CDC | CARTEL DAMAGE CLAIMS

Subject: **Contribution to the public consultation of the draft revised Horizontal Cooperation Guidelines of the European Commission**

Date: **26 April 2022**

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[1] On 1 March 2022, the European Commission published its draft of a "newer version" of the horizontal cooperation agreement guidelines and invited interested parties to comment.[1] The draft Guidelines[2] contain some completely new chapters, including Section 9 on sustainability agreements. This submission sets out the opinion of CDC Cartel Damage Claims on that chapter.

[2] We find it important to comment because we fear that a lenient regulation of sustainability agreements jeopardizes the effectiveness of private (and public) enforcement related to infringements of EU competition law.

[3] In our view, the European Commission does not emphasize sufficiently that sustainability agreements are inherently information exchanges of strategic private business data. As information exchanges are a rather prevalent form of (*per se*) competition law infringements when they are related to prices or other important factors of competition, following a more relaxed approach towards sustainability-related information exchange may generate more risks than benefits.

[4] Also, there are intrinsic difficulties with measuring sustainability: there is a high risk that an analysis of in-market and out-of-market benefits may be based on a subjective interpretation of complex data that are vaguely related to the issues they are supposed to measure. Using sustainability as a defence in the scope of competition law infringements may open Pandora's box and make competition law enforcement less effective.

[5] Therefore, in our view, sustainability agreements should only be exempted from the application of Article 101 TFEU in very exceptional circumstances. In general, the following conditions should be met at least: (i) the agreement is objectively justified with the highest possible level of certainty, (ii) the harms and benefits are quantitatively verified, (iii) all details of the agreements are publicly available (for example, in a public register), and (iv) constant monitoring of the implementation is fully ensured by the authorities.

[1] https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1371

[2] Annex to the Communication from the Commission, Approval of the content of a draft for a Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Brussels, 1.3.2022, C(2022) 1159 final ("draft Guidelines"), available at https://bit.ly/3v9535N.

1. Introduction

[6] In Section 9 of the draft, the Commission provides guidelines addressing whether Article 101 TFEU is applicable to certain sustainability agreements or whether these agreements may be exempted by applying Article 101(3) TFEU. Exempting (certain) sustainability agreements from the application of competition law is a highly debated topic,[3] with no general agreement in the (academic) circles of competition lawyers and economists as to whether exempting such agreements is beneficial.[4] Sustainability agreements are covered by the Guidelines because one of the key messages of the DG Competition is that competition policy should support the objects of the European Green Deal.[5]

[7] To make things clear from the outset, the draft Guidelines do not support the idea that *all* sustainability agreements are good and should be exempted from the application of Article 101 TFEU. In particular, it is clear from the text that the Commission:

- prefers for sustainability issues to be primarily dealt with by regulation; competition policy would be applied only if the regulation was not feasible or did not exist; and
- requires sustainability-related benefits of the agreements to outweigh the harm caused to competition by the same agreements.

[8] These are important features that CDC supports. However, some features of sustainability agreements concerning economic assessment and monitoring cast some doubts on the effective implementation of the Guidelines. Section 2 briefly summarizes the key aspects of the Guidelines related to exempting sustainability agreements from Article 101 TFEU, in which we also highlight some issues with the current text of the draft Guidelines. Based on existing economic literature, Section 3 discusses our caveats that the guidelines are over-optimistic about the sustainability incentives of profit-seeking companies. Finally, in Section 4 we provide some suggestions that may address our remarks.

2. Exempting sustainability agreements from Article 101 TFEU – objective enough?

[9] Section 9.4 of the draft Guidelines assesses the conditions necessary for sustainability-related agreements to escape the application of Article 101 TFEU. The framework is in line with that

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[3] The publisher Concurrences dedicated an entire book to sustainability and competition law: Holmes, Simon; Middelschute, Dirk; Snoep, Martijn (eds.) (2021), *Competition Law, Climate Change & Environmental Sustainability*, Concurrences, Institute of Competition Law, First printing, March 2021. Sustainability and competition law were the topic of the OECD Competition Open Day 2021 on 24 February 2021 (https://www.oecd.org/daf/competition/oecd-competition-open-day-2021.htm). On 4 February 2021, the DG Competition also organized a conference to debate how competition rules can help achieve sustainability policies (https://ec.europa.eu/competition-policy/policy/green-gazette/conference-2021_en). To date, numerous other conferences and seminars have been organized around the topic.

