Comments on the draft revised rules on horizontal agreements

Prepared in response to the public consultation by the European Commission

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1 Introduction

Oxera welcomes the opportunity provided by the European Commission ('the Commission') to comment on the draft revised Horizontal Block Exemption Regulations ('HBER') and the draft revised Horizontal Guidelines ('Draft Horizontal Guidelines'). Below, we set out our comments on the Draft Horizontal Guidelines from an economics perspective.

We comment on four areas: (i) purchasing agreements (section 2); (ii) information exchange (section 3); (iii) standardisation agreements (section 4); and (iv) sustainability agreements (section 5).

In providing our view, we have sought to keep in mind the need to strike an adequate balance between legal certainty (through a rule-based approach) and a flexible, case-by-case approach based on appropriate economic analysis and evidence.

2 Purchasing agreements

We welcome the overall approach suggested by the Commission whereby the assessment of whether a joint purchasing agreement ('JPA') between firms qualifies as a buyer cartel—and, more generally, whether the JPA is likely to have anti-competitive effects—needs to be conducted on a case-by-case basis, taking account of each case's specific economic and legal context.[1]

Below, we set out some specific comments and suggestions for the Commission to consider for the final version of the Draft Horizontal Guidelines.

2.1 The effects of JPAs and rules around implementation

Broadly speaking, we agree with the Commission that the effects of a JPA must be assessed in the specific context of the case, and that the effects

[1] European Commission (2022), 'Draft Horizontal Guidelines', paras 319 and 323.

analysis should cover both the purchasing market (where the joint purchasing group negotiates with the seller(s)) and the selling market (where the members of the group compete).

In this context, the Commission notes that ‘in general, [a JPA is] less likely [to raise competition concerns when members] do not have market power in the selling markets’, and that a JPA ‘could have beneficial effects’ if there are restrictions on members regarding alternative competing arrangements.[2]

We note that there are instances in the context of licensing negotiation groups (‘LNGs’) where, even if members of the LNG do not have market power in the selling market, the existence of the LNG could increase their bargaining power to an extent that leads to harmful effects on competition. This could be pointed out by the Commission.[3]

2.2 The relevance of market definition

We agree with the general approach set out in the Draft Horizontal Guidelines to assess the effects of the JPA on two markets: (i) the relevant purchasing market; and (ii) the selling market(s), both of which need to be defined.

Regarding (i), the Draft Guidelines state that the suppliers’ alternatives are decisive in identifying the competitive constraints on purchasers, and that these alternatives could be analysed, for example, by examining the suppliers’ reaction to a small but non-transitory price decrease (the ‘SSNDP test’).[4]

We agree that the SSNDP test is a useful tool to define the relevant purchasing market. We consider that it is critical to implement the test using party-specific (and not only market-specific) evidence to avoid overstating the possibility of supplier switching away from the JPA. This is because there may be a host of party-specific factors that hold suppliers back from switching away (from the focal product or the JPA). For example, one supplier may not want to compromise its relationship with the JPA for some specific reason that does not apply to another supplier.

2.3 Assessment of relative bargaining power

In our view, an assessment guided by the key principles of bargaining theory better addresses the nature of competition and market power—particularly in the purchasing market(s), given the context of a JPA. The notion of bargaining power can better help to assess countervailing buyer and seller power.

In this context, the inclusion of a short discussion of the key principles of the bargaining framework (with examples) would help companies to better assess their JPA.

