ecta RESPONSE

TO THE PUBLIC CONSULTATION BY THE EUROPEAN COMMISSION ON THE

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

26 APRIL 2022

1. Introductory remarks

1. ecta, the european competitive telecommunications association,[1] welcomes the opportunity to provide feedback on the European Commission's public consultation launched on 1 March 2022 on the draft revised Horizontal Block Exemption Regulations (hereinafter "HBERs") and Horizontal Guidelines (hereinafter "The Proposed Guidelines").

2. ecta represents those alternative operators who, relying on the pro-competitive EU legal framework that has created a free market for electronic communications, have helped overcome national monopolies to give EU citizens, businesses and public administrations quality and choice at affordable prices. ecta represents at large those operators who are driving the development of an accessible Gigabit society, who represent significant investments in fixed, mobile and fixed wireless access networks that qualify as Very High Capacity Networks (hereinafter "VHCN") and who demonstrate unique innovation capabilities.

3. ecta wishes to underline that due to the direct and significant impact that the texts put to public consultation have on the telecommunications sector, ecta provides its comments exclusively on the Proposed Guidelines on horizontal co-operation agreements, and only with reference to Section 3.6 entitled "Mobile infrastructure Sharing Agreements" and Section 9 entitled "Sustainability Agreements".

4. ecta welcomes the Commission's initiative to review the existing guidance because the time is ripe to provide structured and explicit guidance on mobile network sharing agreements and sustainability agreements.

5. ecta considers this timely, necessary and appropriate for the reasons exposed in the following paragraphs.

6. The mobile network sharing agreements that European mobile network operators started to sign many years ago with the beginning of 3G network deployments will probably become an even more attractive option for the operators, especially with the advent of 5G networks. Indeed, operators are facing, on the one hand, very demanding coverage and quality expectations from institutions and consumers and, on the other hand, higher deployment costs also due to the network densification required by 5G technology, environmental regulations, increase in energy costs and, in some countries, shortage of field technicians that are likely to massively increase these costs. It should also be noted that available locations to install antennas, especially in urban areas, are limited.

[1] https://www.ectaportal.com/about-ecta

7. The sustainability agreements, after the Paris Agreement[2] and the ambitious targets defined by the Commission in its European Green Deal[3] and Fit-for-55 package[4] which respectively consist in achieving zero net GHG emissions by 2050 and reducing emissions 55% by 2030, are expected to be engaged in by a multitude of undertakings in general, and by telecomunications operators in particular.

8. The telecommunications sector in Europe, thanks to the EU Regulatory Framework[5] in place has registered in the past twenty plus years good progress in terms of competition. European users of mobile services enjoy a real possibility of choice between different providers' offers. Moreover, with respect to other comparable areas of the world such as the United States, those offers are characterized by innovative services and competitive prices[6]. This is a very important asset that Europe has built over time for European consumers and businesses, taking into account the strategic importance of telecommunications in enabling the digitalization of other sectors by creating a spill over effect.

9. It goes without saying that it is crucial that competition is preserved and enabled to further unfold its beneficial effects in European telecommunications markets.

10. For these reasons, ecta recognizes the utmost relevance of this consultation, and, underlines how the rules introduced by the final text of the Guidelines, depending on their content, will substantially impact, negatively or positively, not only the extent of mobile network sharing and sustainability agreements that can help respectively to meet the European Digital Compass and European Green Deal targets, but also the associated competition dynamics where such agreements will be put in place.

11. In the following parts of this response, from paragraph 10 to 30, ecta puts forward its key considerations on mobile network sharing agreements and from paragraph 30 to 47 on the sustainability agreements sections of the Proposed Guidelines.

2. Key ecta considerations

2.1. Mobile Infrastructure Sharing Agreements

[2] The Paris Agreement is the first-ever legally binding agreement setting out a common framework to undertake to keep global warming to well below 2°C and in particular to pursue efforts to limit it to 1.5°C above pre-industrial levels: The Paris Agreement | UNFCCC

[3] A European Green Deal | European Commission (europa.eu)

[4] Fit for 55 - The EU's plan for a green transition - Consilium (europa.eu)

[5] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast)Text with EEA relevance. (europa.eu)

[6] See for instance the "Study on mobile and fixed broadband prices in Europe at the end of 2020", available at: DESI - Connectivity | Shaping Europe's digital future (europa.eu)

12. The current state of the market shows how mobile network sharing has been widely used for a number of years by a multitude of mobile network operators (hereinafter "MNOs") in European markets.

