

Ministerie van Economische Zaken
en Klimaat

**Response of the Dutch Ministry of Economic Affairs and Climate Policy on
the public consultation on the draft revised Horizontal Block Exemption
Regulations and Horizontal guidelines 2022**

Datum 26 april 2022

Status Definitief

Introduction

The Dutch Ministry of Economic Affairs and Climate Policy (hereafter: The Netherlands) welcomes the Commission's draft revised Horizontal Block Exemption Regulations (HBERs) and the accompanying Horizontal Guidelines. The Horizontal Guidelines are currently not fully adapted to economic and societal developments, such as the pursuit of sustainability goals that help support the European Green Deal.¹ We hereby submit our response to the public consultation of the Horizontal Guidelines and in particular to the new Chapter 9 on sustainability agreements. The Netherlands much welcomes the draft revised Guidelines, but also has suggestions for further improvement.

Background

For some years now, the Netherlands has together with the Dutch Competition Authority (ACM)² pleaded for the application of EU competition law in such a way that it facilitates sustainability agreements that benefit society.³ Competition law does not in principle hinder these agreements. Moreover, a strong competition framework and enforcement of Article 101 TFEU is of ongoing importance. At the same time, we observe that companies abstain from 'green' cooperation for a fear of cartel fines, and due to uncertainty on the application of guidelines on horizontal and vertical agreements.⁴ For example, discussing the phasing out of certain polluting production methods might already be perceived as a cartel. In our experience, voluntary agreements among undertakings can contribute to attaining public sustainability goals and are usually implemented faster than public legislation.⁵ To increase legal certainty for undertakings, the Netherlands has urged the Commission to provide clarity and guidance on the application of the competition framework.

General remarks

The Netherlands very much welcomes the reintroduction of a sustainability chapter in the Horizontal Guidelines (Chapter 9), including a soft safe harbour for sustainability standardisation agreements. The Netherlands appreciates that the guidance provided by the Commission in section 9.3 can help take away legal uncertainty among market participants who wish to cooperate in order to develop or comply with sustainability standards.

Moreover, the Commission acknowledges in section 9.4 that *'sustainability agreements can produce efficiencies, such as the use of cleaner production or distribution technologies, less pollution, improved conditions of production and distribution, more resilient infrastructure or supply chains, better quality products, etc. They can also avoid supply chain disruptions, reduce the time it takes to bring sustainable products to the market and can help to improve consumer choice by facilitating the comparison of products.'* The Netherlands welcomes the Commission's explicit acknowledgement of sustainability benefits as part of the efficiency gains.

Further improvements

To ensure that also the more ambitious sustainability initiatives might be deployed, and to leave potential room for agreements which "push the boundaries", The Netherlands has some suggestions for improvement to Chapter 9, set out below. The Netherlands trusts the Commission will give due weight to these suggestions and looks forward to the final text.

¹ European Commission (2021), Commission Staff Working Document: Executive Summary of the Evaluation of the Horizontal Block Exemption Regulations, p. 2. See also: Speech Vestager (2020) [The Green Deal and competition policy | European Commission \(europa.eu\)](#)

² See also the submitted response of ACM to the public consultation on HBERs: [Response ACM public consultation horizontal block exemptions and guidelines](#)

³ Minister EZK "Duurzame ontwikkeling en beleid", Kamerstuk 30196, nr. 354 (in Dutch)

⁴ The tension between competition law and sustainability was experienced in 2013 when the voluntary closing of the last five coal-fired plants in the Netherlands could not be exempted under the Dutch equivalence of Article 101(3) TFEU and was therefore seen as an infringement of competition law.

⁵ As is also recognized in the Ecodesign Directive (2009/125/EC). "(19) Self-regulation, including voluntary agreements offered as unilateral commitments by industry, can enable quick progress due to rapid and cost-effective implementation, and allows for flexible and appropriate adaptations to technological options and market sensitivities."

Rethink 'a fair share' to consumers when it comes to sustainability agreements

One of the conditions of Article 101(3) TFEU is that consumers must receive 'a fair share' of the resulting efficiency gains attained by indispensable restrictions. In section 9.3.4 of the draft revised Horizontal Guidelines, it is stated that consumers receive a fair share of the benefits when the overall effect on consumers in the relevant market is at least neutral. To the extent that this implies full compensation, The Netherlands believes that this interpretation is too narrow.

It is the view of The Netherlands that the consumer does not need to be fully compensated in this context. Only an appreciable objective advantage must be enjoyed by consumers within the relevant market. Hence, collective benefits that accrue to parties that are not (also) consumers within the relevant market, such as a reduction in global carbon emissions, should count towards the fair share for consumers. Methods such as shadow prices based upon prevention costs can be useful in this respect. Sustainability initiatives that are ambitious in reducing global carbon emissions, a cornerstone in EU-policy, should also be cleared under the draft revised Horizontal Guidelines, or at least should the fair share criterion not be a hurdle in clearing such initiatives.

Future (generation) benefits should also be taken into account, as they are inherent to sustainability agreements. Although the Commission acknowledges future benefits, more guidance on how to take into account future benefits could be useful.

The Netherlands endorses the response to the public consultation of The Netherlands Authority for Consumers & Markets (ACM) as well as ACM's Guidance on sustainability agreements in which the abovementioned interpretation is explained.⁶ In this context, The Netherlands also refers to ACM's legal memo on the meaning of a fair share for consumers in Article 101(3) TFEU in a sustainability context.⁷

Exempt agreements that restrict below standard competition and comply with national or international legal standards from article 101(1) TFEU

The Netherlands believes that agreements which restrict below standard competition and which aim to comply with national or international legal standards, should fall outside the scope of article 101(1) TFEU or at least under the scope of the new soft safe harbour. These agreements usually derive from international conventions and treaties that protect the environment or concern fundamental (social) rights. In this respect, we concur with ACM's view (page 7 and 10 of the ACM response to the public consultation).

Indispensability

The Horizontal Guidelines state in section 9.4.2 that '*where EU or national law requires undertakings to comply with concrete sustainability goals, cooperation agreements and the restrictions they may entail, cannot be deemed indispensable for the goal to be achieved*'. The Netherlands concurs with ACM (page 9 of ACM's response) that the requirement of indispensability should cover agreements to exceed or accelerate public targets, not exclude them.

⁶ Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law (acm.nl) (Chapter 5)

⁷ ACM, What is meant by a fair share for consumers in Article 101(3) TFEU in a sustainability context?, 27 September 2021: [acm-fair-share-for-consumers-in-a-sustainability-context_202109.pdf](#)