[2] European Commission (2022), ‘Draft Horizontal Guidelines’, paras 324 and 325.
[3] In the licensing of standard-essential patents (‘SEPs’), potential licensees can, (and often do) exercise significant bargaining power through ‘hold-out’, i.e. delaying or declining to take a licence while making use of the SEPs. This is because in contrast to a monopolist of physical infrastructure, who can prevent downstream firms from using the infrastructure by withholding access, the information to use the technology covered by the relevant SEPs is freely available. This means that potential licensees have the ability to use the relevant technology without taking a licence (the ‘no-licence’ option). The use of LNGs poses the risk of *collective* hold-out by potential licensees, and this risk may be exacerbated if the LNG restricts the ability of its members to enter into competing arrangements through bilateral negotiations. Collective industry hold-out is likely to be particularly damaging to the incentives and/or operations of upstream SEP owner(s) whose primary income streams constitute royalties. For instance, it may cause SEP owners to accept below FRAND offers in an attempt to conclude negotiations quickly, thereby undervaluing the technologies in question and dampening incentives to innovate. This issue persists even where the LNG does not operate as an ‘exclusive JPA’, i.e. members of the LNG are not obliged to purchase all or most of the SEPs that they implement through the LNG.
[4] European Commission (2022), ‘Draft Horizontal Guidelines’, para. 327.

In particular, assessment of the relative bargaining power between a seller and the joint group of purchasers would require analysis of the value of the alternatives available to the negotiating parties in the case of a temporary or permanent breakdown in negotiations (i.e. 'inside' and 'outside options' respectively). We set out some of the economic principles in Box 2.1. The bargaining power of purchasers that are not involved in the JPA is also relevant to assess when the concern involves the risk of foreclosure of competing purchasers (e.g. through significantly better terms negotiated by the JPA).

Box 2.1 Aspects to consider in the context of bargaining

In a bargaining situation, what matters is the balance of bargaining power between the relevant parties. Even when the cost of a breakdown in negotiations for one party is large, its 'outside options' (i.e. options in the event of a permanent breakdown) could still confer considerable bargaining power when the cost of a breakdown of negotiations borne by the counterparty is even larger. In other words, what drives relative bargaining power is the difference between the values of the two sides' outside options.

The importance of an outside option as a determinant of bargaining power should not be assessed based on the frequency with which a permanent breakdown of negotiation has occurred in the past. In fact, standard bargaining theory does not predict that a permanent breakdown will occur in practice other than in exceptional circumstances.

To the extent that the negotiating parties are differently affected by a temporary breakdown in negotiations, their relative bargaining power will be influenced by the relative value of the 'inside options' (i.e. alternatives available in case of a temporary breakdown). This could require, for example, an analysis of the nature of contracts and expected reactions in the short run following a temporary breakdown.

The financial position of parties and the urgency with which they want to agree a contract with the counterparty also influences their relative bargaining power.

Source: Oxera.

2.4 Pass-on of efficiency gains to final consumers

As a general comment, it would be useful if the revised Horizontal Guidelines included more discussion on the evidence that companies would need to show to inform the degree of pass-on to consumers of any cost-reducing purchasing efficiencies or qualitative efficiencies in the form of the introduction of new or improved products. More references to other publications (e.g. the Commission's guidance on pass-on) would also be helpful.

This would be especially important when it comes to cases where the JPA may have an effect on suppliers' incentives to innovate and introduce new or improved products to the market; where dynamic efficiencies come into play, the assessment may need to account for a longer (and possibly more uncertain) time horizon.

We note that the Draft Horizontal Guidelines state that if the parties to a JPA are actual or potential downstream competitors, their incentives for price competition on the downstream selling market(s) may be considerably reduced when they purchase a significant part of their products together.[5] The Draft Guidelines further state that in this case if the parties to the JPA hold significant market power, they may pass on less of the reduction in purchase price.[6]

[5] European Commission (2022), 'Draft Horizontal Guidelines', para. 335.
[6] European Commission (2022), 'Draft Horizontal Guidelines', para. 347.

It should be noted that there is a link between the market share of the JPA members and the coverage of the cost change due to the JPA, and in turn the analysis of pass-on. For example, if the significant degree of market power of JPA members on the selling market corresponds with high market shares, then it is also true that the market coverage of the cost reductions due to the JPA would be high. This means the 'cost shock' is closer to industry-wide than firm-specific, and economic principles have established that industry-wide shocks are associated with higher pass-on. This suggests that cost reductions with wider coverage would be passed on to consumers to a greater extent compared to a case where the market coverage of the cost reductions is lower.

