

# CLEARING THE AIR? THE REVISED HORIZONTAL GUIDELINES ON QUANTIFYING THE BENEFITS OF SUSTAINABILITY AGREEMENTS

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## 1 THE EUROPEAN COMMISSION MAINTAINS ITS FRAMEWORK FOR GREEN COLLABORATION

On June 1<sup>st</sup>, the European Commission published the revised Guidelines on Horizontal cooperation agreements. With a number of important amendments throughout, perhaps the most prominent addition has been a new chapter setting out the circumstances under which competitors could collaborate on sustainability grounds.

The Commission, by and large, maintains the approach to sustainability presented in the draft Guidelines. Notably, unlike some other national authorities (notably the CMA in the UK), the Commission did not change tack on ‘collective benefits’. Agreements that restrict competition must lead to verifiable benefits that outweigh the costs to the relevant consumers. This condition effectively focuses on benefits for the consumers of the affected products or services, not wider societal benefits outside the concerned market, a topic that we discussed in our recent article<sup>1</sup>.

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<sup>1</sup> Copenhagen Economics (2023), Who moves first? The quest for clarity on how to assess sustainability agreements. Available online on CE's webpage.

Aside from the stance on ‘collective benefits’, uncertainty over how companies should substantiate the benefits of their proposed sustainability agreements may have been one of the reasons explaining why few sustainability agreements have been brought to competition authorities to date (with some exceptions, notably in the Netherlands). Companies seeking to engage in ‘green collaboration’ now have more clarity on which types of agreements are permitted through the published and soon-in-force Guidelines.<sup>2</sup> This added clarity could, in principle, pave the way for companies to advance sustainability agreements, including those that could run the risk of restricting competition.

How far do the new Guidelines go in providing clarity on how to use economic tools to assess sustainability agreements?

## 2 WHAT CONCRETELY CAN BE LEARNED ON THE QUANTIFICATION OF NET BENEFITS FROM SUSTAINABILITY AGREEMENTS?

The Commission’s Guidelines contain practical and informal guidance about how the EU competition rules apply to ‘green’ collaboration. In the absence of case law, guidance on acceptable evidence and stylised examples of sustainability agreements is important for companies contemplating forms of horizontal agreements to foster sustainability improvements.<sup>3</sup>

The Commission recognises a variety of potential sustainability benefits from reductions in greenhouse gas (GHG) to improvement in public health from better food quality. Quantifying potential benefits requires the use of established methods and verifiable evidence. While the Guidelines do not, somewhat understandably, specify all types of economic analyses that could be performed across different circumstances, they provide examples of approaches to the quantification of different types of benefit, as follows:

**Survey evidence:** The Guidelines recognise the use of customer survey evidence to gain insights into the value of the indirect benefits for the users, so-called “*individual non-use value benefits*”. Non-use value benefits refer to users’ willingness to pay for more sustainable consumption that benefits others, not just the direct (use value) benefit a consumer obtains from, say better quality.<sup>4</sup> Surveys can be used to assess the monetary value a consumer has, for example, for an eco-friendlier product.<sup>5</sup> To overcome the difference between stated preferences and actual (revealed) preferences, the Commission stresses the importance of survey design in obtaining realistic responses to hypothetical decisions.

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<sup>2</sup> The revised Horizontal Guidelines will enter into force once they are published in the Official Journal of the EU.

<sup>3</sup> For example, some observers have requested specific guidance by suggesting stylized examples for the Commission to address in the guidelines, see Annex 1 in: <https://ert.eu/wp-content/uploads/2022/06/ERT-response-on-ECs-draft-horizontal-BERs-and-guidelines-30-April-2022.pdf>.

<sup>4</sup> “... Consumers may value their consumption of a sustainable product more highly than the consumption of a non-sustainable product because the sustainable product has less negative impact on others.” See the European Commission’s Revised Guidelines on Horizontal cooperation agreements (2023), paragraph 575.

<sup>5</sup> The European Commission’s Revised Guidelines on Horizontal cooperation agreements (2023), paragraphs 575 and 578.

**Environmental footprint methods:** Evidencing the benefits of 'green collaboration' necessitates verifiable evidence of the envisaged environmental impact enabled by sustainability agreements. As a basis for the assessment, the Guidelines refer to the Commission's (2021) recommendation on the use of the Environmental Footprint methods to measure and communicate the life cycle environmental performance of products and organisations.<sup>6</sup> The document provides practical guidance on the evaluation of the lifetime footprint of a variety of products. It provides methodological steps of each phase of the products' life cycle stages and provides various data points that can be applied in the assessments, such as typical weights or distances. Additionally, the Guidelines refer to the Commission's Environmental footprint tool which contains a database that is useful for quantifying the environmental impact of various products. For example, to analyse the benefit of greener transportation, the report provides average transportation distances in the EU to quantify a potential reduction in CO<sub>2</sub> emissions resulting from a reduced use of fossil fuels.

