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PUBLIC CONSULTATION ON THE DRAFT REVISED HORIZONTAL BLOCK EXEMPTION REGULATIONS AND HORIZONTAL GUIDELINES

Submission of Castrén & Snellman Attorneys Ltd

1 Introduction and summary

Castrén & Snellman Attorneys Ltd is a member of The Net Zero Lawyers Alliance (NZLA)[1], which has submitted a submission to the Commission concerning the Commission's draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines (the 'Guidelines'). We welcome the opportunity to comment on the proposed Guidelines as part of the ongoing public consultation with gratitude.

In particular, the Castrén & Snellman welcomes the chapter on Sustainability Agreements in the Commission's draft Horizontal Cooperation Guidelines (the 'Guidelines') as a significant positive development in the interpretation of EU Competition law.

Castrén & Snellman believes the Commission could and should adopt a proactive role in developing competition law to support sustainable business. Recent IPCC reports[2] show that the climate crisis is a grave and mounting threat, which has by now put ecosystems and human populations in peril, and that rapid, deep emission cuts paired with ambitious adaptation measures are required urgently to ensure a liveable future. The Commission has rightly made green transition a priority in its Green Deal programme. Castrén & Snellman finds that this must also be reflected in full in the interpretation and application of competition rules. Cooperation between companies, and between competitors, is needed to achieve change at the needed scale.

[1] Net Zero Lawyers is a global group of commercial law firms. We recognise, in accordance with the best science available, that there is an urgent need to accelerate the transition towards global net zero emissions and for commercial law firms and lawyers to play their part to help achieve the goals of the 2015 Paris Agreement and ensure a just transition. The Net Zero Lawyers Alliance (NZLA) commits to support the goal of Net Zero greenhouse gas (GHG) emissions by 2050 or sooner, in line with global efforts to limit warming to 1.5°C (Net Zero). It also commits to amplify Race to Zero law firm membership including law firms in developing states and to support aligning commercial clients' legal contracts and terms, and their enforcement, with Net Zero.

[2] IPCC Working Group III AR6 Synthesis report, Climate Change 2022: Mitigation of climate change, 4 April 2022.

As mentioned in the draft Guidelines, sustainable development is a core principle of the Treaty on European Union and a priority objective for the Union's policies. Therefore, the Castrén & Snellman finds that Article 3 TEU and Article 11 TFEU should be reflected throughout the competition policy to the fullest extent. In practical terms, this requires taking a strong position in matters such as the well-established 'polluter pays' principle. The interpretations of and guidance for such questions from the perspectives of competition law and policy have so far been far too limited.

The proactive approach for promoting sustainability with a more permissible approach towards sustainability enhancing cooperation would be in line with the Commission's recent proposal for a Directive on corporate sustainability due diligence (CSDDD). The proposed Directive would oblige companies to cooperate in order to ensure compliance with human rights and environmental protection.

In the light of Article 3 TEU and Article 11 TFEU, it seems absurd that competition rules still protect non-sustainable production and/or consumption. Rather, competition law should focus on protecting competition relating to sustainable production and consumption. The draft Guidelines do not seem to make a sufficient change in this respect.

In economic terms, environmental harm, such as climate emissions, are negative externalities, and the Castrén & Snellman is pleased to see that the Commission has recognised them as a market failure that may require cooperation between undertakings. The draft Guidelines include positive changes to this end. However, Castrén & Snellman as a member of the NZLA calls for a stronger position still to ensure that competition law will not get in the way of the green transition. The Guidelines should allow sustainability agreements to the fullest extent possible under the wording of Article 101 TFEU as well as existing case law. This means e.g. the following:

- The Commission should provide clearer guidance on which kinds of agreements and arrangements fall outside the scope of Article 101(1) TFEU and pay more attention to existing case law.

- The Commission should adopt a wider scope of application for the exemption granted by Article 101(3) TFEU e.g. by making the following changes to the Guidelines:

    - When determining whether an agreement allows consumers a fair share of the resulting benefit, the Commission should place less emphasis on consumers' willingness to pay and more emphasis on collective benefits to society. The requirement of "fair share" should not mean full compensation.

    - The position of future consumers should be considered in the analysis.

    - The Commission should reject the requirement for collective benefits that the group of consumers affected by the restriction and benefiting from the efficiency gains is substantially the same.

- Qualitative evidence of benefits should be allowed in the self-assessment.

Each of these suggestions will be discussed in more detail below.

2 Agreements outside Article 101(1)

Sustainability agreements only raise competition concerns under Article 101(1) if they entail serious restrictions of competition in the form of restrictions by object or produce appreciable negative effects on competition contrary to Article 101(1).

