

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

### **Response from Natuur & Milieu (Netherlands)**

26 April 2022

#### **Introduction**

Natuur & Milieu welcomes the Commission's draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines as well as the public consultation on these standards. Natuur & Milieu wishes to use this opportunity to react.

Natuur & Milieu welcomes the Commission's attention to sustainability. Joint private efforts are, next to public interventions, important to achieve the Green Deal goals. Natuur & Milieu is an environmental NGO that regularly works with commercial actors to come to joint sustainability agreements. We observe that the perceived risk of an (unintentional) infringement of competition law, is one of the main concerns of commercial parties that wish to engage in sectoral sustainability initiatives.<sup>1</sup> Clear guidelines in this field can help market actors who wish to contribute to sustainability goals. Natuur & Milieu therefore also welcomes the soft safe harbour for sustainability standardization that is proposed by the Commission.

However, Natuur & Milieu is concerned that on other points the proposals may still pose unwanted restrictions to sustainability agreements. In fact, the Commission guidelines are stricter than the more liberal, and by market actors much welcomed, approach by the Netherlands Authority for Consumers & Markets (ACM).<sup>2</sup> Competition law should not constitute a barrier to (timely) achieving the pressing sustainability goals that our modern society is faced with. Therefore Natuur & Milieu wishes to propose some changes to the Guidelines that will help private actors to invest in joint sustainability initiatives as a way to achieve the European Green Deal goals.

#### **Agreements that enforce national or international standards**

Horizontal agreements that merely enforce national or international standards, should fall outside the scope of competition law. One may think of an agreement between supermarkets to ban products that are linked to illegal deforestation of sprayed with (in the EU) illegal pesticides. Such an agreement should not fall under the scope of Article 101 TFEU. In fact agreements that enforce common legal standards, actually lead to a level playing field and therefore contribute to the well-functioning of the internal market. Natuur & Milieu feels the Guidelines could benefit from clarifying that such agreements fall outside the scope of Article 101 TFEU.

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<sup>1</sup> This is partially because some sustainability agreements have indeed been deemed an infringement of competition law by the Dutch Competition Authority. See: <https://www.acm.nl/nl/publicaties/publicatie/13760/Afspraken-Kip-van-Morgen-beperken-concurrentie>

<sup>2</sup> As set out in the ACM's Guidelines 'Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law' and the ACM's note on the fair-share criterion (<https://www.acm.nl/sites/default/files/documents/acm-fairshare-for-consumers-in-a-sustainability-context.pdf>).

Natuur & Milieu is surprised that the Commission seems to adopt the opposite view. In par. 583 it states that ‘where EU or national law requires undertakings to comply with concrete sustainability goals, cooperation agreements and the restrictions they may entail, cannot be deemed indispensable for the goal to be achieved’. Considering the great challenge of reducing greenhouse gasses, Natuur & Milieu is particularly concerned about the explicit reference to the example of the ETS-cap. The ETS is imposed on sectors with a view on reducing greenhouse gas emissions. The Commission seems to imply that this system would preclude actors to jointly strive for greenhouse gas emissions in other ways.

Natuur & Milieu objects to such an approach. Environmental rules and standards are not always effective in achieving environmental goals. This is the natural result of political compromising which may lead to suboptimal legal standards. For example, for many years the ETS was rather ineffective due to a very low pricing of the ETS-rights. In addition, scientific insights and evidence into solutions for environmental problems are subject to constant change and development, meaning that environmental legal standards can get outdated quickly. Also in that situation market actors need to be able to invest in additional joint initiatives to achieve sustainability goals. This reality is also reflected in Article 93 TFEU which clarifies that EU environmental standards are only meant to establish a minimum standard: Member States may still adopt stricter standards. By the same token, the existence of such EU standards should not prevent market actors from adopting more ambitious sustainability standards.

Natuur & Milieu would like to ask the Commission to clarify that competition law does not pose a barrier to horizontal agreements that aim to enforce legal environmental standards or that help achieve the same environmental goals.

## **Collective benefits**

Natuur & Milieu welcomes that the Commission recognizes that sustainability agreements can have collective benefits. Indeed, while a consumer may be mostly driven by price-considerations, the costs are often born by society. As long as prices do not reflect these costs, the market will not function optimally. It is positive that the Commission pays particular attention to this problem. However, to fully tackle this issue, Natuur & Milieu feels that the definition of what constitutes benefits for the consumer within the meaning of Article 101(3) TFEU should be broader still.

Natuur & Milieu is particularly concerned about the requirement that the consumer is part of the group that enjoys the collective benefit. First of all, this may exclude the weighting of future benefits. Since future generations often bear the burden of our current consumption patterns, it is important to clarify that the benefits for the consumer’s (grand)children will be accounted as benefits for the consumer himself.

Secondly, many of the environmental problems that we face nowadays are global. For example, deforestation in the Amazon, leads to increased global warming affecting citizens and consumers all over the world. Similarly European greenhouse emissions affect the climate in non-EU countries. This requires a broad view on what constitutes collective benefits which recognizes that the European consumer is part of the global collective.

Thirdly, Natuur & Milieu would like to warn against an approach that would practically prohibit horizontal agreements that strive to protect wildlife and biodiversity on its own merits. For example, a heavy emphasis on benefits for consumers could be a serious barrier to agreements that wish to protect insects from pollution. It will be difficult to establish what are the benefits for humans of such agreements, in particular if a quantitative analyses

of the benefits is required. To prevent discussion on this point, Natuur & Milieu would therefore like to propose that it is clarified that biodiversity benefits qualify as collective benefits that are enjoyed by all consumers.

Lastly, some benefits only take place outside the group to which the consumer belongs. One may think of agreements that intend to prevent child labour or the pollution of land in Africa. Looking at the Commission's proposal for a Directive on corporate sustainability due diligence and the obligations of companies to ensure compliance with human rights and environmental protection, competition law should not constitute a barrier to such agreements either.

## Concluding remarks

Natuur & Milieu welcomes the Commission's attention to sustainability in its Horizontal Guidelines. It applauds the Commission's ambition to Green EU competition policy.<sup>3</sup> The major environmental challenges we face require extensive public efforts and efforts from private actors. For allowing the greening of the market, the clarifications offered by the proposed Guidelines are important steps. However, Natuur & Milieu feels that the current guidelines can still lead to unwanted restrictions to sustainability initiatives.

In particular, Natuur & Milieu recommends clarifying that:

- 1) The private enforcements of legal standards does not infringe competition law;
- 2) Private parties may set private standards in addition to existing legal standards in order to achieve nationally and internationally recognized sustainability goals;
- 3) The concept of 'benefits for the consumer' is interpreted broadly, as to include the prevention from environmental damages born by other countries or future generations, as well as damages to wildlife and biodiversity.

We hope that our submission to the consultation will help to remove existing burdens to private sustainability initiatives and we look forward seeing the final result.

Yours sincerely,

Rob van Tilburg



Program director

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<sup>3</sup> [https://ec.europa.eu/competition-policy/policy/green-gazette/competition-policy\\_en](https://ec.europa.eu/competition-policy/policy/green-gazette/competition-policy_en)