3 Information exchange

3.1 General comments

The Draft Horizontal Guidelines continue to rightly highlight a wide range of both positive and negative effects resulting from information exchange between firms.

The general framework remains largely unchanged: effects on competition must be analysed on a case-by-case basis, with the outcome of the assessment depending on a combination of case-specific factors, such as the nature of the information exchanged, the characteristics of the exchange, and the market characteristics.[7]

Nevertheless, the Draft Horizontal Guidelines state that for an information exchange to be considered a restriction by object, the information exchanged needs to be sensitive and the exchange capable of 'removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market'.[8]

In our view, this definition is not yet clear or concrete enough to be informative to firms or their advisers during self-assessment in a real market environment. Information exchange will, almost by definition, reduce uncertainty in some way. Taken as stated, a company announcing to the press that it would launch a new product the following month, a company warning its competitors that a particular component was unsafe, or the provision of information from banks for the creation of financial indices would appear to fall within the definition.

It may be that phrases such as 'sensitive', 'modifications to be adopted', and 'conduct on the market' are meant to narrow down the object category to private exchange of forward-looking information that is very likely to reduce competition. This would exclude the above examples, but this is not made clear in the Draft Horizontal Guidelines.

The Draft Guidelines emphasise that the Commission will pay particular attention to the content, its objectives, and the legal and economic context in which the information exchange takes place before determining whether a particular instance of information exchange restricts competition by object.

We welcome this confirmation, and in our view the 'by-object' category could be applied still more precisely if the Commission also considered, as part of any 'by-object' assessment, the mechanism by which a particular piece of information exchanged would be capable of reducing competition. From an

[7] European Commission (2022), 'Draft Horizontal Guidelines', paras 452 and 453.
[8] European Commission (2022), 'Draft Horizontal Guidelines', para. 448.

economics perspective, it should not be assumed that all reduction in market uncertainty implies a reduction in competition when making such an assessment.

In addition, we welcome the innovative step taken by the Commission in acknowledging the use of algorithms by firms. Nevertheless, we encourage the Commission to take a more balanced stance in relation to the effects that these tools can have on competition, as discussed below.

3.2 Information exchange in digital markets

The Draft Horizontal Guidelines refer to the use of algorithms by competitors as a tool to increase market transparency, detect price deviations in real time, and make punishment mechanisms more effective.[9]

We note that monitoring competitor behaviour in digital markets has become simple, rapid and economical, regardless of the geographical size of the relevant market or the number of players. Such monitoring allows for a quick and intelligent adaptation to market conditions. This is a rational, inevitable and legitimate behaviour for every operator.

The use of new technological tools such as pricing algorithms reduces transaction costs for firms; they increase efficiency by, for instance, repricing thousands of products in real time for consumers, ensuring optimal price discovery.[10] Algorithms may also help firms to enter (and become effective competitors in) new markets previously reserved for knowledgeable and experienced players, helping to level the playing field.

We welcome the additional guidance provided in the Draft Horizontal Guidelines regarding the different types of information exchange, including different types of data sharing. It would be useful to expand this further to discuss and acknowledge the increasing importance of technology in facilitating the availability and sharing of information, and the positive aspects that information exchange can (in principle) bring about in the digital era.

Overall, technology has the effect of making information that is already public more easily accessible. As with the assessment of any form of conduct in a competition context, the relevant question is how much extra information the conduct makes available relative to the baseline. This means that some types of information exchange that may previously have had a negative effect on competition may no longer do so where this information is already easily accessible in the public domain.

Such cases would require careful consideration of the right counterfactual for assessing the effects of the information exchange. As such, we suggest that the Commission considers and explores this aspect in the revised Horizontal Guidelines.

