

Horizontal guidelines: new clarity on information exchange and sustainability agreements

**Zalando's contribution to the Public Consultation on the draft
revised Horizontal Block Exemption Regulations and Horizontal
Guidelines, April 2022**



Zalando welcomes the European Commission's public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines. Among other points, the chapters on information exchange and on sustainability agreements in the Horizontal Guidelines bring beneficial clarity for business actors today and for building the EU's vision of a green digital transition towards 2030.

Zalando is a European online platform for fashion and lifestyle¹. Founded in 2008 and headquartered in Berlin, we bring fashion (clothing, footwear, accessories) and beauty products to 48 million active customers in 23 European markets². Our assortment of international brands ranges from world famous brands to local labels. We offer around 1.4 million products, from 5,800 brands to our customers. Zalando counts more than 17,000 employees.

The Horizontal Guidelines are particularly relevant to Zalando as regards information exchange and sustainability agreements. Generally, we believe EU regulation should facilitate voluntary B2B data-sharing both for innovation or research purposes and - equally importantly - so as to generate new growth opportunities for businesses. In addition, Zalando is committed to being a sustainable fashion platform with a net-positive impact for people and the planet. This covers many action points in 3 impact areas: Planet, Products, People³. We therefore pay particular attention to elements enabling this vision in the Horizontal Guidelines.

The revised Horizontal Guidelines bring a new wealth of details on these aspects. Among others, the introduction of a new specific section on sustainability agreements is a welcome addition given that actors previously had to rely on their own assessments.

On the basis of the draft guidelines, we would like to stress the following points:

- **Undoubtedly clearer rules for information exchange:** The revised chapter on information exchange provides new clarity for information exchange on a horizontal level. From a practical business point of view, additional guidance is

¹ <https://corporate.zalando.com>

² Figures for the last 12 month-period, January to December 2021.

³ For details on Zalando's Do.MORE strategy and our first sustainability progress reports, see here: <https://corporate.zalando.com/en/our-impact/sustainability>

valuable, especially with regard to the nature of the relevant information, such as on commercially sensitive and public information, to the characteristics of the exchange (e.g. regarding unilateral disclosure, indirect information exchanges and measures to limit and/or control how data is used), as well as to the use of algorithms.

- **Sustainability Agreements:** The new section on sustainability in the draft Horizontal Guidelines provides a broad guidance on the different analytical routes available for assessing sustainability agreements. We deem this an important step towards more legal certainty for the assessment of these kinds of agreements. This particularly holds true in view of the many sustainability initiatives that Zalando pursues, e.g. with regard to research and development of more sustainable materials or packaging, the advance of sustainability standards in the fashion industry or the fostering of circularity in fashion. Among other examples, for circularity, Zalando collaborates with circular.fashion to apply Circular Design Criteria⁴ and engages in the Accelerating Circularity initiative⁵ which aims to establish systems that will use the embedded value and resources in existing textiles for new products, thereby reducing textile waste and greenhouse gas emissions.
- **The interpretation of the concept of consumer benefits in the Horizontal Guidelines is not fit for building a sustainable and resilient society.** In contrast to the Dutch Competition Authority for example, the European Commission interprets in its draft guidelines the requirement of “allowing consumers a fair share of the resulting benefit” as provided for in Art. 101(3) TFEU rather narrowly. To that end, the draft explicitly emphasizes that benefits resulting from sustainability agreements have to be related to the consumers of the products covered by those agreements in terms of individual use value benefits. As a consequence, general positive externalities such as less pollution or soil erosion, that may be enjoyed by society as such shall not be taken into account unless consumers in the relevant market substantially overlap with, or are part of the beneficiaries outside the relevant market.

⁴ More information at:

<https://corporate.zalando.com/en/newsroom/news-stories/zalando-roll-out-circularfashions-circular-design-criteria-brands>

⁵ <https://www.acceleratingcircularity.org/>

- This approach is too narrow. In view of the fact that sustainability initiatives often (also) aim at generating general positive externalities, while lacking evidence as to a specific share of benefit for the concrete consumers (e.g. the use of green energy for production), the draft does not go far enough to support meaningful sustainability initiatives and the European Green Deal as such.
- On the contrary, we believe that the assessment should not be limited to the benefits that consumers of the products directly enjoy but should include a broader view on the further interests affected. In many respects sustainability agreements, particularly those aiming at reducing harm to environment, people and nature, benefit both consumers as well as society in general. In other words, they bring collective benefits.
- Under these circumstances it seems adequate that the “fair share of the resulting benefits” can (also) be attributed to society and not only to a specific group of consumers. Examples of what constitutes societal benefits can be found in other pieces of EU legislation, such as the proposed Corporate Sustainability Due Diligence Directive, the proposed Corporate Sustainability Reporting Directive or based on the on-going technical and legislative work of the European Commission to ensure claims of sustainability at product level are reliable and justified.

To conclude, the new Horizontal Guidelines bring much welcome clarity on horizontal exchange or sustainability agreements, although the concept of consumer benefit could be extended to societal benefits in general, in our view.

The Horizontal Guidelines do not address the exchange of information in the context of dual distribution, which is dealt with separately in the European Commission’s draft new Vertical Guidelines.

However, the continuously increasing importance of voluntary B2B data cooperation for European companies, whether in horizontal or vertical relationships, would in our view be more comprehensively addressed on the basis of a new, all-encompassing approach, possibly through a new “Block Exemption Regulation for data cooperation”.