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*Recht voor Klimaat's* contribution to the European Commission's consultation on the Draft guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings [reference: HT.100055 Guidelines on exclusionary abuses]

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## Key points

- The lack of focus on sustainability in the draft Guidelines on exclusionary conduct is a missed opportunity to combat unsustainable behaviours, encourage more sustainable market behaviour, and ensure a coherent approach at national and EU level.
- The objective necessity defence is construed too restrictively in the draft Guidelines, as is the efficiency defence, which is moreover not in line with the approach under Article 101(3) TFEU. This may prevent dominant undertakings from acting sustainably.
- It is important that the final version of the Guidelines takes into account externalities when considering an “as efficient competitor” (AEC) analysis, including where potential pricing abuses are involved.

# 1. Introduction

*Recht voor Klimaat* (“Law for Climate”) is a foundation established under Dutch law that has the objective of encouraging lawyers and other legal practitioners to use legal means to promote the observance of our planetary limits, focusing on climate change. We welcome the opportunity provided by the Commission to comment on its draft guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings (“the draft Guidelines”). Given the nature of *Recht voor Klimaat*, our comments concern the relationship between abusive conduct by dominant undertakings and sustainability.

## 2. Our general view on the relationship between sustainability and dominance abuse

In our view, sustainability considerations can play an important role under abuse of dominance as “sword” and “shield”, i.e. respectively to prosecute unsustainable behaviour and to protect sustainable behaviour:

- This applies to exclusion – think for instance of predation in relation to competitors who are taking externalities into account by dominant operators who ignore externalities.
- It also applies to exploitation – think for instance of violations of legal norms in relation to climate change, such as harmful emissions, that entail harm to consumers.

However, competition law enforcement is currently not ready to address these concerns in EU law in a coherent and constructive manner, and the draft Guidelines do not provide the necessary clarity – even on the exclusionary aspects of sustainability related abuse. In that sense they are a missed opportunity.

Below we will provide more detail on what the draft Guidelines do not cover in this respect, and what in our view the final version should instead include from a sustainability perspective.

## 3. Missed opportunities re sustainability in the draft Guidelines

We find the draft Guidelines fall short on the following five points:

- I. First, the draft Guidelines do not go into the concept of sustainability as a “sword” nor as a “shield”. There is no separate sustainability chapter as was included in last year’s Guidelines on the applicability of Article 101 of the TFEU to horizontal cooperation agreements (2023: “the Horizontal Guidelines”). The only explicit mention of sustainability is in footnote 4, but as an elaboration on the concept of quality. This does obviously not provide for the required clarity and is a missed opportunity in our view. In order to provide clarity about the Commission’s policy regarding the prosecution of unsustainable behaviour and to protect sustainable behaviour we recommend including a separate chapter, or at least some text dedicated to this topic in the final version (see also the next points).

- II. Second, there is no extension of the sustainability principles for efficiency that were introduced under those Horizontal Guidelines (Article 101 TFEU) to the draft Guidelines (Article 102 TFEU). The efficiency exception proposed for Article 102 TFEU is different from that under Article 101(3) TFEU in the sustainability chapter of the Horizontal Guidelines (chapter 9). This discrepancy leads to a proliferation of competition standards that is both unhelpful and not justifiable. We recommend introducing the three categories of individual use and non-use benefits as well as collective benefits that were introduced under Article 101 TFEU by the Horizontal Guidelines under Article 102 TFEU as well. In addition, we recommend taking a broader general view on the collective benefits that can be accepted.
- III. Thirdly, also missing from the draft Guidelines is a clear steer on the exception for legitimate objectives under the objective justification. That could have been done in line with the *Wouters* approach that has often been advocated and has been used repeatedly under Article 101 TFEU. We do note that the draft Guidelines contain references to the *Meta* ruling that Article 102 TFEU can be applied to the infringement of rules that pursue different objectives. This may partially fill the gap on legitimate objectives that we have just noted.
- IV. Fourthly, the draft Guidelines contain ample references to the AEC principle. However they do not detail how externalities are to be taken into account in this context, notably in relation to pricing abuses where the AEC principle is in practice most relevant.
- V. Finally, the draft Guidelines do not contain guidance on the relationship with sustainability legislation, notably the Corporate Sustainability Due Diligence Directive (CSDDD). This Directive, once implemented in national legislation, requires undertakings, including dominant undertakings, to enforce sustainability norms in the vertical dimension. Such actions can include refusals to deal and boycotts that would normally raise competition concerns.

Below, we will address these points in more detail, where relevant.

## 4. Suggestions for including sustainability in the final version of the draft Guidelines

### A consistent approach to Articles 101 and 102 TFEU

There is a need for a consistent application of Articles 101 and 102 TFEU, in the sense that the conditions for analysis under *Wouters* case law (legitimate objective, necessity, proportionality), and the conditions for exemption under Article 101(3) TFEU (contribution to improving the production or distribution of goods or to promoting technical or economic progress; fair share to consumers; necessity; residual competition) should be applied *mutatis mutandis* for the assessment of whether there is an “abuse” in the first place, and of whether exclusionary conduct is justified.