Overall, we recommend nuancing the Draft Horizontal Guidelines to distinguish cases where it would be possible to attribute to companies any antitrust infringement arising from the parallel use of individual algorithms from those where that is not the case. The elements identified by the Draft Horizontal Guidelines—such as the level of awareness of the suppliers or recipients of the

[9] European Commission (2022), 'Draft Horizontal Guidelines', box on para. 418.
[10] In this respect, consider online retailers that sell a multitude of different products in a fluctuating market, with changing costs and inventories. It can be difficult for a multi-product firm of that kind to identify the 'right' price for all of its products. The use of automated decision rules or optimisation algorithms can lead to significant efficiency gains. These cost savings can then be passed on, in whole or in part, to consumers through lower prices.

information regarding the exchanges, the existence of a tacit agreement, or the reasonable foreseeability of such exchange—might prove rather unclear in practice.

Furthermore, the Commission distinguishes between ‘algorithmic collusion’ and the so-called ‘collusion by code’.[11] The Commission notes that ‘collusion by code’ is typically considered a cartel, and therefore a restriction of competition by object. However, the Draft Horizontal Guidelines do not spell out what ‘collusion by code’ looks like.

As an example, imagine two competitors unilaterally adopt a reward–punishment algorithm that keeps prices high if the other competitor does likewise, and sets competitive prices if the competitor does not. It is not clear from the Draft Horizontal Guidelines if that would be enough for the practice to be considered ‘collusion by code’ and, as such, an infringement by object. We encourage the Commission to clarify the two categories by providing some examples.

4 Standardisation agreements

We agree with the notion that standardisation agreements typically produce significant positive economic effects on both the demand and supply side.[12] The Draft Horizontal Guidelines also confirm the general principle that even if the establishment of a standard can create or increase the market power of the intellectual property right (‘IPR’) holders possessing the IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power.[13] As such, we agree that the question of market power can only be assessed on a case-by-case basis and by way of undertaking an effects-based analysis.[14]

However, there continues to be uncertainty in the description that the Commission provides of the four possible markets over which standardisation agreements may produce their effects.[15] It would be useful to provide more clarity—for example, by way of offering concrete examples.

Below, we provide specific comments on the Draft Horizontal Guidelines with respect to: (i) which economic analyses can be used to assess whether the price of an intellectual property right is fair and reasonable; and (ii) the use of market shares as a tool to assess the effects of a standard development agreement.

4.1 How to assess whether the price for IPRs is fair and reasonable

We welcome the introduction in the Draft Horizontal Guidelines of more elements to guide companies in conducting the assessment of whether a proposed licensee fee is fair, reasonable and non-discriminatory (‘FRAND’).

We consider that the Commission rightly discourages the use of a price–cost test to determine whether the price of an IPR is fair and reasonable.[16] In addition to the difficulty of assessing the costs attributable to the development of a particular patent (or groups of patents) and the fact that carrying out such

[11] European Commission (2022), ‘Draft Horizontal Guidelines’, footnote 206.
[12] European Commission (2022), ‘Draft Horizontal Guidelines’, para. 465.
[13] European Commission (2022), ‘Draft Horizontal Guidelines’, para. 471.
[14] European Commission (2022), ‘Draft Horizontal Guidelines’, paras 471 and 489.
[15] European Commission (2022), ‘Draft Horizontal Guidelines’, para. 464.
[16] European Commission (2022), ‘Draft Horizontal Guidelines’, footnote 286.

an assessment may distort the incentives to innovate in the first place, we highlight the following.

- The economic value of an IPR could be high due to customers' willingness to pay for a specific feature, and this may not involve higher production costs. From an economics perspective, if a customer derives a high economic value from the product or service, the supplier may be able to legitimately charge a high price—even if it involves high margins.
- Looking solely at the cost of the technology in question to undertake the price–cost test may overlook the risky nature of the R&D process. In order to diversify risk, companies choose to develop multiple technologies at the same time, hoping that at least one of them will be part of a standard. As such, the price–cost test would ignore the costs incurred by the IPR holder to develop the other technologies, leading to an underestimation of the real overall costs incurred.

