

Submission to the public consultation on the revision of
the Block Exemption Regulations for horizontal
cooperation agreements and the Horizontal Guidelines

Brussels, 5th of October 2021

This document includes the feedback given by the Fair Trade Advocacy Office (FTAO) to the European Commission's questionnaire on the public consultation on the revision of the Block Exemption Regulations for horizontal cooperation agreements (HBER) and the Horizontal Guidelines (HG). For more information please contact Fabian Richter (richter@fairtrade-advocacy.org).

Please describe the relevance of the HBERs and the Horizontal Guidelines for your activities and/or your organisation.

Answer to **'Horizontal Guidelines'**

While many fair-trade enterprises can and do achieve some meaningful progress on key sustainability goals by acting alone, more structural issues do require partnership and collective action, involving a wide range of stakeholders. This may mean engaging with the likes of government agencies, NGOs, researchers, farmers, suppliers, retailers and/or competitors.

The Fair Trade Advocacy Office is part of several multi-stakeholder initiatives (MSIs) involving competitors. Therefore, we invite the EC to also clarify the role of NGOs and civil society organisations with regard to competition law when they participate in MSIs involving competitors.

Please explain what prompted you to consider cooperation with your competitors instead of pursuing the stated sustainability objective on your own and why the agreement was necessary to reach that objective.

5000 character(s) maximum

Horizontal agreements aimed at having positive impacts on society (*e.g.*, waste reduction, the reduction of emissions, the provision of living wages and a living income upstream) often require cooperation among competing actors to be effective and to be able to allocate their benefits most effectively. The objectives of the agreement may not be attainable by any of the actors acting unilaterally, nor in some cases by public authorities, since they might require taking action outside of the EU. By the same token, if acting alone, there might be a significant "first mover disadvantage" involved for those business actors who decide to take action in markets where customers are highly sensitive to price or where there is little scope for product differentiation. There are sufficient experiences proving that the first mover disadvantage is a real issue for those companies who decide to move forward unilaterally to adopt sustainability standards, while their competitors continue to offer less sustainable (and often cheaper) products. The case of Lidl, which backed away from its decision in September 2018 to sell only Fairtrade bananas, offers a classic example of vulnerability to entrenched consumer behaviour (see: <https://www.bananalink.org.uk/news/lidl-backs-away-from-fairtrade-bananas/>). This is precisely the reason why collaboration among competitors is often required to achieve a positive result in social policy terms.

A study by the Fairtrade Foundation lays out that, in particular in the cocoa industry, multiple actors along the supply chains recognise the need for collaboration to achieve meaningful progress on key sustainability goals. *“Many leading market actors have already identified the critical need for action in many agricultural supply chains, as well as the need for collective action. This is particularly true in the banana and cocoa sectors, where market players have begun to work together in multiple collaborative forums to tackle sustainability issues.”* ([Competition Law and Sustainability - Fairtrade Foundation](#)) While some initiatives might universally be considered to fall under the exception of Article 101 (3) TFEU, achieving greater certainty throughout the HBERs and the Horizontal Guidelines would facilitate competitor-driven initiatives, hence adding to the private sector’s contribution to sustainable growth worldwide, including in developing countries, where it is most necessary.

Based on your experience, please indicate any concrete provisions in the current Horizontal Guidelines that in your view need to be revised to facilitate cooperation agreements pursuing sustainability objectives. Please explain your reply.

5000 character(s) maximum

Agreements pursuing sustainability objectives are currently not covered in the Horizontal Guidelines (HG). This lack of specific provisions reflects the current absence of alignment between competition policy and other key EU policies, such as social and environmental policies.

The ambitious goals set out in the EU Treaties, the UN 2030 Agenda and the EU Green Deal require that all available policy and regulatory tools be brought together in a holistic manner in order to fulfil the objectives set out in these policy documents. Competition policy plays an important role in shaping the EU’s economy and the decisions taken by our businesses. As such, it should be sensitive to the fact that it is not only competition, but also collaboration, that fosters sustainability.

