

Response to public consultation

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

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I INTRODUCTION & SUMMARY

- 1 LTO Nederland (“**LTO**”) is the Netherlands Agricultural and Horticultural Association – the association for farmers and growers in the Dutch agricultural and horticultural sector. LTO is an association of three associations of undertakings: LTO Noord, ZLTO and LLTB. Together they represent over 35,000 undertakings in the Dutch agricultural and horticultural sector. LTO is a member of Copa (the Committee of Professional Agricultural Organisations). LTO is committed to the improvement of the socio-economic position of the undertakings and persons it represents.
- 2 BarentsKrans Coöperatief U.A. (“**BarentsKrans**”) is an independent firm of lawyers and civil-law notaries. BarentsKrans is based in the Hague and its (approximately) 90 lawyers represent Dutch and international clients in both domestic and international matters. BarentsKrans has a strong presence in the food & agri sector (originating from its proximity to the Dutch horticultural hub in the *Westland*) and in the sustainable energy sector.
- 3 LTO and BarentsKrans welcome the guidance provided by the Commission’s draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (the “**Guidelines**”) as well as the opportunity to contribute to the public consultation. In particular, LTO and BarentsKrans are pleased by the inclusion of guidance specifically aimed at sustainability agreements in chapter 9 of the Guidelines. European policy – rightly – focuses on sustainable production and consumption. In order to deliver on the European Green Deal objectives, including the Farm-to-Fork and Biodiversity strategies, responsibility needs to be shared among all actors in agriculture and in society as a whole. Transitioning to more sustainable production comes with challenges and requires significant effort from producers – among others in the agricultural and horticultural sector: farmers and growers (traditionally family-owned businesses). To meet those challenges, coordination may be required to ensure that the European farming community can effectively transition to sustainable production whilst ensuring a living wage for all parties involved. The number of farmers and growers in the EU is falling year after year, because many of them face financial difficulties. Their capacity to deal with the transition to more sustainable production is often hampered by low (sometimes below-cost) prices offered for their products. In light of the importance of sustainable development, remedying such market failure should be one of the main objectives of the Guidelines.

II GENERAL REMARKS

- 4 LTO and BarentsKrans appreciate the guidance provided by the draft Horizontal Guidelines. LTO and BarentsKrans consider that such guidance provides a degree of legal certainty to businesses that may facilitate initiatives that in turn create significant efficiencies. If misconstrued, guidance may also restrict the emergence of initiatives that may have had significant benefits to consumers and to society as a whole. For example if businesses wrongly assume that the guidance provided in the Guidelines are an exhaustive list of agreements that may fall outside of article 101(1) TFEU or may be exempted under article 101(3) TFEU. Therefore, it should be clearly communicated that behaviour that falls outside the guidance provided in the Guidelines does not necessarily infringe

the cartel prohibition but must be analysed on a case-by-case basis. LTO and BarentsKrans appreciate that the draft Guidelines contain clear remarks that examples provided are not exhaustive. LTO and BarentsKrans suggest that such remarks may also be included in the chapter on sustainability agreements. In particular, such a remark may be included at chapter 9.3 regarding the assessment of sustainability agreements under Article 101(1). This chapter currently contains principles regarding the assessment of sustainability agreements under article 101(1) TFEU as well as a more detailed analysis of sustainability standardisation agreements. It would be useful to reiterate that other types of agreements, such as those mentioned in chapters 9.2 and 9.3.1, may similarly fall outside the scope of article 101(1) TFEU.

III SUSTAINABILITY AGREEMENTS

- 5 As a general remark, LTO and BarentsKrans submit that sustainability agreements aim to provide a solution for the negative externalities that are the result of non-sustainable consumption. Simply put: many of the costs of production are externalized. The true costs of non-sustainable consumption may not be borne by the consumers using the products but those costs certainly exist. Those costs may, for example, include environmental costs resulting from greenhouse gas emissions that are borne by society now and in the (distant) future, while consumers using a product today only bear a small part of those costs. The same applies to social welfare costs involved in the production in low-wage countries. Such costs are not borne by consumers of the products even though those consumers reap the price benefits.
- 6 Remedying such negative externalities is the aim of sustainability initiatives. Solving market failure is by definition rarely without costs. It is widely recognized that a solution to solving negative externalities is their internalisation in prices.¹ While government intervention generally negates competition concerns, there are a myriad of reasons why private action from undertakings may be essential to achieve the goals set by the European Green Deal and the United Nation's Sustainable Development Goals (SDGs). Such private actions generally require agreements to ensure that initiatives cover a sufficient part of the market and to prevent free riding and first mover disadvantages. Solving those issues often requires coordination on competitive elements to ensure that the internalisation of negative externalities is made possible and results in a sustainable supply chain – from farm-to-fork.