Guidance on agreements and arrangements that fall outside the scope of Article 101 is very helpful and could encourage sustainability enhancing cooperation, e.g. within industry organizations. Of particular concern is the fact that, following the reforms brought about by the ECN+ Directive, many companies find cooperation within trade associations uncomfortable due to the high risks and uncertainty. This has inevitably led to challenges in sustainability driven cooperation as well. It is therefore desirable that the Commission provides further examples of, inter alia, how trade associations—and companies belonging to one—can promote sustainable development initiatives in their sectors without a fear of significant fines. The uncertainty of cooperation within trade associations has already affected even very basic cooperation, such as the drafting of sustainability roadmaps. The situation is far from desirable. For example, even though we welcome the adoption of a soft safe harbour of sustainability standardisation agreements with gratitude, we nonetheless think that the Guidelines should state more clearly that mandatory standards fulfilling certain conditions do not harm competition, if for no other season, for the legal certainty of the companies doing their best to increase sustainability.

In the light of previous case law, such as *Wouters*, cooperation between undertakings may, in certain situations, fall entirely outside the scope of Article 101(1) TFEU. As the Court stated, all agreements or coordinated practices that may limit parties' or party's freedom to act do not necessarily fall under the scope of Article 101(1). For the purposes of applying Article 101, account must be taken, first, of the overall situation in which the decision was adopted or by which it is affected, and particularly its objectives.[3] In the light of the Court's practice and given the importance of the goal that the sustainability agreements try to reach, we would have hoped for a more courageous approach in the Guidelines. Companies fighting climate change find it extremely important to know in which situations their genuine sustainability relating cooperation falls completely outside the scope of Article 101(1). Needless to say, any advice and guidance would inevitably increase sustainable solutions.

Moreover, arrangements that oblige to avoid '*below standard*' conditions, for example in developing countries, should also be excluded from the scope of Article 101(1). Standards for, among other things, protecting natural resources and human rights are usually derived from international conventions and treaties, and under no circumstances should competition law protect the right to take action against international conventions and treaties. It might also be the case that the principles of international conventions etc. have not yet been implemented in

[3] C-309/99 Wouters v Algemene Raad van de Nederlandse Orde van Advocaten, para. 97.

national legislation. Agreements to avoid below-standard conditions may therefore be needed to achieve the goals set out in the conventions, and therefore competition regulations should not form an obstacle to safeguarding these goals.

In addition to the obligations based on international treaties and conventions, the proposed CSDDD requires companies to have clear processes for identifying, preventing, mitigating, and remedying adverse human rights and environmental impacts of its own operations and of those of its subsidiaries and for monitoring measures taken. CSDDD also requires cooperation under certain circumstances. Competition law should not slow down or hinder companies' ability to meet the objectives required by the Directive either.

3 Analysis under Article 101(3)

3.1 Wording of Article 101(3) – concepts of "fair share" and "consumers"

The wording of Article 101(3) would make it possible to adopt a wider application of the exemption than currently proposed by the Commission.

Article 101(3) requires that consumers get a 'fair share' of the resulting benefit. The Commission sets a significantly higher standard in the draft Guidelines. According to the draft, consumers receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the same agreement, so that the overall effect on consumers in the relevant market is at least neutral (para 588). Such a high standard would be contrary to the wording of Article 101(3), and it is not required by the current case law either.

The *CECED* case is an excellent example of a case where sustainability considerations and the concept of fair share were interpreted broadly in assessment of anti-competitive agreements. In the case, a collective agreement to remove outdated washing machines fulfilled the criterion of fair share. For the purposes of the fair share assessment, in addition to evaluating individual economic benefit, the Commission also considered collective economic benefit and the harm stemming from carbon dioxide emissions. The Commission concluded that the environmental benefits of the agreement constituted as fair share to the consumers even if the individual purchaser of the washing machine would not personally receive the benefit. It was also noted that the agreement was likely to lead to future research and development which would in turn allow long-term product differentiation between manufacturers.[4]

In our view, the Guidelines should include a similar interpretation: reducing negative externalities *de facto* results in benefits to the individual consumer, even if the benefits are realised at the societal level.

Furthermore, when assessing fair share, one must bear in mind that environmental harm is currently under-priced. In this light, if consumers pay a higher price for a sustainable product that causes less emissions or has other sustainability benefits compared to competing products, they are in fact internalising some of the negative externalities caused by their consumption.

[4] Commission Decision IV.F.1/36.718.CECED.

Finally, the concept of 'consumers' is interpreted by the Commission to mean primarily current consumers, although the wording of Article 101(3) could be understood to encompass future consumers. The draft Guidelines evoke this possibility in stating that 'positive externalities … may be enjoyed by the society today or in the future'. It is well known that the interests of future generations are underrepresented in policymaking, or, in economic terms, over-discounted. This fact is one of the many reasons underlying the current climate crisis. Therefore, we suggest that future consumers be included in the interpretation of Article 101(3).

3.2 Types of benefits identified by the Commission and passed on to consumers

The Commission identifies three types of benefits:

- 'individual use value benefits', such as improvements in product quality or lower prices, which arise in the relevant market (para. 590);
- 'individual non-use value benefits', which include indirect benefits resulting from consumers' appreciation of the impact of their sustainable consumption on others (para. 594); and
- 'collective benefits', such as positive externalities that benefit society as a whole (para. 601).