[4] See, *e.g.,* Dolmans, Maurits (2022), *Sustainable Competition Policy*, Competition Law and Policy Debate CLPD, Vol 5, Issue 4 and Vol 6 issue 1 March 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608023, last accessed 20 April 2022; Holmes, Simon (2020), *Climate change, sustainability, and competition law*, Journal of Antitrust Enforcement, 2020, 8, 354-405, https://academic.oup.com/antitrust/article/8/2/354/5819564, last accessed 20 April 2022; van Dijk, Theon (2021), *A New Approach to Assess Certain Sustainability Agreements under Competition Law*, in: Competition Law, Climate Change & Environmental Sustainability (eds. Holmes, Simon, Middelschute, Dirk, Snoep, Martijn), pp. 55-68; but especially, Schinkel-Treuren (2021) – *infra note* 13.

[5] https://ec.europa.eu/competition-policy/policy/green-gazette/competition-policy_en

of Article 101(3) applied to other forms of agreements and organized under four headings: efficiency gains, indispensability, passing on to consumers, and no elimination of competition.

[10] Efficiency gains: the conditions set out in the Guidelines to meet the conditions organized around efficiency gains are fairly standard. A sustainability agreement needs to increase efficiencies in the market, including reductions in production and distribution costs. It may also be expected to increase product variety and quality and to contribute to improving the production or distribution processes.

[11] Indispensability: the indispensability condition in the Guidelines require that the agreements are necessary to achieve the claimed sustainability objectives. In other words, there should be no other "first-best" solutions available (for example, governmental regulation) or it should be demonstrated that such solutions are inadequate. Furthermore, even if alternative solutions were available, it must be shown that the agreement is the most cost-efficient for achieving sustainability objectives (for example, the sustainability agreement is the only way to reach the necessary economies of scale in production). However, the second part of the indispensability section in the Guidelines[6] introduces some ideas that relax the strictness of proving indispensability.

[12] First, the Commission discusses the potential that certain agreements may help solve the "first mover disadvantage" that may occur in cases when, in the absence of the agreement, sustainability investments are so costly that no individual company would carry out the necessary investments. As we discuss later, the economic literature suggests that "first mover disadvantage" is not typical in the context of sustainability investments and, even if it were present, agreements are not the optimal solution.

[13] Second, the Commission considers that agreements may be beneficial for situations in which consumers are unable to make the right consumption decisions, destroying their own (future) consumer surplus. This can happen due to, for example, a lack of information or simply "consumer stupidity" as they do not see the benefits of purchasing a more sustainable, but perhaps more expensive, product. We think that this can lead to subjective assessments of indispensability.

[14] Passing on to consumers: the condition that sustainability benefits should be passed on to consumers generated the most heated debates in the competition sphere. In particular, the question arises whether the exact same (group of) consumers that should be compensated are also harmed by the agreement (by higher prices, for example) or if compensation of consumers external to the relevant market is sufficient. In addition to issues of measurability, questions about the principles of consumer welfare are debated.

[15] The Commission seems to put an end to this debate by requiring that the overall effect on consumers ***in the relevant market*** is at least neutral.[7] However, "collective benefits" will also be considered by the Commission[8] by allowing for the welfare of consumers outside of the relevant market to be considered as well. Even so, companies should demonstrate that the

[6] Draft Guidelines, from para. 584-587.
[7] Draft Guidelines, para. 588.
[8] Draft Guidelines, Section 9.4.3.3.

consumers in the relevant market *substantially overlap* with the beneficiaries *or are part* of them.[9]

[16] We find that the wording of the draft Guidelines (*e.g.,* "substantial overlap" and "are part of them") could result in some subjective interpretation of the passing-on condition, even if the full compensation of consumers seems ensured. It is also noteworthy that there does not seem to be an overall obligation to assess sustainability benefits quantitatively,[10] which we do not find ideal.

[17] No further elimination of competition: finally, the draft Guidelines require that a sustainability agreement does not allow the elimination of competition beyond what is necessary (some degree of residual competition should remain). Unlike in the section on production agreements, where the definition of residual competition is left open,[11] in the case of sustainability agreements, the Commission specifies the level of the required residual competition. In particular, companies involved in the agreement should continue competing on ***at least one*** important aspect of competition: price, quality, variety, or innovation (this latter, we understand, refers to innovation not covered by the sustainability agreement).[12] As we explain below, we do not find it rational to offer such a soft condition.

[18] In the next section we examine the questions that sustainability agreements may raise in light of the existing economic literature.

