

Sustainability cooperations between competitors & Art. 101 TFEU

Unilever submission to DG COMP

I. Introduction

1. Industry collaboration – and competition policy – as important pillars of sustainability efforts

European companies across industries are stepping up efforts to run their businesses sustainably¹, and many firms are leveraging the competitive benefits that come with environmentally friendly products or socially responsible sourcing². But if Europe, and the world, really want to deliver on the United Nations' Sustainable Development Goals ("SDGs") and the European Green Deal³, the case for collective action is captivating:

- *Unilateral initiatives* alone cannot achieve the system change that is called for in many fields.⁴
- *Regulation* is often desirable but not always feasible or effective, be it for lack of political compromise, administrative burden, insufficient implementation or geographical limitations.⁵
- Understood as a complement, international *cooperation amongst industry peers* has the potential to profoundly scale-up business contribution to the SDGs.

Competition policy plays a pivotal role in defining the relevant legal framework. It will encourage or disincentivise collective action that goes further than voluntary self-commitments and other very laudable, but often insufficient, industry initiatives. Environmental and social crisis may require closely co-ordinated action that likely falls within the remit of competition law, especially where:

- Impact depends on scale - which requires bundling of resources and, most important, demand;
- Meaningful progress may not be possible absent mandatory standards (stricter than the law); and
- Systemic change (temporarily) triggers extra costs that individual companies cannot bear without suffering a 'first-mover disadvantage'. Absent a level-playing field, the most sustainable products would not enter, or would vanish from the market, or survive only in often pricier niche segments.

2. Purpose and scope of this submission to the European Commission

Unilever welcomes the Commission's intention, expressed in relation to the Farm-to-Fork initiative, to clarify "the competition rules regarding collective initiatives promoting sustainability in supply

¹ The probably most frequently quoted definition of "sustainable development" is from "Our Common Future", also known as the Brundtland Report (1987): "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." (Brundtland, Report of the World Commission on Environment and Development: Our Common Future, 1987). This paper covers elements of environmental, societal and governmental (increasingly known as "ESG") sustainability.

² Consistently ranked as a sustainability leader by NGOs, Unilever's purpose-led business may serve as an example here: in 2019, Unilever's Sustainable Living Brands – those used to support positive change for people and the planet – grew 78 % faster than the rest of its business; they have continuously outperformed the average rate of growth of Unilever as well as growth of rest of the business over last 5 years.

³ Commission, "The European Green Deal" (COM(2019) 640) makes a number of references to the necessity of industry contribution and collaboration to attain the objectives of the Green New Deal (see pages 8, 9 and 18).

⁴ Business and Sustainable Development Commission, Better Business Better World, p. 15, available at: https://sdgresources.relx.com/sites/default/files/betterbiz-betterworld_170215_012417.pdf.

⁵ See e.g. Pacheco et. al., Governing sustainable palm oil supply: Disconnects, complementarities, and antagonisms between state regulations and private standards; available at <https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12220>.

chains”⁶. With this submission, we wish to contribute to the broader competition policy debate around sustainability collaborations that is currently taking place, especially in the context of the review of the Guidelines on Horizontal Co-operation Agreements (“HGL”). More specifically, this memorandum:

- reflects insights from a leading European company with global activities in a wide range of fast-moving consumer goods (FMCGs) that faces - and works vigorously to respond effectively to - a multitude of sustainability challenges;
- puts forward and tries to categorize examples of existing and potential competitor collaborations, sourced from the most pressing sustainability concerns affecting the consumer goods industry⁷, and references the Commission’s and the Courts’ decisional practice regarding similar types of peer collaborations; and
- asks for clarifications of the Commission’s interpretation of Art. 101 TFEU in relation to sustainability agreements, ideally in a designated section in the revised HGL, thus reverting to the structural approach of the 2001 Guidelines that included a section on environmental agreements.