III.1 Efficiency gains

- 7 LTO and BarentsKrans welcome the recognition by the European Commission that collective benefits may derive from sustainability initiatives and may be taken into account when assessing such initiatives (para. 9.4.3.3. of the Guidelines). LTO and BarentsKrans will, in a separate chapter, discuss the application of the fair share-criterion to such benefits. For the purpose of showing these

¹ Pigou, A.C. (2019). *The Economics of Welfare*. London: Macmillan; Laffont, J.J. (2008). Externalities. In *The New Palgrave Dictionary of Economics*. London: Palgrave Macmillan. Available at https://doi.org/10.1057/978-1-349-95121-5_126-2/

types of benefits, LTO and BarentsKrans would welcome any guidance the Commission could provide regarding methodologies to, quantitatively or qualitatively, substantiate collective benefits.

- 8 In para. 87 of the Commission Guidelines on the application of Article 81(3) of the Treaty it is recognized that future benefits may be taken into account to determine if consumers receive a fair share of the benefits. Such future benefits are particularly relevant within the context of sustainability agreements. These types of agreements aim, by their nature, for future benefits. That follows directly from the description of sustainability agreements used by the Commission in para. 543 of the Guidelines: *“In broad terms, sustainable development refers to the ability of society to consume and use the available resources today without compromising the ability of future generations to meet their own needs.”* For example, the benefits of sustainability initiatives that aim to reduce pollution or greenhouse gas emissions are largely future benefits. Slowed climate change (and the avoided costs resulting from that reduction) and a reduction in medical costs are important benefits that may derive from sustainability initiatives and that are mostly enjoyed in the future – even by future generations.
- 9 In short: future benefits are central to sustainability initiatives. LTO and BarentsKrans appreciate the recognition given to such benefits in the Guidelines. At the same time, there is at present limited guidance on how undertakings may account for future benefits in their analysis of efficiencies resulting from sustainability initiatives. LTO and BarentsKrans would welcome any guidance the Commission could provide on this topic since future benefits are central to sustainability initiatives.

III.2 Fair share-criterion

- 10 LTO and BarentsKrans appreciate that the European Commission acknowledges the collective benefits that may derive from sustainability agreements. Such benefits may be the most important effects of sustainability agreements and may not always be properly evaluated and appreciated by consumers of the relevant products. Furthermore, it is appreciated that the Commission aims to set out a framework for putting forward collective benefits in para. 606.
- 11 Furthermore, LTO and BarentsKrans recognize that competition may very well result in sustainability improvements if undertakings are in a position to effectively compete with each other regarding sustainable production and distribution. However, certain market failures may not be solved, in a timely matter, through competition. In those circumstances coordination may facilitate sustainable production. The starting point in those circumstances should be that exemption of sustainability initiatives may be possible if the benefits to society outweigh the increased cost that is passed on to consumers.² If the costs clearly outweigh the benefits of an initiative, exemption should not be possible. Such a safeguard prevents *greenwashing* of anti-competitive agreements that have no material benefits to society.

² Consider as an example the description in Section three of Ellison, Jordan, A Fair Share: Time for the Carbon Defence? (February 21, 2020). Available at SSRN: <https://ssrn.com/abstract=3542186> or <http://dx.doi.org/10.2139/ssrn.3542186>.