The Commission rightly highlights the relevance of the economic value approach for IPRs.[17] This is a welcome clarification and, for the reasons above, makes economic sense. However, we note that an analysis of costs and profitability of the users of the IPR may still be useful—for example, to test whether the impact on the user of the IPR is significant enough that downstream competition is distorted.

The Commission also rightly recognises FRAND commitment as a tool to strike the right balance between: (i) the creation of the IPR; and (ii) its distribution or implementation. This is a useful clarification, and it avoids the interpretation of the term 'FRAND commitment' as a tool to only reduce royalties.

In this context, the Commission's explanation of hold-up and hold-out is also useful.[18] The Commission could expand on this to some extent, explaining the relevance of these two concepts to the negotiation power of the IPR holder(s) and users. While this clarification and discussion may not directly go to the assessment of the standardisation agreement itself, as discussed in the context of purchasing agreements (or LNGs in this context), the concepts are highly relevant.

The Commission notes that participants will have to assess for themselves whether the licensing terms—and in particular the fees that they charge—fulfil the FRAND commitment.[19] It provides some comments on the methods available to do this. For example, the Draft Horizontal Guidelines mention comparisons, including comparisons with royalty/value before the standard is adopted (ex ante) and royalty after standardisation (ex post).

While this is reasonable, the Commission could provide brief comments on the advantages and disadvantages of each method. For example, in our view, an ex ante assessment of the economic value bears a high risk of measurement error, leading to distorted values. This is because it could be difficult to assess

[17] European Commission (2022), 'Draft Horizontal Guidelines', para. 486.
[18] European Commission (2022), 'Draft Horizontal Guidelines', para. 470. We welcome the Commission's clarification that 'there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power' (para. 471). This is aligned with the economic principles of assessing market power, which suggest taking into account all of the constraints faced by an IPR holder (instead of solely looking at the IPR holder's market share). Hold-out is an important constraint on SEP owners, and it effectively works as countervailing buyer power in SEP licensing negotiations.
[19] The Draft Guidelines suggest that pure IPR holders (i.e. upstream-only undertaking) have an incentive to maximise royalties, as their only source of income is the licensing revenue. Note that these undertakings also have a strong incentive to conclude negotiations quickly (so that they can start earning licensing income), which affects the level of royalty rate that they offer/accept. See European Commission (2022), 'Draft Horizontal Guidelines', para. 469.

the real contribution or value of the IPR before the standard is actually adopted.

For example, the IPR holder might overestimate the real economic value by setting the expectations too high—for instance, if they expect the standard to stay in place for a long period of time, while in reality the innovative process leads to a new standard sooner than the IPR holder expects. Alternatively, the IPR holder may not fully realise all of the use cases that the technology will be used for. In this context, the suggestion of using ex post benchmarks is useful.

In addition, two other analyses could be mentioned (even if briefly) in the revised Horizontal Guidelines.

- In the context of SEPs, a valuation exercise could include: (i) an assessment of the contribution of, say, 5G technology, to the final value of a smartphone to inform the total royalties that 5G SEP owners should receive (the rest of the final value would go to the implementers); and (ii) allocating this total royalty amount among the various 5G SEP owners. The first step could be implemented using, for example, a conjoint survey of consumers or hedonic price analysis to isolate the part of the price driven by connectivity as opposed to other features.
- An alternative way of assessing fairness is to assess outcomes that allow the set of participants to obtain sufficient remuneration to make their long-term participation in the value chain a worthwhile economic activity, and the process of reaching these outcomes. This, in turn, depends on the balance of bargaining power of the parties. If the parties have balanced bargaining position, and if the negotiation incudes a fair process, the outcomes should be considered as fair. The elements set out earlier in relation to the assessment of bargaining power would also be relevant here.