Since agreements pursuing sustainability objectives can take many different forms, we consider that the best way to provide guidance for this type of agreements would be to address them in a stand-alone section rather than in the existing sections for different types of agreements. This was the approach that taken in the 2001 HG for environmental agreements which we support.

Such section should be modelled on the other sections of the HG. As such, it should first provide a definition of agreements pursuing sustainability goals. We welcome the approach the Commission has taken in this questionnaire when defining sustainability, i.e. by reference to the economic, social and environmental goals set out in Article 3(3) TEU. The same definition should be included in the revised HG. Focussing only on environmental goals to the detriment of economic and social ones would be overlooking the inherent multidimensional nature of sustainability and the interdependence of different policy objectives.

Due to the specificities of agreements pursuing sustainability goals, the new section should include guidance on agreements that do not fall within the scope of Article 101(1) TFEU, e.g. in application of the Wouters case law, ancillary restraints, etc. For agreements falling within the scope of 101(1) TFEU, the new section should provide guidance as to how such agreements should be assessed. We would suggest following the approach currently adopted for standardisation agreement, i.e. setting out the main competition concerns that could arise, outlining circumstances in which an agreement would be viewed as restrictive by object, and then providing guidance as to the effects analysis, including an overview of agreements that normally do not restrict competition.

This last part is key as a study by Fairtrade Foundation (<https://bit.ly/2SOY7th>) has collected evidence proving that the lack of certainty on whether a particular co-operation initiative is permissible, and how it can be structured, acts as a deterrent to retailers from collaborating on sustainability issues, particularly those associated with low incomes and wages. Interviewees stated that *“an unclear legal landscape around potential collaboration in relation to low farm-gate prices restricted progress towards working collectively to secure living wages and incomes in supply chains”*. A detailed framework to assess the effect of such agreements on competition would eliminate this stumbling block.

This framework should first provide guidance on agreements that normally do not restrict competition to facilitate undertakings’ self-assessment. This should include guidance on agreements that are entered into to implement national or international binding obligations. For instance, we would appreciate guidance on whether and how an agreement between companies agreeing to the payment of a decent wage to comply with e.g. the SDGs (Goal 1: “End poverty”, Goal 8: “Decent work for all”) could be allowed.

The new section should also provide a detailed framework to assess sustainability agreements that may affect competition, including the criteria to be taken into account and examples of what can and cannot be done. This should also include guidance on how to structure an initiative to ensure it does not have any negative spill-over effects.

Due to the specificities of agreements pursuing sustainability goals, the new section should also provide guidance on how to assess MSIs, especially when they involve companies active at various levels of the supply chain, civil society, and/or public entities. This would allow NGOs to better understand the role they can play in supporting industry partnerships within the framework of competition law.

Finally, the new section should provide guidance on the application of Article 101(3) TFEU criteria to agreements pursuing sustainability goals. This should include in particular clarification on how out-of-market efficiencies can be taken into account, a consumer welfare standard that goes beyond the monetary consumer surplus, the assessment of the notion of fair share, as well as the consumers that can be taken into account in these circumstances (more details in the answer to Q 141).

Please indicate in which chapter(s) of the current Horizontal Guidelines it would be helpful to have more specific guidance on the assessment of agreements pursuing sustainability objectives? Please explain your reply.

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As explained in answer to q. 140, we believe that introducing a section on sustainability agreements following the model on environmental agreements set forth in the 2001 HG, and broadening it to encompass the wider array of sustainability goals set out by the Treaties, could provide more certainty to public and private actors.

If the Commission were to not follow this approach, we would invite the Commission to include guidance in various chapters of the current HG.