- 12 It seems that the Commission takes the position, in paras. 588 and 603 of the Guidelines,³ that consumers must be fully compensated for any harm resulting from the agreement by the benefits deriving from the agreement. For that purpose “consumers” are all direct or indirect users of the products. LTO and BarentsKrans are of the opinion that the case law from the European Court of Justice supports a broader interpretation of the fair share-criterion. LTO and BarentsKrans submit that the fair share-criterion may be satisfied if consumers are not fully compensated for price increases resulting from the initiative.
- 13 In the view of LTO and BarentsKrans, the application of the fair share-criterion must reflect the legitimate goals of sustainability initiatives: to correct market failures and minimize negative externalities resulting from unsustainable production. That may result in consumers being not fully compensated for higher prices resulting from sustainable production. However, that must not stand in the way of exemption of such agreements if there is concrete evidence that the collective benefits, now and in the future, outweigh the additional costs. Furthermore, the case law from the European Court of Justice supports an approach in which the fair share-criterion is satisfied when consumers receive a fair share of the benefits without being fully compensated.
- (a) First, in *Consten and Grundig*⁴ the Court indicated that the objective advantages deriving from an agreement must compensate for the disadvantages which they cause in the field of competition. That leaves open the question as to the compensation of consumers. Similarly, in *Shaw*, the Court of First Instance did not deal with the question if consumers must be fully compensated. The Court merely considered that the effects of an agreement must not be assessed for each individual consumer but rather for consumers as a whole.
- (b) Second, in *Compagnie Générale Maritime*,⁵ the Court of First Instance concluded that beneficial effects of an agreement outside of the markets concerned should be considered in the context of article 101(3) TFEU.

“For the purposes of examining the merits of the Commission’s findings as to the various requirements of Article 85(3) of the Treaty and Article 5 of Regulation No 1017/68, regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market, namely that for inland transport services provided as part of intermodal transport, but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement. Both Article 5 of Regulation No 1017/68 and Article 85(3) of the Treaty envisage exemption in favour of, amongst others, agreements which contribute to promoting technical or

³ Footnote 44 of the Guidelines furthermore refers to the Commission Guidelines on the application of Article 81(3) of the Treaty which sets out the position of the Commission in respect of the fair share-criterion with a reference to *Consten and Grundig*.

⁴ ECJ 13 July 1966, joined cases 56 and 58/64 (*Consten and Grundig*), ECLI:EU:C:1966:41.

⁵ CFI 28 February 2002, case T-86/95 (*Compagnie Générale Maritime*), ECLI:EU:C:2002:50.

economic progress, without requiring a specific link with the relevant market.”

- (c) Third, in *Mastercard*,⁶ the Court of Justice of the European Union endorsed the notion that out-of-market benefits count towards the benefits that must be weighed to establish if consumers receive a fair share of the benefits of an agreement.

- 14 Furthermore, the approach suggested by LTO and BarentsKrans is not only supported by competition lawyers, economists and NCAs⁷ but also by the European Commission itself in its decisional practice. LTO and BarentsKrans rely on the *CECED* decision in which the Commission exempted an agreement on the basis of societal benefits, even if customers of the undertakings involved did not benefit from the agreement.

“(56) The Commission reasonably estimates the saving in marginal damage from (avoided) carbon dioxide emissions (the so-called “external costs”) at EUR 41 to 61 per ton of carbon dioxide. On a European scale, avoided damage from sulphur dioxide amounts to EUR 4000 to 7000 per ton and EUR 3000 to 5000 per ton of nitrous oxide(11). On the basis of reasonable assumptions, the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines.”⁸

- 15 In summary, LTO and BarentsKrans consider that the fair share-criterion is satisfied if the overall benefits to society outweigh the negative effects on competition and consumers of the products receive at least some of the benefits, without necessarily being fully compensated. LTO and BarentsKrans submit that this approach is not only in line with the cited case law but also maximizes the potential for the creation of societal benefits and a fair distribution of costs.⁹

III.3 Quantitative analysis

- 16 Quantification of efficiency gains as well as the weighing of benefits and harm to competition are the most prominent hurdles for a successful exemption of sustainability initiatives. While it is appreciated that a qualitative substantiation of efficiency gains may suffice, quantification provides undertakings with increased legal certainty in a self-assessment context.
- 17 LTO and BarentsKrans consider that the Commission seems to focus on willingness to pay-methodologies for the quantification of efficiency gains. For example in para. 597 of the Guidelines, the Commission makes the following remark.

⁶ ECJ 11 September 2014, case C-382/12 P (*Mastercard*), ECLI:EU:C:2014:2201.

⁷ Consider the response submitted by the Authority for Consumers and Markets to the public consultation for the Guidelines.