13. The first mobile network sharing agreements in Europe date back to the advent of 3G networks[7]. There are no doubts: network sharing agreements are likely to be used even more as a relevant tool by the operators (by both Mobile Network Operators (MNOs) and Fixed-Wireless Access (FWA) operators) in the deployment of 5G networks. Clarity on competition law constraints is therefore essential.

14. The BEREC Report on Infrastructure Sharing[8] has shown that most of the mobile infrastructure sharing agreements in Europe, be it solely passive network sharing or active sharing (where in addition to the passive elements also the active equipments and sometimes also the spectrum are shared), are the result of commercial negotiation, rather than regulatory intervention.

15. This is a clear indication of how those sharing agreements are driven by the operators' own initiative rather than an external push by the authorities.

16. This is not a surprise given the numerous advantages that network sharing potentially offers to the parties to the agreement such as:

    i) cost savings in the form of CAPEX and OPEX reduction[9];

    ii) efficiency gains in terms of administrative costs savings and more efficient use of spectrum;

    iii) quality gains thanks to faster roll-out of new networks and technologies, wider coverage or denser network grids;

    iv) benefits to the end-users because they can enjoy a wider variety of offers from more than one operator, also in places where in absence of a sharing agreement this would not be possible due to the high deployment costs;

    v) public interest gains because the operators can decrease energy consumption, thereby lowering the carbon footprint of the electronic communications sector and contributing to the fight against climate change.

[7] See for instance the 2003 Commission Decision approving 3rd Generation mobile network sharing in Germany between T-Mobile and mmO2: https://ec.europa.eu/commission/presscorner/detail/en/IP_03_1026

[8] BEREC Report on infrastructure sharing (europa.eu)

[9] According to NRA responses to the BEREC questionnaire, in case of passive sharing the CAPEX and OPEX savings can arrive up to 35% with respect to a situation in which the sharing does not take place, while in case of active sharing without spectrum share CAPEX saving can be up to 35% while OPEX saving could count up to 33%. Finally in case of active sharing also of the spectrum, the CAPEX and OPEX saving can count respectively around 45% and 33% (see page 16 of BEREC Report on infrastructure sharing (europa.eu)).

vi) Finally, in specific areas such as those having historical or natural value, subject to the special State protection or the metropolitan areas where there is limited space to deploy different networks, mobile network sharing agreements can ensure a limited and efficient deployment.

17. In light of this list of efficiencies associated to mobile network sharing agreements, ecta agrees with the Proposed Guidelines and with the important clarificatory statement, as follows: *"The Commission considers that mobile infrastructure sharing agreements, including a possible spectrum sharing, would in principle not be restrictive of competition by object within the meaning of* Article *101(1), unless they serve as a tool to engage in a cartel".*

18. The Proposed Guidelines, suggest to consider, *"... in conducting the assessment of whether a mobile infrastructure sharing agreement may have restrictive effects on competition, a variety of factors, including:*

> *(a) the type and depth of sharing (including the degree of independence retained by the network operators)[174];*
>
> *(b) the scope of shared services and shared technologies, the duration and the structure put in place by the agreements;*
>
> *(c) the geographic scope and the market coverage of the mobile infrastructure sharing agreement (for example, the population coverage and whether the agreement concerns densely populated areas)[175];*
>
> *(d) the market structure and characteristics (market shares of the parties, amount of spectrum held by the parties, closeness of competition between the parties, number of operators outside the agreement and extent of competitive pressure exerted by them, barriers to entry, etc.)."*

19. ecta while agreeing in general with the list of factors, wishes to highlight that:

i) the **number of parties active on the market, the market shares of the parties**, **the density and coverage of their existing networks together with the amount of spectrum held by those parties** and **the fact that the agreement is open or not** to other operators **should be given more prominence and be subject to greater focus** in the final text of the Guidelines;

ii) **the existence of local regulation** (such as for example Electromagnetic Field Emission limits, permits, etc.) is an important factor that should be used in assessing the competitive restrictions posed by mobile network sharing agreements and currently **is not included in the list of factors suggested by the proposed Giudelines**.

