

Cefic Response to the European Commission call for comments on the draft revised rules on horizontal cooperation agreements between companies (“Draft Horizontal Guidelines”)

The Chemical Industry supports the European Commission’s review of the Horizontal Guidelines to bring more clarity, guidance and legal certainty following the market developments from the last ten years and to support the unprecedented industrial transformation required to achieve the Green Deal.

Cefic supports the overall direction taken by the European Commission in its revision of the Horizontal Guidelines. EU competition policy should be aligned with the Green Deal objectives and enable this massive transformation. Until now, the lack of specific guidance on sustainability agreements has been (and still is) a major hinderance to the conclusion of such agreements. Innovation will be key for the success of this transformation. Competition policy needs to aim at supporting innovation via competition and cooperation at the same time. The EU chemical industry is a driving player and already supplies the homegrown essentials for going clean, circular, digitalized and climate neutral.

This Response constitutes a contribution to the European Commission call for comments on the Draft Horizontal Guidelines and provides Cefic’s position on the proposed new guidance on Exchange of Information and Sustainability Agreements.

General Considerations – Terminology

The revision of the Horizontal Guidelines is part of a broader effort from the European Commission to update and modernize a wide range of (soft) competition legislations¹. In this difficult exercise, particular attention should be paid to the coherence of the terminology used in different documents (definitions of active and passive sales slightly differ in the Draft Horizontal and Vertical Guidelines, for example) or within a specific document (the concept of “new market” is used with a different meaning in para. 60 and para. 227 of the Draft Horizontal Guidelines, for example).

¹ For example: the Horizontal Block Exemptions Regulations or the so-called “Vertical Guidelines”.

Sustainability Agreements

Cefic welcomes the addition of a whole chapter on sustainability agreements. As an association of undertakings, Cefic often faces requests from authorities or from its Members to assess, organize or take part in sustainability agreements. This topic has been the subject of a lot of debates, in particular since the publication of its own Guidelines² on the matter by the *Autoriteit Consument en Markt* (“ACM”) but the current rules at the European level does not bring enough legal certainty on this subject. Cefic is pleased to see the common grounds between the Guidelines of the ACM and the Draft Horizontal Guidelines but would like to highlight differences that are detrimental to the development and implementation of sustainability agreements.

Sustainability agreements not raising competition concerns: Cefic agrees that some types of sustainability agreements do not raise competition concerns. The (non-exhaustive) list of examples provided is helpful in identifying agreements that are not capable of raising competition law concerns. However, other competition authorities³ have also published guidance on this matter and their respective lists differ. It would be very valuable for Cefic if the European Commission would take into account and include these other examples of unobjectionable sustainability agreements in its Horizontal Guidelines. This would give legal certainty to all participants in the economy and would ensure the uniform application of competition law.

Soft Safe Harbour: Cefic supports the inclusion of a (Soft) Safe Harbour for sustainability agreements unlikely to produce appreciable negative effects on competition. However, the seven cumulative conditions proposed in the Draft Horizontal Guidelines could be developed further. In particular, the condition that *“the sustainability standard should not lead to a significant increase in price or to a significant reduction in the choice of products available on the market”* would benefit from more guidance or examples. Footnote 325 rightly highlights the dichotomy between price increases resulting from a restriction of competition (which is a concern for Competition Authorities) and price increases reflecting an increase in the quality of the products (which is not a concern for Competition Authorities) but fails short to provide guidance on the methodology the European Commission intends to use to distinguish between the two (or to attribute part of the price increase to one or to the other).

Further, the sustainability agreement discussed in “Example 4” (para. 620) seems to meet all seven cumulative conditions of the Soft Safe Harbour - in particular the fact that the price increase exclusively results from an increase in the quality of the products (which is not a concern for Competition Authorities, according to footnote 325). However, for unexplained reasons, this sustainability agreement does not benefit from the Soft Safe Harbour and is deemed to be breaching competition law following an assessment under Article 101(3) TFEU, which heavily relies on the price increase.