In connection with the “fair share to consumers”, it should be kept in mind that when applied to sustainability conduct (or agreements) that resolve market failure, the *Mastercard* case does not require a substantial overlap between consumers who benefit from the sustainability and the consumers who may bear part of the costs. Therefore:

- Firstly, fair compensation for consumers can result from out of market benefits for a larger group of beneficiaries that includes the consumers who are also present in the relevant market, for instance because the relevant benefits accrue to society as a whole.
- Secondly, *Mastercard* concerned a balancing of financial/commercial private benefits and costs for different groups of consumers, not a balancing of private costs against public benefits

- Thirdly, the principle underpinning *Mastercard* is that it is unfair to ask one group of consumers to pay (without compensating them) for a private benefit for another group of consumers.
  - Similarly, it is unfair to ask one group/society to accept a cost caused by production / consumption benefiting another group (without compensation) – *i.e.*, unfair to insist that a polluter should be *paid* to stop polluting as a condition for exempting a sustainability agreement.
  - *Mastercard* is thus entirely consistent with the “polluter pays” rule in Art 191(2) TFEU
- This means:
  - If public benefits/avoided social costs exceed private costs: conduct or agreement is justified / exempt;
  - Only if private costs exceed public benefits/avoided social costs, then consumers who pay should receive a fair share in the form of “*appreciable objective advantages of such a character as to compensate for the disadvantages which that agreement entails for competition.*”

## Objective justification

The current wording of paragraph 168 of the draft Guidelines on objective necessity does not mention sustainability. One could consider it to be an “other public interest consideration” in the sentence “*While the arguments supporting an objective necessity defence may also relate, for instance, to public health, safety or other public interest considerations*”. We believe, however, that for clarity sake, and given the importance of it, sustainability should be mentioned explicitly.

Moreover, paragraph 168’s current wording is too restrictive. The case law is considerably more nuanced than how it is currently represented in the draft Guidelines. For instance, with reference to *Hilti* and *Tetra Pak*, the draft Guidelines suggest the Commission remains committed to the primacy of government action and in relying on public enforcement of sustainability norms. But *Hilti* concerned an *ex post facto* excuse for exclusionary tying, and should not be taken as a reliable precedent for conduct that is genuinely designed to achieve sustainability goals in a proportional manner. Such action should not be considered “abuse” to begin with. Observing the reality of deficient Government action (lack of effective regulation, and inadequate enforcement of such regulation as exists) we think effective and proportional sustainability action should be allowed even if it has the effect of reducing competition from rivals who use unsustainable products or processes, and who compete on the basis of unsustainable exploitation of the environment commons. Ex post public enforcement of sustainability norms is in many instances too little too late: not effective enough or non-existent.

As a matter of more recent case law (e.g. *Stichting Certificatie Kraanverhuurbedrijf*, *Slovak Banks*, *Allianz Hungaria*), private enforcement of public norms is already possible where public enforcement falls short, the review does not involve complex assessments that only public authorities can carry out, the restrictions concerned are effective and proportional to the legitimate objective of ensuring compliance with a public norm, consumers benefit, all competition is not excluded, and restrictions are applied in observance of procedural fairness. Hence, it is necessary to allow not just standardisation agreements but compliance agreements as a form of private enforcement – especially where there are first mover disadvantages. Similarly, dominant firms should be allowed to enforce public standards privately and ex ante under the objective necessity defence.

In fact, such enforcement is in certain cases required by the CSDDD. For instance, where needed, a dominant firm should be allowed to cut off supply to a customer who uses it for unsustainable activities, or to stop purchasing from a supplier who produces in an unsustainable manner. As stated above, the current wording of paragraph 168 in the draft Guidelines is too restrictive. As a result, dominant undertakings might be unnecessarily hesitant in taking the required steps from a

sustainability perspective. Especially since the current wording might imply for less informed readers (those who do not know the mentioned judgements in detail) that an objective necessity defence relating to “an other public interest” will be very difficult, given that “*the Union Courts have confirmed that it is not the dominant undertaking’s task to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or as inferior in quality to its own products, nor more generally to enforce other undertakings’ compliance with the law*”. This might give the impression that even if products are indeed (“rightly”) dangerous from a sustainability perspective (e.g. containing toxic substances) a dominant undertaking is constrained in taking the right measures. Therefore, we emphasise that it is important to clarify that sustainability can be used as an objective justification and that the *Hilti* and *Tetra Pak* judgments only apply in very specific circumstances.

## Include externalities

The draft Guidelines should indicate that the Commission may include externalities in the costs of the dominant undertaking when assessing possible abuses of dominance involving exclusionary pricing. Likewise, the Guidelines should suggest that externalities may be taken into account when conducting an “as efficient competitor” (AEC) test. This is even more important in the light of the most recent *Intel* judgement and the *Qualcomm* case on strategic predation. For example, when a dominant producer of cheap (non- or less recyclable) plastics temporarily lowering prices to push a smaller, innovative competitor offering biodegradable packaging out of the market. Thus, in an assessment of whether a particular type of conduct is capable of excluding a sustainable rival, the cost base of the dominant firm using unsustainable input or production, or producing unsustainable output, should include not only the actual market costs of the dominant firm, but also the externalities, such as the social cost of carbon that the dominant firm emits and the targeted sustainable rival avoids.

## 5. Conclusion

Hopefully, the flaws noted above will be remedied in the final version of the draft Guidelines. The background, beliefs and brief of future Executive Vice President Ribera suggest that she may promote more effective competition enforcement concerning sustainability, including based on Article 102 TFEU. We hope this will involve making clear statements to promote legal certainty, including by means of informal guidance and/or Article 10 Decisions under Reg 1/2003.

Kind regards,

on behalf of *Recht voor Klimaat*,  
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