20. The Proposed Guidelines recognize that mobile network sharing agreements can give rise to restrictive effects on competition. In particular they state that those agreements *"may limit infrastructure competition that would take place absent the agreement[167]. Reduced infrastructure competition may in turn limit competition at wholesale as well as at retail level. This is because more limited competition at the*

infrastructure level may affect parameters such as the number and location of sites, timing of the sites' rollout, as well as the amount of capacity installed at each site, which, in turn, can affect quality of service and prices". The Proposed Guidelines also state that those agreements "*may also de facto reduce the parties' decision making independence and limit the parties' ability and incentives to engage in infrastructure competition with each other. For instance, this could be due to some technical[168] contractual or financial terms of the agreement[169]. Information exchanges between the parties may also be problematic from a competition perspective, especially when they exceed what is strictly necessary for the mobile infrastructure sharing agreement to function. "*

21. ecta fully agrees with the description the Proposed Guidelines provide with respect to the potential restrictive effects that those agreements could have on market competition. However, ecta respectfully invites the Commission to take into utmost account and reflect in the final text of the Guidelines how **those agreements can have competition drawbacks especially when they are being concluded among the biggest players** (i.e., the mobile operators that hold the greatest market shares in the relevant market) and those drawbacks are not easy to remedy when the parties to the agreement are the biggest two MNOs. The restriction on competition created by the agreement will be even greater if the gap between the parties to the agreement (i.e. the biggest two MNOs) in terms of market share, network infrastructure and spectrum allowance with respect to the rest of the players is significant. In addition, the Guidelines should consider cases in which the sharing agreements are being concluded, for example, by an operator with a relevant market share and a new entrant (or operator with a limited market share). In these cases, the sharing agreement may contribute to an improvement of the competitive position of smaller operators and as a consequence increase competition on the market.

22. ecta believes that the competitive drawbacks described in the Proposed Guidelines such as:

    i) potentially lower incentives for the parties to invest or the ability to compete due to the limitation of infrastructure based competition;

    ii) potentially greater coordination between participants which will need to share at least some information to collaborate on network deployment with the connected risk relating to tacit collusion;

    could be managed by the provision of specific measures to make sure that those restrictions on competition are neutralized and there are effective efficiency gains deriving from the agreement to the market and the consumers.

    In order to overcome the competitive restrictions posed by point i) the parties to the agreement could offer binding commitments to include in their agreement that further network deployments or upgrades are not restrictricted by the network sharing agreement in a way to let the parties autonomously deploy further parts of the network or its upgrades.

In relation to the potential competitive restriction deriving from point ii) the parties could commit in the same agreement and with the competition authority to:

i) introduce chinese walls to avoid all information flows between the parties to the agreement except the strictly necessary information needed to make sure that the shared network is well functioning.

ii) commit in the agreement and with the competition authority to set their wholesale and retail offers, pricing strategies and technical conditions in total autonomy and independency.

However, in ecta's opinion, **it would not be possible to neutralize the restrictive effects on the competition if the parties to the agreement are the two biggest MNOs and if the agreement is not open to the other MNOs on the market at the same terms and conditions agreed between the parties to the agreement.**

This is because unless the agreement is really open to the other MNOs, no neutralizing measure could compensate the smaller MNOs from the significant and structural advantage that the biggest and strongest MNOs on the market would further gain in terms of faster network deployment, strongly lower CAPEX and OPEX and denser networks with greater coverage vis a vis their smaller competitors.

23. In relation to the absence of any reference to **local regulation** in the list of factors to be considered in assessing the competitive restrictions posed by mobile network sharing agreements, ecta would like to underline that this can be a decisive factor which could limit access to existing sites and the building of new sites. For instance, in Member States where the Electromagnetic Field Emission (EMF) regulation is particularly severe, this factor could be a very relevant one in assessing the competitive restrictions implied by the infrastructure sharing agreements. Another issue to consider at national level is the availability of access to smaller sites by existing operators.

24. ecta notes that the Proposed Guidelines provide for the assessment under art.101, broad principles "*as guidance to conduct such an assessment for the different types of mobile infrastructure sharing agreements:*

(a) Passive sharing is unlikely to give rise to restrictive effects on competition, as long as the network operators maintain a significant degree of independence and flexibility in defining their business strategy, the characteristics of their services and network investments;

(b) Active RAN sharing agreements may be more likely to give rise to restrictive effects on competition. This is because, compared to passive sharing, active RAN sharing likely involves more extensive cooperation on network elements that are likely to affect not only coverage but also independent deployment of capacity;

(c) Spectrum sharing agreements (also referred to as 'spectrum pooling') are a more far-reaching cooperation and may restrict the parties' ability to differentiate their retail and/or wholesale offers even further and directly limit competition between them[171]. While competent authorities shall not prevent the sharing of radio spectrum in the conditions attached to the rights of use for radio spectrum,[172] these agreements must be examined cautiously under Article 101[173] ."

ecta points out, with regard to the specific factor of local regulation, how in some Member States with a very strict EMF Regulation[10] even the simplest form of sharing agreement (i.e. passive sharing) indicated in the Proposed Guidelines as the type of agreement that would be unlikely to give rise to restrictive effects on competition, could as a matter of fact create significant competitive restrictions.