This division is useful and clarifies the concept of benefits under Article 101(3). The recognition of individual non-use benefits and collective benefits in particular marks a change in the Commission's approach. However, there are a number of comments to be made.

It seems that individual use value benefits as well as non-use value benefits would still be tied to the consumers' willingness to pay. This raises the question whether cooperation would be allowed in the first place in such situations where consumers are willing to pay for the more sustainable product. Cooperation would most likely only be seen *necessary* in situations where consumers would not be willing to pay for a more sustainable product.

In Castrén & Snellman's view, the Commission still puts too much emphasis on consumers' willingness to pay for more sustainable products. Benefit to the consumers should also be evaluated through other means in addition to their willingness to pay. Consumers' own appreciation of more sustainable production is not necessarily reflected in the actual purchasing behaviour if a cheaper but less sustainable product is available.

In addition, consumers might not receive sufficient information on the sustainability of the product; while taste and design are directly experienced and easily evaluated by consumers, this does not apply to sustainability features such as emissions generated or avoided, energy efficiency or use of fair labour.

The draft Guidelines specifically recognises collective benefits, which is a major step forward. When competitors agree on reduction of GHG emissions, for example, this benefits the society as a whole. Such benefits are at the heart of sustainability agreements. However, the Commission sets unnecessarily strict

conditions for the passing of the benefits on to the consumers in the same market where the restriction occurs:

- *'Although the balancing of negative effects with the benefits resulting from restrictive agreements is normally made within the relevant market to which the agreement relates, where two markets are related, efficiencies achieved on separate markets can be taken into account, provided that the group of consumers affected by the restriction and benefiting from the efficiency gains is substantially the same.' (para 602)*

- *'By analogy, where consumers in the relevant market substantially overlap with, or are part of the beneficiaries outside the relevant market, 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.' (para 603).*

Castrén & Snellman is concerned that such conditions would rule out a great proportion of arrangements with clear sustainability benefits. For example, emissions reductions help mitigate climate change globally and benefit all consumers regardless of where they occur. Therefore, it should be evident that consumers in any relevant markets get a sufficient portion of this benefit. Otherwise, it will be very difficult for producers to invoke collective benefits.

In addition, the conditions proposed by the Commission do not seem compatible with safeguarding the interests of future consumers (see the final paragraph in Section 3.1).

4 Quantitative and qualitative analysis of the benefits

Naturally, the sustainability agreements envisaged by the Guidelines must have real sustainability benefits. Ideally, the sustainability benefits and the anticompetitive effects should be quantified and weighed against each other. The quantification of sustainability benefits is, however, not straightforward. We have already referred to the difficulty of incorporating the interests of future generations and to the drawbacks of willingness to pay methods. In general, there is a risk that sustainability benefits are undervalued if the focus is on current consumers in narrowly defined relevant markets.

Due to the challenges in quantifying sustainability benefits, Castrén & Snellman suggests reserving a possibility to describe benefits in qualitative terms or otherwise take into account the necessity to change the practice so that the analysis of sustainability benefits would not be unreasonably difficult.

Ultimately, we encourage the Commission to consider exempting companies from sanctions in situations where a company has sought to comply with instructions and has pursued responsible actions with sincerity but failed to comply with Article 101 due to, for example, ambiguity of the guidance or other misinterpretation.

5 Practical examples

It would be welcomed for the Commission to include in its Guidelines further practical examples to facilitate the competition assessment related to sustainability cooperation.

Example 1: Cooperation aiming to influence voting behaviour in a shareholders' meeting. Does Article 101(1) apply to situations where minority shareholders agree with each other to vote in favour of sustainable measures (e.g. requiring companies to reallocate their business away from fossil fuels, etc.)?

Example 2: Suppliers cooperating to reduce their use of plastics/packaging. Suppliers can be of very different sizes and it can be challenging to get most of the suppliers in the industry involved in the initiative at the same time. Is it possible for a few suppliers to aim to reduce the use of plastics/packaging and seek to involve other competitors in the sector without any guarantees that the consumers would appreciate the environmentally friendly packaging over the costs or that the positive results would be significant enough to compensate consumers in the relevant market?

Example 3: A group of grocery stores agree to procure responsibly certain products, such as fruit, chocolate and coffee, originating from Latin America or Africa. The aim of the agreement is to prevent environmental damage and human rights violations in the countries of origin. In this context, the grocery stores comply with the standards laid down in the national laws of the countries concerned. The combined market share of grocery stores is almost 90%, but the share of the products covered by the agreement in the total selection of grocery stores is relatively small. How should the significance of the collective benefit of such cooperation arrangements be assessed?

Example 4: Five manufacturers of building materials with a combined market share of 40% wish to enter into an agreement to make certain building materials completely carbon neutral within ten years. The duration of the agreement is long, so there is much uncertainty involved concerning the costs and benefits of the agreement due to developments in government regulation aiming to reduce carbon dioxide emissions. Is it at all possible for companies to plan long-term cooperation projects in order to avoid the first-mover disadvantage?