3. Economic literature – competition is more beneficial

[19] This section highlights the issues identified concerning the interpretation of the current draft of the Guidelines on sustainability agreements based on the current standing of the economic literature dealing with the topic. Although we support the general objectives of the Commission, this literature casts some doubt on the positive attitude towards the effectiveness of such agreements. This section demonstrates the key issues identified by Schinkel-Treuren (2021),[13] Schinkel-Spiegel (2017),[14] and Schinkel *et al.* (2022).[15]

[20] The general message of the reviewed literature is that allowing agreements to reach sustainability objectives is generally not a good idea. In particular, as long as (i) there is a group of consumers who care about sustainability and (ii) firms in the market that follow a profit-maximizing objective, sustainability is more attainable under competition.[16] As both

[9] Draft Guidelines, para. 606.
[10] Draft Guidelines, para. 608.
[11] Draft Guidelines, Section 3.5.4.
[12] Draft Guidelines, para. 611.
[13] Schinkel, Maarten Pieter; Treuren, Leonard (2021), *Green Antitrust: (More) Friendly Fire in the Fight against Climate Change*, Amsterdam Law School Legal Studies Research Paper No. 2020-72, Amsterdam Center for Law & Economics Working Paper No. 2020-07, November 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3749147, last accessed 8 April 2022.
[14] Schinkel, Maarten Pieter; Spiegel, Yossi (2017), *Can collusion promote sustainable consumption and production?*, International Journal of Industrial Organization 53 (2017), pp 371-398.
[15] Schinkel, Maarten Pieter; Spiegel, Yossi; Treuren, Leonard (2022), *Production Agreements, Sustainability Investments, and Consumer Welfare*, Amsterdam Law School Legal Studies Research Paper No. 2022-03, Amsterdam Center for Law & Economics Working Paper No. 2022-01, March 6, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4026220, last accessed 11 April 2022.
[16] Interestingly, sustainability is also more attainable under production-related agreements (cartels) if firms still compete in sustainability-related investments. Consumer surplus may also be increased in certain circumstances – but not always (as in the case of competition).

conditions are rather weak (they are in line with how we expect markets to work), the ideas below should merit more attention.

[21] The following issues may reduce the effectiveness of the otherwise sympathetic goals of the Commission to enhance sustainable solutions by competition enforcement:

- There is a substantial risk of "greenwashing". Greenwashing happens if companies' activities appear more sustainable than they really are. Under greenwashing, companies invest the minimum necessary efforts into sustainability and may also sell their non-sustainable or not sufficiently sustainable products to conscious consumers with a high willingness to pay for a higher price. Absent sufficient assessment and monitoring of the effects of the sustainability agreement, greenwashing is a realistic threat. Furthermore, Schinkel-Treuren (2021) highlight that the consideration of collective benefits[17] may also lead to greenwashing because consumers external to the relevant market are not negatively affected by the agreement. Hence, a marginal "green compensation" may sufficiently increase their welfare so that there are less ambitious demands for green development. The Guidelines, however, seem to address this issue by requiring full compensation.

- Economic models show[18] that there is an issue with full compensation too: requiring full compensation of consumers typically leaves firms with a financial loss due to a high level of deadweight loss. Hence, consumers may enjoy the benefits of requiring full compensation, but firms invest in less green compensation than under competition.

- On the question of "first mover disadvantage", the same literature highlights that, if sustainability agreements are related to investment in existing cleaner technology rather than "proper" innovation, sustainability benefits have little to no spill-over from one company to the other. Consequently, the risk that companies are in the situation of "first mover disadvantage" is overestimated. Even if such disadvantages may exist, other solutions (regulation or joint ventures) are preferable.

- Interestingly, even if we assume that certain company managers have an intrinsic motivation to invest sustainably, agreements and coordination in sustainability efforts reduce motivation to do so. Hence, allowing sustainability agreements is, after all, not beneficial.

- Finally, sustainability agreements may pave the way for coordination on other factors of competition (prices, quality, innovation). Although Article 101(3) TFEU is not applicable if firms eliminate residual competition, monitoring firms' actions places an enormous burden on the authorities to supervise the market.

[22] Agreeing with the reviewed economic literature, we think that the Commission should be careful with exempting sustainability agreements from the application of Article 101 TFEU. The same outcome can be achieved more quickly and more efficiently by "requiring" firms to compete rather than cooperate in sustainability-related investments.

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[17] Draft Guidelines, Section 9.4.3.3.

[18] Schinkel-Spiegel (2017); Schinkel *et al.* (2022).

4. Suggested changes to the draft Guidelines

[23] In this section we provide some suggestions to address the issues identified previously.

