accruing to others. Therefore, from an economic perspective, such indirect qualitative benefits are not different from the usual quality-enhancing benefits that increase the direct use value of a product" (i.e. individual use value benefits). If that is so, why is a willingness to pay test required for individual non-use value benefits but not for individual use value benefits?

The HG also note that non-use value benefits accrue to consumers within the relevant market via their personal/individual valuation of the effect on others, including on non-users outside the relevant market. Nevertheless, the same can be said of the externalities identified for individual use value benefits and collective benefits.

With the exception possibly of loss of natural habitats, all the examples used in this category: water contamination, deforestation – where this could affect climate change, and pollution are confusing because they could apply equally well to individual use benefits and collective benefits as described in the HG.

Perhaps the individual non-use value benefits could be better distinguished from individual use value benefits and collective benefits by limiting this category to situations of indirect benefits where the externalities only concern beneficiaries outside the relevant market. The example that would then appear to fit squarely within individual non-use value benefits

²⁰ Alternatively, if such sustainable products involved no or a negligible price impact, they could also meet the Article 101(3) requirements. Sustainable options need not lead to appreciable price increases to consumers, see, for example, on the minimal price impact of paying a living wage on retail prices: <https://api.fairwear.org/wp-content/uploads/2016/06/ClimbingtheLadderReport.pdf>.

would be the example set out in the collective benefits section of the HG on sustainable cotton that reduces chemicals and water use on the land where it is cultivated (but do not have externality benefits also for the consumers of the cotton products in the relevant market in Europe).

While the difference in treatment of, on the one hand, direct benefits for consumers in the relevant markets (individual use value benefits), and on the other, indirect (or purely subjective) benefits for the consumers concerned, without any externality effects in the relevant market (individual non-use value benefits) and collective benefits makes sense, the analysis should be clarified as the test proposed in each case in the HG is different.

In relation to consumers' willingness to pay surveys, BEUC would agree with paragraph 598 that there may well be a difference between consumers' stated preferences and their actual purchasing behaviour.²¹ For example, in a 2020 paper, the Bundeskartellamt recognised this problem and noted that "consumers' willingness to pay for sustainability standards as stated in surveys tends to be greater than their actual buying behaviour suggests".²²

Furthermore, the methodology used in consumer surveys may affect the outcomes. BEUC's June 2020 sustainable food report, including a survey carried out in 11 countries,²³ found that only one in five consumers said they were willing to spend more money on sustainable food.²⁴ A Eurobarometer poll from September 2020 found a significantly higher number (66%).²⁵ A further poll the same year found that 8 in 10 consumers agree with the statement that food prices should reflect costs for society (i.e. including environmental, and health impacts associated with food consumption).²⁶ A 2019 Eurobarometer poll found that only 19% of those questioned said they have actually changed their diets to incorporate more sustainable food.²⁷ The European Commission's Consumer Conditions Scoreboard 2019 found that more than half of EU consumers (56.8%) reported that at least some of their purchasing decisions are influenced by environmental claims.²⁸

These widely differing results suggest that surveys put forward by parties to cooperation agreements should be carefully reviewed and cannot necessarily always be taken at face value. It may be necessary to evidence willingness to pay in different ways including surveys by genuinely independent bodies or conducting/reviewing several surveys in order to get to an approximation of the real intentions of consumers. Another alternative would be behavioural experiments rather than questionnaires.

²¹ For an example of differences in expected and actual consumer behaviour in other fields (privacy) see: Agustin Reyna, "The psychology of privacy: what can behavioural economics contribute to competition in digital markets?", available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3292964.

²² Bundeskartellamt, Offene Märkte und nachhaltiges Wirtschaften – Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis, October 2020, p. 25, https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.pdf;jsessionid=9162F83FE9DEE20B6BF6F975C3A8AC00.1_cid371?_blob=publicationFile&v=2.

²³ Austria, Belgium, Germany, Greece, Italy, Lithuania, the Netherlands, Portugal, Slovakia, Slovenia, and Spain. The results were analysed by our Belgian member Test-Achats.

²⁴ BEUC, One Bite at a Time: Consumers and the Transition to Sustainable Food (Brussels, June 2020), p. 12, https://www.beuc.eu/publications/beuc-x-2020-042_consumers_and_the_transition_to_sustainable_food.pdf

²⁵ 66% of people said that they were prepared to pay 10% more for agricultural products that are produced in a way that limits their carbon footprint. European Commission, Special Eurobarometer 504: Europeans, Agriculture and the CAP – Summary (October 2020), p. 7, <https://europa.eu/eurobarometer/surveys/detail/2229>.