25. The recent INWIT case[11] is a key example of how local regulation can render a passive agreement capable of restricting competition and how a special care should be taken in the case of mobile network sharing agreements between the two biggest MNOs on the market.

26. In this case the Commission, on 6 march 2020, has cleared, under the EU Merger Regulation, the proposed acquisition of joint control over INWIT by Telecom Italia and Vodafone. The approval was made conditional on full compliance with a commitments package offered by Telecom Italia and Vodafone that foresaw:

    i) INWIT would make available, on reasonable and non-discriminatory terms and in accordance with a specific timetable, free space on 4,000 towers in Italian municipalities with more than 35,000 inhabitants, where third parties could install, operate, maintain and use their equipment for the provision of current and future fixed wireless and mobile telecommunications services;

    ii) INWIT would give appropriate publicity to the towers made available;

    iii) INWIT would adopt a procedure to respond in a timely manner to third parties' requests for access to the towers, and would only be able to refuse to provide space on such towers for technical reasons, setting out in writing the reasons for such refusal;

    iv) In the event of dispute concerning access to the towers, a fast track dispute resolution mechanism would be put in place where an independent expert would adjudicate on it; and

    v) INWIT, Telecom Italia and Vodafone would not exercise any right of early termination with respect to all existing hosting contracts and framework

[10] Those Member States include, Brussels in Belgium, Bulgaria, and Italy while Poland has recently reviewed is EMF Regulation to align it to the European average values. Switzerland also has restrictive EMF rules.

[11] Mergers: INWIT / Telecom Italia, Vodafone (europa.eu)

agreements in place and would offer the opportunity to extend such contracts and agreements.

The fourth and fifth MNOs in the Italian market, Iliad and Fastweb, in their quality of new entrants, would have priority in requesting access to the offered towers.

After encountering significant and unsourmountable obstacles in accessing the free spaces on INWIT towers, Iliad has filed an appeal at the European Court of Justice against the Commission Decision on INWIT[12], on the following grounds:

a) The commitments provide no clear definition or quantification of the minimum level of power (emission power) required to satisfy the obligation to provide sufficient free space, which is a central pillar to the effectiveness of the commitments;

b) The commitments fail to explicitly and clearly ensure the right for a new entrant to obtain, from the outset of the implementation of the commitments, hosting services covering the 700 MHz band, which is essential for the effective operation of a competing mobile network.

c) The commitments do not expressly and clearly prohibit the parties from choosing inappropriate sites in discharging their obligation to provide access to new entrants, and the commitments provide no protection against the parties exercising bias in selecting which sites to provide access to.

d) The commitments provide for an insufficient and unclear procedure for arranging access to relevant sites, resulting in new entrants being unable to make effective use of the sites offered under the commitments

27. The case shows how the existence of very strict EMF limitations in Italy (6V/Mt versus the limits applied in other EU Member States between 39V/Mt and 61V/Mt) rendered the passive sharing agreement also in presence of a set of commitments approved by the Commission totally restrictive of competition. ecta believes that the issue of EMF limits is likely to become more relevant with the advent of 5G technology that requires an increasing density of mobile networks.

28. Furthermore, it should be underlined that, as in each agreement, the devil has been in the details from the outset. In fact the parties to the agreement were able to circumvent the commitments by choosing inappropriate sites to fulfill their obligation to provide access to new entrants as there were no explicit prohibitions in the Commitments against this opportunistic behaviour.

29. In light of the above mentioned issues, ecta respectfully invites the Commission to:

i) Include in the final text of the Guidelines a specific focus on the market structure and characteristics with particular reference to the market shares of the parties, the dimension and density of the networks and of

[12] Case T-692/20: Action brought on 18 November 2020 — Iliad Italia v Commission (europa.eu)

network nodes held by the parties, the amount and type of spectrum held by the parties. Accordingly, provide more examples on the treatment of theoretical mobile sharing agreements between the biggest MNOs beyond the extreme one that is already provided in footnote 173 in the Proposed Guidelines;

ii) Include in the list of factors to be considered in conducting the assessment of whether a mobile infrastructure sharing agreement may have restrictive effects on competition in paragraph 303, also the local regulation (EMF) and;

iii) Amend accordingly paragraph 302 by stating that passive sharing is unlikely to give rise to restrictive effects on competition, as long as the network operators maintain a significant degree of independence, confidentiality and flexibility in defining their business strategy, the characteristics of their products and services and their network investments. Unless the existence of local regulations, such as EMF limitations, in the Member States, severely limits the possibility to build new sites near the existing ones and prohibits the increase of the power output (EMF) at the existing sites.