Finally, the 12% price increase of “Example 4” is also considered “significant”, without further explanations. Reference is made to the fact that consumers are willing to pay “only” 5% more for sustainable products. If the benchmark to consider that an increase in price is “significant” is consumers’ willingness to pay, then the sixth condition of the Soft Safe Harbour is unlikely to ever be met in practice.

² The last version is available at : <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>

³ We refer to the various publications of the ACM on the matter.

Assessment of sustainability agreements under Article 101(3) – full compensation of consumers: para. 588 of the Draft Horizontal Guidelines provides that the requirement of Article 101(3) TFEU that consumers should receive a “fair share” of the claimed benefits should be interpreted as *“when the benefit deriving from the agreement outweigh the harm caused by the same agreement, so that the overall effect on consumers in the relevant market is at least neutral”*. This so-called “full compensation” is not required under Article 101(3) TFEU and would impose a heavy burden on market participants. Indeed, sustainability agreements are characterized by a wide range of (in)direct benefits (out-of-market benefits, global benefits, future benefits, ...) and requiring a strict full compensation would have a detrimental effect on the willingness of undertakings to participate in sustainability agreements. Allowing for some flexibility in defining what is a “fair share” of the benefits would not only be more in line with the text of Article 101(3) TFEU itself but would also remove an important barrier for undertakings to enter into such agreements.

Further, more guidance and examples on how these various benefits⁴ will be assessed and considered by the European Commission are needed. The need of and expectations around sustainability agreements are so high that the applicable rules should be sufficiently clear to allow undertakings to enter into such agreements with the needed legal certainty.

Exchanges of information

Cefic welcomes the additional guidance given by the European Commission, the inclusion of the most recent case-law of the Court of Justice of the European Union (“CJEU”) on the matter and the addition of some examples.

However, some critical parts of this section still lack clarity and examples that could provide useful guidance for undertakings in their self-assessment.

Public information: in para. 427 of the Draft Horizontal Guidelines, the European Commission refers to the existence of information published by regulators in the following way: *“Even if there is public availability of information (for example, information published by regulators), an additional information exchange by competitors may give rise to restrictive effects on competition if it further reduces strategic uncertainty in the market.”* It is unclear what the “additional information exchange” refers to. Does it refer to an exchange of genuinely public information? This would mean that a lawful exchange of information would become unlawful because a regulator has published some related information. Or does it refer to an unlawful exchange of information? In that case, such exchange would have been considered unlawful regardless of the presence or absence of the information published by the regulator. The impact of the publication of information by a regulator and the concept of “additional information exchange” should be clarified by providing additional examples.

Age of information: in para. 431 of the Draft Horizontal Guidelines, the exchange of “current information” seems to be prohibited, but then in the example linked to para. 449, information on “the environmental characteristics of their existing products” seems to be considered as “historic”. Additional guidance on when “current information” can be considered to be “historic” could clarify this matter.

⁴ For example, if and how (reduction of) Scope 3 emissions will be taken into account.

Indirect information exchanges: the example linked to para. 436 of the Draft Horizontal Guidelines states that: “(a) common agency, such as a trade association, may also facilitate exchanges between its members.” Compliance with competition law is of the utmost importance for trade associations in general, and for Cefic in particular. However, while acknowledging the very specific position of trade association in the Draft Horizontal Guidelines, the European Commission does not provide specific guidance on how trade association should comply with the rules on exchange of information in general, and in the context of indirect information exchange in particular. Some national competition authorities, in particular the *Autorité de la Concurrence*, have recently published extensive guidance on the compliance of trade associations’ activities with competition law⁵. The revision of the Horizontal Guidelines is an opportunity to include or build on this knowledge to provide legal certainty on this matter at the European level.

For more information please contact:
Quentin Silvestre, Senior Legal Advisor, Cefic
+32.472.20.38.83 or qsi@cefic.be

About Cefic
Cefic, the European Chemical Industry Council, founded in 1972, is the voice of large, medium and small chemical companies across Europe, which provide 1.2 million jobs and account for 16% of world chemicals production.

⁵ Available at : <https://www.autoritedelaconcurrence.fr/fr/communiqués-de-presse/lautorite-de-la-concurrence-publie-une-etude-sur-les-organismes>.