²⁶ European Commission, Special Eurobarometer 505: Making our food fit for the future – Citizens' expectations – Summary (December 2020), p. 9, <https://europa.eu/eurobarometer/surveys/detail/2241>.

²⁷ European Commission, Special Eurobarometer 501: Attitudes of European citizens towards the environment – Summary (March 2020), p. 19, <https://europa.eu/eurobarometer/surveys/detail/2257>. The Gilets Jaunes movement also illustrates the dangers of presuming consumers' willingness to pay more for improvements to sustainability.

²⁸ European Commission, Consumer Conditions Scoreboard 2019 edition – Factsheet, November 2020, https://ec.europa.eu/info/sites/info/files/consumer-conditions-scoreboard-2019-factsheet_en.pdf.

Collective benefits are defined as societal benefits that occur irrespective of the consumer's individual appreciation of the product. These benefits can objectively accrue to the consumers in the relevant market if the latter are part of the larger group of beneficiaries.

Where consumers in the relevant market substantially overlap with, or are part of, the beneficiaries outside the relevant market, paragraph 603 HG states that the collective benefits to the consumers in the relevant market occurring outside that market, can be taken into account if they are significant enough to compensate consumers in the relevant market for the harm suffered.

In these circumstances the HG set out a four-part "fair share" test for collective benefits to be taken into account. This does not include willingness to pay but does include a quantification step in relation to the part of the benefits accruing to the consumers in the relevant market (paragraph 606(d)).

Specifically, in relation to recognised globally tangible environmental benefits which can be considered a common good and thus a benefit to all consumers, such an approach could correct market failures and factor in negative externalities which would be fairer for users and non-users of the affected products. Non-users otherwise necessarily bear the cost of such negative externalities.²⁹ The same reasoning should apply for future environmental benefits.³⁰ In these circumstances, "fair share" could be considered to require consumers in the relevant market to receive a material share of the benefits, though not necessarily full compensation.³¹ Thus, full compensation would not be essential under the quantification calculation in paragraph 606(d).

The same common good/negative externalities analysis would not automatically be true for other types of sustainability agreements with economic/social sustainability goals such as labour or purely local environmental effects.³² These should therefore only be considered under the methodology adopted for individual non-use value benefits. The requirements of Article 101 TFEU do not lend themselves well to non-environmental sustainability goals. These would be better served through regulation.³³

Almost all the examples given in the sustainability chapter of the HG relate to the environment (except Example 3 in paragraph 619 on fat content in food and other food qualities in paragraph 591).

²⁹ This would be out of line with the "polluter pays" principle (Article 191 TFEU).

³⁰ Future benefits are not explicitly mentioned under collective benefits, only for individual non-use value benefits but are implied in the cross-reference in paragraph 592.

³¹ See in this regard ACM draft Guidelines on Sustainability Agreements; Opportunities within competition law, <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>.

However, where consumers in the relevant market do not receive full compensation, they must at least receive a **material** share of the benefits under this analysis, not merely an "appreciable objective advantage" as suggested by the ACM in its Legal Memo, 27 September 2021, 'What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?' The low level of an "appreciable advantage" would not be commensurate with a "fair share". The case law cited in relation to an "appreciable objective advantage" refers to the first condition of Article 101(3) – i.e. advantages flowing from the restrictive measure must compensate for the disadvantages, rather than the notion of "fair share" of the benefits under the third condition of Article 101(3).

³² It is noted that a more expansive approach to "fair share" is only contemplated in relation to environmental benefits under the revised Austrian competition law as well as the UK CMA guidance (see footnote 6 above) and under the Netherlands ACM draft guidance, <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>.

³³ See section 3.1.2 above.

The Commission could however provide further guidance on which out of market benefits could be taken into account and, whilst recognising the difficulties of quantification (paragraph 608), how these should be calculated.³⁴

Fourth condition: No elimination of competition

In relation to the fourth condition for the application of Article 101(3), first of all, this condition must be interpreted strictly for the legality of sustainability agreements. If there is no elimination of competition, and importantly no elimination of price competition, such that consumers retain a sufficient choice of alternatives, any agreement that improves products in any of the three ways identified in the preceding section should amount to a consumer benefit. The market will then decide which products will be bought by consumers. In such circumstance one could argue that the distinctions drawn above between different types of consumer benefit are not in fact necessary.