2.2. Sustainability Agreements

30. First of all, ecta wishes to express its appreciation for the inclusion in the Proposed Guidelines of a specific section on sustainability agreements.

31. ecta notes in particular the statement that *"the notion of sustainability objective therefore includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), eliminating pollution, limiting the use of natural resources, respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutrious food, ensuring animal welfare, etc. [313]"* and therefore recognizes that within such an ample perimeter the common and clear interpretation of the EU law provided by the Commission appears crucial in light of the increasing importance that sustainability agreements could have for reaching the sustainability targets set by the International Agreements and the European Union.

32. ecta agrees with the Commission when it states that "*cooperation agreements may become necessary if there are residual market failures that are not fully addressed by public policies and regulations"* and respectfully calls on the Commission to make it even more clear in the final text of the Guidelines that sustainability agreements should be the last resort in addressing market failures only when it is effectively proven that individual sustainability action and other measures such as public policies and sector specific regulations (i.e. mandatory Union pollution standards, pricing mechanisms, such as the Union's Emissions Trading System ("ETS") and taxe) cannot address the market failure at stake.

33. This clarification in the final text of the Proposed Guidelines is crucial because **a too accommodating position towards sustainability agreements could even have the perverse effect of hampering the virtuous competition dynamics that are currently emerging with the growing importance of sustainability**. Sustainability agreements could reduce the incentive for undertakings to compete with each other for the favor of consumers, which increasingly prefer more sustainable products.

34. The final text of the Guidelines should clearly state that **an agreement is only necessary if and insofar it solves a market failure and sustainability claims shall not be accepted if it is plausible that market participants are able to realize the sustainability gain: i) on their own or ii) through public policy action or regulations.**

35. ecta also underlines that a sustainability agreement should also be tailored to the identified market imperfection and should not go beyond its scope or perimeter.

36. ecta fully agrees with the Commission when it states that *"The Agreements that restrict competition cannot escape the prohibition of Article 101(1) for the sole reason that they are necessary for the pursuit of a sustainability objective"* . ecta firmly believes that **sustainability should not be used instrumentally to restrict and hamper the competition dynamics on the market**, through anti-competitive horizontal agreements, **especially in the markets such as parts of the telecommunications market** which are characterized by an **oligopolistic market structure** where the ex monopolist incumbents continue to hold Significant Market Power. **Horizontal agreements, even sustainability ones, between the biggest players are more likely to have a restrictive effect on competition compared to agreements between the smaller players**.

37. The Commission states that "*When parties claim that an agreement, which appears to pursue price fixing, market or customer allocation, limitation of output or innovation, actually pursues a sustainability objective, they will have to bring forward all facts and evidence demonstrating that the agreement genuinely pursues such objective and is not used to disguise a by object restriction of competition If the evidence allows to establish that the agreement indeed pursues a genuine sustainability objective, its effects on competition will have to be assessed".*

38. ecta recognizes and agrees with the Commission that the burden of proof should fall on the parties to the agreement. However ecta respectfully calls on the Commission to clarify, also by the inclusion of fully-fledged examples, which would be the elements of proper evidence and facts to sustain that the agreement would genuinely pursue the sustainability objective.

39. ecta wishes to highlight the importance of the sustainability standardization agreements for the telecommunications sector. The Proposed Guidelines state that *"competitors may wish to agree to phase out, withdraw, or, in some cases, replace non-sustainable products (e.g., fossil fuels such as oil and coal, plastics) and processes (e.g., gas flaring) with sustainable ones"* and add *"For these purposes, competitors may agree to adopt and comply with certain sustainability standards"*

40. Those specific agreements specify the requirements that producers, traders, manufacturers, retailers or service providers in a supply chain may have to meet in relation to possibly a wide range of sustainability metrics such as the environmental impacts of production.