4.2 On the use of market shares to assess the effects of a standard development agreement

According to the Draft Horizontal Guidelines, the Commission considers the market shares of the goods, services, or technologies based on the standard itself as among the factors that one should consider when assessing the effects of a standard development agreement.[20]

However, as the Commission itself acknowledges, at an early stage, it might not always be possible to assess with any certainty whether the standard will in practice be adopted by a large part of the industry, or whether it will only be a standard used by a marginal part of the relevant industry (this is a reason why, as noted above, the results of the ex ante assessment of the economic value generated from the IPR should also be interpreted with caution).

In addition, while market shares can provide an indication of the effects of a given standard agreement, in contexts where the introduction of the standard is likely to result in a new relevant market being created, computing market shares in an accurate and reliable manner may not be feasible. We therefore recommend that the revised Horizontal Guidelines acknowledge this further limitation.

[20] European Commission (2022), 'Draft Horizontal Guidelines', para. 498.

5 Sustainability agreements

The debate on sustainability has shifted from the question 'should competition law and policy deal with the environmental ambitions set by the Commission and other government institutions?' towards the more action-focused question 'how should we use Art. 101 TFEU to balance the sustainability benefits from a cooperation with the potential negative effects on competition?'.

With their brand-new section dedicated to sustainability agreements, the Draft Horizontal Guidelines move in the right direction. Compared to the current Horizonal Guidelines, the Draft Horizontal Guidelines offer more room and guidance for corporates who want to coordinate on green initiatives. Below, we discuss some economic aspects of the assessment of sustainability agreements.

5.1 The relevance of willingness to pay

From an economics perspective, the key issue facing firms who want to invest in greener technology or production is the 'first-mover disadvantage'. By adopting more environmentally friendly production technology, for instance, they are also likely to increase their costs. If their competitors do not follow suit in these green ambitions, the first-movers risk ending up with a competitive disadvantage—reducing their profitability and possibly even their long-term financial sustainability if their customers do not recognise and fully value the green solution.[21]

However, the issue of the first-mover disadvantage is not always present. Consumer willingness to pay plays a crucial role. If there is demand for greener products and sufficient willingness to pay, a firm could unilaterally engage in greener production—as the higher costs could be passed on to consumers. In such a case, there would be no first-mover disadvantage; the green characteristic of the product becomes a parameter over which companies compete with each other. Hence, one would normally consider that there is no need to coordinate between competitors.

Economics research has shown that when the costs are not too high and consumers have at least some willingness to pay for green products, coordination would lead to lower levels of sustainability than when companies compete on green.[22] This is referred to as 'greenwashing'. The Draft Horizontal Guidelines seem to recognise this point by stating that in situations where there is demand for sustainable products, the agreement is not indispensable; that said, it does not rule out cooperation completely in these settings, as an agreement may be required for achieving sustainability goals in a more cost-efficient way.[23]

However, in markets where there is no or insufficient willingness to pay, firms do face the first-mover disadvantage, and cooperation could help to overcome this issue. While competition authorities might be sceptical due to the risk of greenwashing, it is important to consider not only the economic rationale (based on theory) but also specific market dynamics, such as spillover effects.

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[21] We have seen examples of this in the past—for example, in Unilever's compressed deodorant. In 2018, Lidl tried sell only Fairtrade bananas in German and Swiss shops. See also BananaLink (2019), 'Lidl backs away from Fairtrade Bananas', https://www.bananalink.org.uk/news/Lidl-backs-away-from-fairtrade-bananas/.
[22] Schinkel, M.P. and Treuren, L. (2021), 'Corporate social responsibility by joint agreement', Amsterdam Center for Law and Economics, working paper No. 2021-01.
[23] European Commission (2022), 'Draft Horizontal Guidelines', para. 582

When incorporating spillovers into the analysis, cooperation on green goals may turn from seemingly irrational to making perfect economic sense, as discussed below.[24]