⁸ Commission decision of 24 January 1999, Case IV.F.1/36.718.CECED.

⁹ Consider the contribution by Maurits Dolmans, *The “polluter pays” principle as a basis for sustainable competition policy*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3735561

“Consumers who are ready to pay more for such products perceive them to be of a higher quality, precisely because of the benefits accruing to others. Therefore, from an economic perspective, such indirect qualitative benefits are not different from the usual quality-enhancing benefits that increase the direct use value of a product, discussed above in Section 9.4.3.1. Measurement of such indirect, non-use value benefits can be undertaken by investigating the consumers’ willingness to pay, for instance, through customer surveys.”

- 18 LTO and BarentsKrans respectfully submit that a willingness to pay analysis may not always provide useful results. First, consumer surveys are by their nature fairly sensitive to manipulation. Second, consumers may not fully appreciate future benefits deriving from agreements. There is generally a disconnect between consumers’ stated preference and their actual purchasing behaviour. Furthermore, it is very difficult to fully appreciate future benefits that are enjoyed by consumers. It is even more difficult to appreciate benefits enjoyed by others such as non-users or future generations. For those reasons, LTO and BarentsKrans welcome any guidance the Commission could provide regarding other methodologies to quantify benefits deriving from sustainability initiatives.
- 19 LTO and BarentsKrans call attention to the true costs method to quantify the value of production and to calculate effects of sustainability initiatives. In short, true costs accounting aims to measure the true costs of products including all costs of a product that would otherwise be left out of the analysis. For example, conventional costs analyses may not incorporate indirect costs of unhealthy or unsustainable food into the analysis. A conventional cost analysis would simply consist of the production costs of the product while it ignores environmental costs such as greenhouse gas emissions, land use, water use and air pollution. Conversely, conventional cost analyses do not incorporate benefits that derive from sustainable production. In short: the true costs of unsustainably produced products are underestimated while the price of sustainably produced products is inflated.
- 20 Using true cost accounting may yield far more reliable results regarding costs and benefits of sustainable production than using willingness-to-pay methodologies. More and more experience with true cost accounting is gained. Examples include, among many others, research into true costs of eco-agri-food systems,¹⁰ the true cost of milk production,¹¹ the true price of meat production,¹² the true price of cocoa production¹³ and the true price of jeans.¹⁴ Furthermore research institutes such as Impact Institute¹⁵ and True Price¹⁶ have published frameworks for the application of true cost

¹⁰ Baltussen, W., T. Achterbosch, E. Arets, A. de Blaeij, N. Erlenborn, V. Fobelets, P. Galgani, A. De Groot Ruiz, R. Hardwicke, S.J. Hiemstra, P. van Horne, O. A. Karachalios, G. Kruseman, R. Lord, W. Ouweltjes, M. Tarin Robles, T. Vellinga, L. Verkooijen; *Valuation of livestock eco-agri-food systems: poultry, beef and dairy*. Wageningen, Wageningen University & Research, Trucost & True Price, publication 2017-039.

¹¹ John van Duursen en Kim van der Leeuw, *De echte prijs van melk* (2016), available at: https://www.ngpf.nl/wp-content/uploads/2016/02/NGPF_RAPPORT_ECHTE_PRIJS_MELK_240216.pdf.

¹² Sander de Bruyn, Geert Warringa, Ingrid Odegard, *De echte prijs van vlees* (2018), https://ce.nl/wp-content/uploads/2021/03/CE_Delft_7N81_De_echte_prijs_van_vlees_DEF.pdf.

¹³ True Price, *The True Cost of Cocoa Prepared for: Tony's Chocolonely* (2018 progress report. V3.2), available at: <https://trueprice.org/wp-content/uploads/2018/11/The-True-Price-of-Cocoa.-Progress-Tonys-Chocolonely-2018.pdf>

¹⁴ Impact Institute, *The true price of jeans* (2019), available at: <https://www.impactinstitute.com/wp-content/uploads/2019/06/Impact-Institute-Report-True-Price-of-Jeans.pdf>

¹⁵ <https://www.impactinstitute.com/>

¹⁶ <https://trueprice.org/>

accounting. LTO and BarentsKrans advocate the inclusion of alternative efficiencies quantification methods such as true cost accounting.

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