**Existing evidence on environmental costs:** The Guidelines further refer to other public authorities' or recognised academic organisations' reports that quantify the environmental impact. Such reports can be used, in particular, for the assessment of the collective benefits that affect the environment and climate, such as those derived from climate change agreements.<sup>7</sup> For example, we believe that the use of shadow prices and the social cost of carbon to monetise environmental benefits can draw on measures and methods established through environmental economics.<sup>8</sup>

Further to mentioning certain methods and sources, the Commission acknowledges in the revised Guidelines that **some benefits may materialise over a long period of time**, while negative effects may be immediate. The value of future profits must be appropriately discounted to present value and outweigh the immediate harm.<sup>9</sup> This acknowledgement of future benefits is a new addition compared to the Draft version from 2022. This is also supported by the Commission's stated aim to provide more guidance on quantifying collective benefits once it gains more experience from concrete cases.<sup>10</sup>

**Assessing price effects of sustainability agreements.** The revised Guidelines contain a new illustrative example of an agreement that has no appreciable effect on competition. It outlines the logic of assessing the impact of the agreement on consumer prices. In the example, clothing providers in the EU have agreed to purchase clothing *only* from producers that respect minimum wages. This agreement could come at a cost for European consumers, for whom prices could have increased between 1.5-2%.<sup>11</sup> However, a retrospective assessment has shown that the average price of clothing in the EU has not, in fact, increased mainly because the cost increases constitute just a fraction of final prices and were not passed on to consumers to any appreciable extent.<sup>12</sup>

<sup>6</sup> The European Commission's Revised Guidelines on Horizontal cooperation agreements (2023), paragraph 559.

<sup>7</sup> The European Commission's Revised Guidelines on Horizontal cooperation agreements (2023), paragraph 588.

<sup>8</sup> Copenhagen Economics (2021), Beyond the policy debate: How to quantify sustainability benefits in competition cases – Lessons learned from environmental economics. Available online [on CE's webpage](#).

<sup>9</sup> The European Commission's Revised Guidelines on Horizontal cooperation agreements (2023), paragraph 591. The acknowledgement of future benefits is a new addition compared to the Draft version from 2022.

<sup>10</sup> The European Commission's Revised Guidelines on Horizontal cooperation agreements (2023), paragraph 589.

<sup>11</sup> Due to the agreement, average textile worker wages have increased by 20%. Given wages share in product costs of 30% and clothing providers' average margin of 200-300% on top of the purchase price, agreement's impact on consumer price would be 1.5-2%.

<sup>12</sup> The European Commission's Revised Guidelines on Horizontal cooperation agreements (2023), paragraph 601, Example 3.

While the example refers to an *ex-post* review, the underlying logic is applicable to assessing the likely impact of an agreement on consumer prices before the agreement is implemented. Indeed, well-established economic tools and studies inform the degree to which price effects could materialise. The key ingredients needed for an estimation of price effects are the size of cost increases and an analysis of the extent to which they would be passed on to final prices. Additionally, potential productivity improvement could be assessed, for example, based on companies' data on corresponding changes that have impacted productivity in the past.

### **3 MORE TO BE LEARNED BY DOING**

The aim of the Guidelines is to provide clarity on what kind of cooperation is acceptable on sustainability grounds. While concrete guidance and examples are particularly desirable - given the limited case practice - it is unrealistic to provide detailed guidance on the quantification of benefits across the wide spectrum of potential sustainability gains acknowledged by the Commission.

That said, the Guidelines are now settled and clarify the Commission's stance on some of the central questions, such as the contentious question of collective benefits. The guidelines also provide some steer on how to evidence sustainability benefits - the types of methods can be deemed acceptable. These methods have been found plausible by scholars and practitioners, as discussed also in [our article regarding the Quantification of Sustainability Benefits](#).<sup>13</sup>

The devil is however always in the detail and the upcoming case practice will bring clarity to what constitutes sufficient evidence. Whether or not the new Guidelines will open the floodgates for more concrete cases to emerge remains to be seen.

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<sup>13</sup> Copenhagen Economics (2021), Beyond the policy debate: How to quantify sustainability benefits in competition cases – Lessons learned from environmental economics. Available online [on CE's webpage](#).