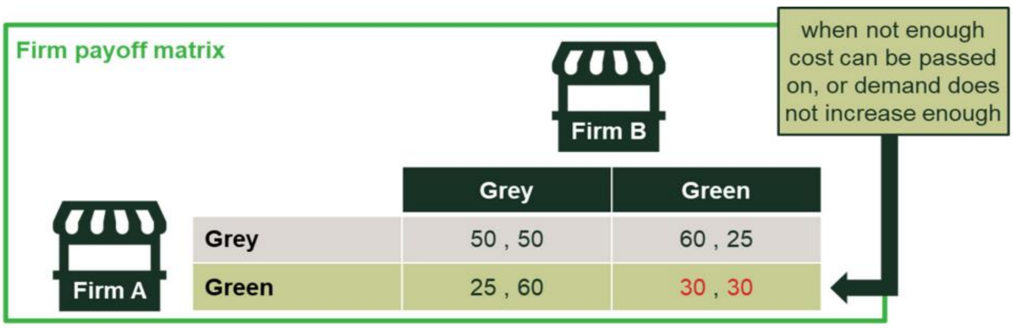
5.2 Spillovers on the firm side

We take the stylised situation of only two competing firms that can decide on whether to offer 'grey' or 'green' products. This situation is illustrated in the figure below using a so-called 'payoff matrix'. The payoffs reflect the likely situation where firms are not able to fully pass on the costs of their green products to consumers, and/or consumers do not have a sufficiently high willingness to pay for products that are 'green' instead of 'grey'. Note that willingness to pay (i.e. an individual's demand for a product) will depend on the alternatives available and budget constraints.

Starting from a situation where both firms sell a grey (i.e. environmentally unfriendly) product and enjoy a payoff of 50 each, we can see that if one firm decides to sell a greener product, it will end up being worse off, earning a payoff of 25—with the other firm benefiting from the competitive advantage and increasing its payoff to 60.[25]

The combination of incomplete pass-on of costs and insufficient willingness to pay mean that in the situation where both firms choose green, total payoffs are likely to be lower than before—set here at 30 for illustrative purposes. This means that firms may indeed have the ability to coordinate on both choosing green, but they would not necessarily have an incentive to do so. While it is better for each firm to coordinate on green than go it alone, the dominant strategy here is for each firm to stick with its grey production technology. Hence, from a purely rational perspective, there does not appear to be an incentive for firms to coordinate on green.

Figure 5.1 Not enough willingness to pay to unilaterally go green



Source: Oxera.

In practice, competition authorities might perceive such cooperation sceptically.

However, in the above, positive spillovers between firms from sustainability efforts are not captured. Where positive spillovers exist between firms, efforts by one firm also benefit other firms.[26] In this case, the level of sustainability

[24] Considering spillovers on the firm side works similarly to a consideration of spillovers on the consumer side, which the Commission has now introduced in the framework for Art. 101(3) TFEU by allowing benefits to consumers as a result of externalities (see in section 5.3 below).
[25] This competitive advantage may come from lower (relative) costs, increased sales (because the firm can charge a somewhat lower price than its green rival), or both.
[26] A more commonly used term for 'spillovers' in economics is 'externalities'. Both terms can be used interchangeably and capture any situation in which an action by one 'economic agent' has a benefit or cost

efforts by other firms would actually have a positive effect on a firm achieving its own objectives. Allowing firms to coordinate their sustainability efforts will then lead to *higher* overall effort levels. To refer back to the illustration above, this would mean that the bottom right corner might turn into a higher payoff and hence render cooperation on green as rational.

There are a number of different scenarios in which such positive sustainability spillovers exist, such as industry reputation or reduced existential threat.[27]

5.3 Benefits to consumers: opening the door to spillovers on the consumer side

As discussed above, by capturing spillovers between firms, what appears to be an irrational cooperation can in fact become economically rational. We are pleased to see that the Commission recognises the importance of capturing spillovers (or externalities, as the Commission calls them), as it does on the consumer side.