First, the introductory sections should include guidance on the assessment of MSI’s, including competitors and undertakings active at various levels of the supply chain, as well as NGOs and/or public bodies. Although the HG currently explain how vertical agreements between competitors should be assessed, they lack any guidance on more complex agreements. Since agreements pursuing

sustainability goals are likely to involve a wide variety of actors, additional clarification of the rules under which they should be assessed is needed.

Then, the introductory sections outlining the basic principles for assessing horizontal agreements should also address agreements falling outside the scope of Article 101(1) TFEU, either by application of the ECJ case law or other EU regulation. In particular, clarification of the interplay of the HG and the specific regulations for the production of, and trade in, agricultural products is warranted.

Finally, the section dealing with the application of Article 101(3) should be revised and supplemented. The revised version should acknowledge that sustainability goals – including both environmental and social goals – can generate benefits to consumers and outweigh potential competitive harm under Article 101(3) TFEU. The FTAO also considers that competition rules applicable to horizontal agreements should take greater account of non-monetary values which can benefit EU consumers when assessing the lawfulness of an agreement. The revised version should clarify the type of out of market efficiencies acceptable under Article 101(3) TFEU, in particular when a particular agreement benefits in part non-EU consumers (e.g. workers in a non-EU country). The first condition (‘improving the production or distribution of goods or promoting technical or economic progress’) does not mention ‘efficiency’, nor is it limited to ‘economic progress’. Therefore, it should encompass a wider scope of social benefits, such as environmental quality, enjoyment of human rights, and improvement of social conditions, within and outside the EU. The second condition (‘allowing consumers a fair share of the resulting benefit’) does not limit the ‘consumers’ to the individual purchasers in the relevant market(s). Neither does it limit the concept of ‘benefit’ to prices or other quantifiable benefits. Indeed, as the European Parliament has stressed, *‘consumers have interests other than low prices alone, including animal welfare, environmental sustainability, rural development and initiatives to reduce antibiotic use and stave off antimicrobial resistance, etc.’* We encourage the Commission to include within the revised assessment framework a range of non-price efficiencies which would allow for the inclusion of a broader range of benefits for consumers and citizens, for example, environmental quality, enjoyment of decent work, and further positive impacts on sustainable development and social conditions in the EU and in third countries. We therefore welcome the recent speech (IBA, 10 September) and publication by Commission officials (Competition Policy in Support of Europe’s Green Ambition, CPB 1/2021) identifying different types of sustainable benefits, i.e. consumers benefiting from (1) better products, (2) knowing that they’re doing “good”, and (3) agreements that help society as a whole. These benefits, as mentioned above should not be limited to environmental benefits but also include broader ones.

As a result, even agreements that result in a price increase for European consumers should be able to benefit from an exemption if the sustainability benefits, such as living wages for farmers or the eradication of child labour, are sufficient and clearly substantiated. Overall, the analysis of the first two conditions should not be based on a monetary cost-benefit analysis or other types of economic quantification that render the integration of sustainability into competition law very difficult, if not impossible. Needless to say, only genuine sustainability agreements should be permissible. ‘Greenwashing’, as well as smokescreens hiding cartels, are valid concerns for policy makers and they should be weeded out. To that end, the third and fourth conditions (‘indispensability’ and ‘no substantial elimination of competition’) can function as a check against the misuse of Article 101(3) for the sole benefit of the parties, including greenwashing. Claimed sustainability benefits must be objective and substantiated in order to avoid greenwashing.

Do you have any additional comments that you want to make in relation to the assessment of cooperation agreements pursuing sustainability objectives?
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When assessing cooperation agreements pursuing sustainability objectives, we consider that the Commission should also rely on a wider consumer welfare standard, going beyond the monetary consumer surplus. The “consumer welfare” standard is currently the guiding principle in the assessment of potentially anticompetitive agreements; however, the FTAO considers that the current interpretation of the standard has been excessively narrowed to price considerations and is not in line with the original concept.