Paragraph 611 HG states that the no elimination of competition requirement “may be satisfied even if the agreement restricting competition covers the entire industry, as long as the parties to the agreement continue to compete vigorously on at least one important aspect of competition”. This statement does not appear to require the “one important aspect” to be price (though in the examples that follow, price competition remains unaffected).

We would strongly suggest that this statement be clarified to the effect that the elimination of price competition can, if ever, only be considered to be compatible with Article 101 in highly exceptional circumstances.³⁵ For consumers, in particular the lowest income consumers, for whom the cheapest product is probably their only possible choice, the elimination of price competition in respect of a substantial part of the products in question could not be outweighed by continued competition in quality parameters alone.

It should not be possible to override the no elimination of price competition requirement through a willingness to pay test based on a representative fraction of consumers in the relevant market as that would harm the least affluent consumers. Willingness to pay will find an average for the market, not a maximum that the lowest income consumers can afford.³⁶

If it is necessary to eliminate price competition for sustainability efficiencies to arise, this would be better done through public intervention (regulation) not private agreements between self-interested companies. On the other hand, as long as the least well off in European society still have access to products at a range of price points, agreements to promote more sustainable options which other consumers can choose would certainly be desirable.³⁷

3.5 Examples

It would be useful for the Commission to provide further examples and to classify them in terms of the three groups of consumer benefits, if these categories are retained, in order to avoid the current ambiguities in the examples. It is recognised however that this also depends on industry providing “real life” examples to the Commission. Further examples

³⁴ See also ACM Response, p.8-9.

³⁵ See also Notice Guidelines on the application of Article 81(3) of the Treaty, para 110, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(07\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(07)&from=EN).

³⁶ See Climate action as an opportunity for all – How the green transition should and can benefit consumers’ daily lives, https://www.beuc.eu/publications/beuc-x-2021-098_how_the_green_transition_should_and_can_benefit_consumer_daily_lives.pdf, in relation to the needs of lower income groups, page 2-3.

³⁷ BEUC’s Green Deal Response, page 7.

on the fourth condition, no elimination of competition, could also be included to reflect the points made above.

4. Conclusions

Subject to the points set out above being taken into account, the Commission's revised draft HG on sustainability agreements is to be welcomed. We would also encourage the Commission to give guidance in individual cases and to publish this in order to provide further concrete examples of its position.³⁸

It has been suggested that the HG may need to go further.³⁹ Here we would, however, counsel caution not to embark on a slippery slope which could ultimately undermine the essence and purpose of competition law.

In laying out principles for a potentially "softer" approach to the EU competition law principles in relation to sustainability agreements under Article 101 TFEU, care must be taken not to open the door to other "special pleading". It is noted that the EU/ECN have adopted special policy statements in relation to Article 101 to deal with the Covid 19⁴⁰ and now the Ukraine crisis⁴¹. Whilst this, on the one hand, shows laudable flexibility to deal with particular circumstances, on the other, we do not know what long-term consequences a potentially more permissive approach to agreements between competitors will have. This should not become the immediate reflex to every crisis. In doing the right thing, competition law must recognise its limits.⁴² It must not succumb to Maslow's well-worn maxim that "If all you have is a hammer, everything looks like a nail".

³⁸ Similarly to the Bundeskartellamt in a number of sustainability cases, see https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html?nn=3591568;
https://www.bundeskartellamt.de/DE/Missbrauchsaufsicht/missbrauchsaufsicht_node.html.

³⁹ See, for example, section 3.3 above.

⁴⁰ Antitrust rules and coronavirus: How the Commission has responded to the Coronavirus outbreak in the context of Antitrust Rules, at: https://ec.europa.eu/competition-policy/antitrust/coronavirus_en.

⁴¹ Antitrust: Joint statement by the European Competition Network (ECN) on the application of competition law in the context of the war in Ukraine, at: https://ec.europa.eu/competition-policy/system/files/2022-03/202203_joint-statement_ecn_ukraine-war.pdf.

⁴² BEUC fully agrees with EVP Vestager's view that: "Competition policy has to do its bit, of course. But it cannot replace the essential role of regulation. And in any case, as competition enforcers, we also have our own task to carry out – to protect consumers, by defending competition. It's a task that's been given to us by the Treaties – and one that's essential to keep our economy working fairly for everyone, in the green future." Renew Webinar, 22 September 2020, at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en.



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