41. While agreeing with the Commission, ecta would like to highlight the importance that an agreement, even when it does not create a restriction by object, meets fully the safe habour principle (i.e. in order to assess that the agreement is unlikely to produce appreciable negative effects on competition and will fall outside Article 101(1)) through meeting the cumulative criteria.

42. To this end, particular attention should be paid, including fully-fledged examples, to ensure that: i) the procedure for developing the sustainability standard is transparent and all interested competitors can participate in the process leading to the selection of the standard; ii) the sustainability standard should not impose any obligations on the undertakings that do not wish to participate in the standard - either directly or indirectly - to comply with the standard; iii) effective and non-discriminatory access to the outcome of the standardisation process should be ensured. This should include effective and non-discriminatory access to the requirements and the conditions for obtaining the agreed label or for the adoption of the standard at a later stage by undertakings that have not participated in the standard development process.

43. With respect to ii) ecta respectfuly asks to the Commission that the final text of the Guidelines provide concrete examples.

44. Moreover, ecta believes that concrete examples in the final text of the Guidelines are needed with respect to the elements to assess the effects of the agreement. If the agreement regards the products of the biggest players on a market, it can concretely affect the competitive dynamics, as it may jeopardize sufficient competition from alternative sustainability labels, standards and/or from products produced and distributed outside of the agreement by the other players. ecta believes that, in contrast to what is written in the Draft Guidelines: "*Even if the market coverage of the agreement is significant, the restraining effect of potential competition may still be sufficient if the agreement leaving the participating firms free to also operate outside the label: consumers will thus have the choice of buying products that bear the label, or products, possibly made by the same undertakings, that do not comply with the label, and hence competition is unlikely to be restricted*" It is quite possible that other players not participating to the agreement given the significant dimension of the participants to the agreement and the importance and popularity of the products or services subject of the agreement would be de facto obliged to follow the parties in agreement in terms of standard, otherwise they would be driven out of the market. In such cases, competition could be restricted also in presence of freedom of operation outside of the agreement.

45. Finally in relation to the assessment that is made under the article 101 (3) with the aim of ascertaining whether the agreement can be exempted once it is assessed that the sustainability agreement would infringe Article 101(1), ecta respectfully invites the Commission to provide more details on price competition

when it comes to the fourth cumulative condition regarding "no elimination of competition".

46. In particular, paragraphs 610 and 611 state respectively: "*According to the fourth condition of Article 101(3) the agreement must not allow the parties the possibility to eliminate competition in respect of a substantial part of the products in question. In essence, the condition ensures that some degree of residual competition will always remain on the market concerned by the agreement, regardless of the extent of the benefits. This last condition may be satisfied even if the agreement restricting competition covers the entire industry, as long as the parties to the agreement continue to compete vigorously on at least one important aspect of competition. For instance, if the agreement eliminates competition on quality or variety, but competition on price is also an important parameter for competition in the industry concerned and is not restricted, this condition can still be satisfied.* ecta notes that price and quality competition are the key elements for healthy unfolding of competition dynamics. ecta also underlines that no case example is reported regarding the agreement cases in which price competition would be restricted. ecta believes that the final text of the Guidelines should clarify that in no cases, an agreement that restricts price and or quality competition could be deemed as satisfying the fourth cumulative criterion of "no elimination of competition".

47. In light of the above mentioned issues, ecta respectfully invites the Commission, in the final text of the Guidelines, to:

    i) clarify that **an agreement is only necessary if and insofar it solves a market failure, and sustainability claims shall not be accepted if it is plausible that market participants are able to realize the sustainability gain: i) on their own or ii) through public policy action or regulations;**

    ii) provide through **concrete examples which would be elements, evidence, facts that** would incontrovertibly **show that an agreement is made for genuine sustainability purposes**;

    iii) **provide concrete and fully-fledged examples**, **with respect to** the criteria that an agreement must fully meet when the same agreement does not create a restriction by object ("**the safe harbour criteria**");

    iv) amend paragraph 575 (on assessing the effects of the agreement) to **confirm that there can be specific cases in which competition would be restricted, also in presence of the freedom to operate outside of the standard**;

    v) clarify in the assessment under the art. 101(3) that, with regard to the fourth criterion of "no elimination of competition", that **any price competition restriction cannot be accepted even though the other elements are not subject to restriction such as product variety**.

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In case of questions or requests for clarification regarding this contribution, The Commission is welcome to contact Mr Luc Hindryckx, ecta Director General or Mrs Pinar Serdengecti ecta Regulation and Competition Affairs Director.