As a result, the current antitrust mantra predicates the enforcement of Article 101 TFEU mainly when there are inefficiencies created at the end consumer level. It has, hence, generally allowed and contributed to the creation of markets based on cheap products. While initially, personal welfare was defined by an individual’s own assessment of his or her satisfaction, the current prevailing concept mainly refers to the individual benefits derived from the consumption of goods and services. We are afraid that consumers are perceived to be merely buyers of goods and, therefore, their welfare primarily corresponds to the price they have to pay for that product or service. Relying exclusively on consumer surplus, i.e. the difference between what consumers would have been willing to pay for a good and what they actually have to pay, when assessing the impact on consumer welfare gives enormous weight to economic efficiencies and short-term economic effects.

We invite the Commission to widen its approach beyond monetary benefits that occur for consumers within a fixed and short period to take into account broader interests. Such an approach would allow to protect and represent the interests of many of the actors along a supply chain, not the actual consumer only. It would prevent inequitable distribution of the wealth alongside the supply chain and ensure that a fair share of such wealth is equally distributed between consumer, producer and society as a whole. This would be better aligned with the SDGs and ensure equal treatment of various societal groups. The Article 101(3) TFEU requirement that a “fair share” of the resulting benefits is passed on to consumers does not require the benefit to be passed on to the consumer in full. A fair share only presupposes that the adverse effects resulting from the anticompetitive agreement on the affected potential consumer groups are at least partially compensated. Instead of drifting apart further from the initial objectives of Article 101(3) TFEU, the consumer welfare principle must be applied in accordance with its wording in order to provide a legitimate tool for national and European policymakers, antitrust authorities and academics to take essential social goals into account. Instead of pursuing a theory of “full share” we invite the Commission to stick to the “*fair share*” approach required by Article 101(3) TFEU. In this context we would also like to reference to the Legal Memo of the Dutch Authority for Consumer and Markets on “What is meant by a fair share for consumers in Article 101(3) TFEU in a sustainability context?” ([*ACM Fair share for consumers in a sustainability context](#)). We support the Memo saying that “*as a matter of the law as it stands, out of market benefits are relevant, full compensation of directly affected consumers in the relevant market is not required in all cases, and we should act accordingly when applying Article 101(3) TFEU to sustainability agreements.*”

A definition of consumer welfare that understands aspects of sustainability as beneficial for consumers would also be consistent with the Commission’s own stated ambitions on sustainable development and allow to account for longer term benefits. By moving away from the narrow focus on the short-term effects for consumers, resources would be allocated to maximise social benefits as a whole and to recreate more sustainable and resilient markets.

Do you have any further comments on this initiative on aspects not covered by the previous questions?

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The revised rules should not focus exclusively on environmental aspects within the notion of sustainability, while overlooking the social dimension of it; the latter is a key part of the concept of sustainability as defined in the Agenda for Sustainable Development which were set up to “realize human rights of all” and to “balance the three dimensions of sustainable development: the economic, social and environment”(*21252030 Agenda for Sustainable Development web.pdf (un.org)). We stress that the environment cannot be seen in isolation and is closely related to social issues.

Within the Guidelines on Sustainability Agreements by the Netherlands Authority for Consumers and Markets (ACM), it is acknowledged that sustainability “includes the protection of the environment, biodiversity, climate, public health, animal welfare, and fair trade”. That shows the interdependence of different policy objectives included in the notion of sustainability and its multidimensional nature. The FTAO fully supports the definition used by the ACM encompassing not only environmental agreements but also agreements “*aimed at the identification, prevention, restriction or mitigation of the negative impact of economic activities on people including their working conditions*”(Draft Guidelines on Sustainability Agreements) and the acknowledgement of the Commission in the present questionnaire to define sustainability by reference to the economic, social and environmental goals set out in Article 3(3) TEU.

In addition, we would like to draw attention to the following two documents:

- [Policy-position-paper EU-Competition-Law final.pdf \(fairtrade-advocacy.org\)](#)
- [Competition Law and Sustainability - Fairtrade Foundation](#)