In the Draft Horizontal Guidelines, we can clearly see the influence of the advice written by Prof. Roman Inderst for the Commission.[28] The effect of this is that the Commission now recognises three types of benefits to consumers that could follow from sustainability agreements—namely individual use value benefits, individual non-use value benefits, and collective benefits.[29]

We consider this as the biggest shift compared to the existing version of the Horizonal Guidelines, where only the first category above was considered. We welcome the introduction of these further categories.

The first category—improvements that benefit the consumers individually—involves no spillovers between consumers, as the benefit to a consumer is independent of whether others are consuming the product. However, the other two categories[30] do provide room for spillover effects to be incorporated into the analysis. As opposed to the current version of the Horizontal Guidelines, this means that a sustainability agreement has a higher chance of generating sufficient benefits for consumers (across all three categories combined) to be weighed against the potential negative effects of the agreement.

In this context, it is noteworthy that the Draft Horizontal Guidelines no longer refer to consumers needing to be fully compensated as part of the assessment of Art. 101(3) TFEU.[31] They now state that the overall effect on consumers in the relevant market is at least neutral. While this is—from an economics perspective—very similar to the previous wording, we wonder whether the Commission is aiming to show that there is more room in the balancing of benefits versus negative effects than previously thought.

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to another 'economic agent', without this benefit or cost being properly considered when deciding on that action.

[27] For more information, see this article by Oxera: *Agenda* (2021), 'When to give the green light to green agreements', 13 September.

[28] European Commission (2022), 'Draft Horizontal Guidelines'. For example, see paras 594 and 596. See also Inderst, R. (2022), 'Incorporating Sustainability into an Effects-analysis of Horizontal Agreements'.

[29] European Commission (2022), 'Draft Horizontal Guidelines', para. 590 for individual use value benefits, para. 594 for individual non-use value benefits, and paras 601 and 606 for collective benefits.

[30] Individual non-use value benefits: indirect benefits resulting from consumer appreciation of the impact of their sustainable consumption on others. Collective benefits on different markets: e.g. positive externalities that benefit everyone, if consumers who 'pay' for the benefit substantially overlap with customers who benefit, as in the case of climate change abatement.

[31] European Commission (2022), 'Draft Horizontal Guidelines', para. 588.

Finally, regarding the last category of consumer benefits (collective benefits, section 9.4.3.3), we make two observations.

- First, while the Draft Horizontal Guidelines explicitly bring in spillovers and talk about internalising negative externalities and sustainability benefits for a larger segment of society, they do restrict the situations in which the spilled-over benefits can be taken into account.[32] Consumers need to substantially overlap with the beneficiaries or be a part of them to allow the benefits for the beneficiaries to be included in the balancing exercise of Art. 101(3) TFEU.[33] It is unclear when this threshold of substantial overlap is met.

  In practice, this means that the Draft Horizontal Guidelines largely maintain the default that consumer interests always take priority over the interests of non-consumers when it comes to assessing horizontal agreements. We would welcome clarification of this in the revised Horizontal Guidelines.

- Second, while the Draft Horizontal Guidelines broaden the scope, it would be useful if more guidance could be provided. We appreciate that the Commission has little experience with such agreements so far. Nonetheless, it would be useful if the Commission could expand the revised Horizontal Guidelines by building on other regulators' experiences (such as the ACM's analysis of the closure of coal plants, where the reports by CE Delft are used to determine the collective value of fewer emissions).[34]

[32] European Commission (2022), 'Draft Horizontal Guidelines', para. 601.
[33] European Commission (2022), 'Draft Horizontal Guidelines', para. 606.
[34] See Autoriteit Consument en Markt, 'Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting van 80er jaren kolencentrales in het kader van het SER Energieakkoord', https://www.acm.nl/sites/default/files/old_publication/publicaties/12033_acm-notitie-sluiting-kolencentrales.pdf.