[24] The enforcement of competition law does not happen in a static environment; this is particularly true for sustainability agreements. Sustainability agreements require constant monitoring, and we suggest that exempted cooperation agreements be regularly revised by the authorities. In particular, the option should be left open to modify or withdraw a decision if circumstances in the market change. For example, if cooperation in the market is no longer the most preferred path for achieving sustainability objectives, the exemption should be removed.

[25] While monitoring should be a key objective of the authorities, ensuring a high level of transparency can also ensure that companies do not use sustainability agreements to unlawfully restrict competition (*e.g.,* by greenwashing). Informing consumers about sustainability objectives is a key priority of the draft guidelines (after all, such agreements are meant to guide/help consumer choices to make decisions that are more in line with sustainable consumption[19]). Transparency and clarity during the process of the competition authorities are even more important than in other cases related to (anti-competitive) agreements. We suggest the introduction of a public register in which relevant agreements are published. This ensures effective monitoring and the possibility that affected stakeholders can raise potential concerns to the competition authorities.

[26] In general, sustainability agreements should not rely on business information that cannot be shared with the public. Therefore, confidentiality should not be a reason to redact certain parts of the authorities' decision or the case file. We suggest that the Commission complement the introduction text of Section 9 with a general explanation that evidence submitted by the firms involved and other documents of the competitive assessment will be promptly and publicly available.

[27] This would also allow for all stakeholders to express their opinion regarding the (proposed) sustainability agreement in a timely manner. We find this particularly important because there is an informational disadvantage on the side of the authority when deciding on the exemption of these agreements. It is therefore crucial that the authorities do not rely solely on the submissions of the parties taking part in the agreement, but that the opinions of third parties are also considered.

[28] To avoid subjective interpretation of the rules, authorities should always require a quantitative assessment in the case of sustainability agreements. In the absence of quantifiable benefits (and disadvantages), a sustainability agreement should not be allowed to be exempt from Article 101 TFEU. Therefore, we suggest that the Commission change, at least, paragraph 608 of the draft Guidelines which – as is currently written – allows firms to not provide a quantitative analysis of collective benefits.

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[19] See, *e.g.,* draft Guidelines para. 586.

[29] Furthermore, we think that the condition of maintaining residual competition (paragraph 611) is too lax. Companies should not be allowed to escape the application of Article 101 TFEU by simply demonstrating that they maintain competition on, for example, quality but not on prices or innovation. We do not see why maintaining competition on only one dimension is sufficient in sustainability cases, whereas the same is not explicitly discussed in the context of production agreements.[20] We suggest changing the text of the draft Guidelines accordingly.

[30] Finally, we suggest that the Commission always assess the (proposed) sustainability agreements under alternative solutions, such as governmental regulations or joint ventures, and the agreements should only be accepted if those other options are clearly not viable.

5. Final remarks

[31] We welcome the Commission's willingness to address sustainability issues by providing guidelines to companies on the application of competition law to sustainability agreements. However, authorities should be rigorous in assessing agreements based on sustainability motives, and they should only exempt these agreements from Article 101 TFEU if it is clearly beneficial to society and consumers. Furthermore, companies should quantitatively verify sustainability gains that outweigh the negative effects of restricting competition in all cases, and firms should be required to provide a clear and simple plan about how the authority will be able to easily assess the agreement and monitor compliance. Transparency of the process is even more important than in other forms of agreements.

[32] As a final note, it is worth taking a more holistic view to highlight that exempting certain sustainability agreements should not be interpreted too broadly. Authorities' and courts' acceptance of "sustainability defence" in (hard-core) cartel, abuse of dominance, or other forms of non-sustainability-related infringements of competition law must be avoided. Anti-competitive effects or the amount of the overcharge should not be allowed to be reduced because infringers claim (ex-post) that the anti-competitive agreement or conduct also brought about sustainability-related benefits.[21] It would not only jeopardize the principles of cartel enforcement and undermine deterrence, but also lead to an endless debate about how to account for and estimate those benefits. Private (and public) enforcement of damages could become utterly ineffective.

[20] The draft Guidelines discuss the different dimensions of competition in para. 36 in the context of restrictive effects, highlighting that at least one of the parameters (price, output, quality, variety, innovation) is enough to be adversely affected to identify restrictive effects on competition. In essence, in para. 36, the Commission expresses that *restricting* competition on only one dimension may be enough to have anti-competitive effects, whereas in the context of sustainability agreements *maintaining* competition on one of the dimensions seems sufficient.

[21] Retroactive application of the guidelines should not be allowed (ex-post sustainability-related arguments introduced in ongoing infringement and damages cases should be dismissed).