3. The benefits of a predictable, progressive competition law framework – for Europe and beyond

In providing clarification on how European competition law applies to sustainability agreements – and, where possible, indicating safe harbours – the Commission can define limits *and* incite collective action that would otherwise not materialize for lack of legal certainty, and maybe also a “certain level of conservatism in the advisory industry”⁸, as Commissioner Vestager observed. Beyond that, the Commission has an opportunity to pave the way for industry initiatives globally, instrumental for Europe’s ambition to “contribute to [...] the sustainable development of the Earth” (Art. 3 (5) TEU):

- Many sustainability issues European consumers care about most are either global by definition - the climate crisis being the most obvious example - or they materialize in D&E markets - take deforestation in the Amazon, human rights of farm workers in West Africa or the dramatic plastics pollution in South and Southeast Asia.
- As much as European consumers lead the way in demanding more sustainability efforts from businesses, the European Commission – arguably the most influential competition enforcer in the world – is in the catbird’s seat to lead by example and provide orientation for enforcers in other jurisdictions. Orientation that would be pertinent, as two recent examples show:
 - In 2016, the Indonesian competition authority KPPU threatened to fine palm-oil traders who had decided not to buy palm oil from farmers that engaged in illegal deforestation, giving in to political pressure after initially endorsing the initiative⁹;
 - the Brazilian competition agency CADE has been urged to investigate a soy-bean moratorium barring grain traders from buying oilseed from deforested areas in the Amazon.¹⁰

Commissioner Vestager has recognized that the remit and influence of EU competition law don’t stop at Europe’s doorsteps when she flagged in 2018 that European businesses bear responsibility for the

⁶ Commission, A Farm to Fork Strategy, p. 7 (unpublished draft); available at https://www.politico.eu/wp-content/uploads/2020/02/FarmToForkFebruary.pdf?utm_source=POLITICO.EU&utm_campaign=88912795c3-EMAIL_CAMPAIGN_2020_03_02_05_57&utm_medium=email&utm_term=0_10959edeb5-88912795c3-189131121.

⁷ We are not suggesting that Unilever pursues or endorses all initiatives mentioned in this paper; the idea is to highlight a broad variety of areas where collaboration could, at least in principle, have a positive impact.

⁸ Vestager, keynote speech at Conference “Sustainability and Competition Policy: Bridging two Worlds to Enable a Fairer Economy”, 24 October 2019, available at <https://www.youtube.com/watch?v=7mpWAOhkQbY>.

⁹ See <https://www.straitstimes.com/world/jakarta-wants-oil-majors-to-ditch-zero-deforestation-pact>.

¹⁰ See <https://www.reuters.com/article/us-brazil-soybeans-environment/europe-says-brazils-move-to-end-soy-moratorium-threatens-5-billion-market-idUSKBN1XZ1CV>.

prices paid to farmers in developing countries and for their families' livelihood - areas where, the necessary safeguards in place, "the competition rules aren't there to stop that from happening".¹¹

II. Classification of sustainability co-operations under Article 101 (1) and (3) TFEU

We are aiming to categorise sustainability co-operations according to their compatibility with Article 101 TFEU which the Commission could consider feeding into the review of the HGL.

We will be setting out in detail which types of sustainability co-operations we believe are unlikely to have appreciable effects on markets and consumers in the sense of Art. 101 TFEU (*see under 1.*), and in which circumstances sustainability agreements that are more likely to come under Art. 101 (1) TFEU (*under 2.*) may not be subjected to Art. 101 (1) because they provide public policy benefits or contribute to (other) wider objectives of the European treaties (*under 3.*). Lastly, we will be explaining when, in our view, agreements may be exempted under the application of Art. 101 (3) TFEU (*under 4.*).

1. Sustainability agreements that are unlikely to fall under Article 101 (1) TFEU

A wide range of sustainability agreements are not likely to fall under Article 101 (1) TFEU for lack of appreciable effects: Agreements between parties whose combined market share is limited can benefit from the "safe harbour" thresholds set out in the current HGL and, more generally, the *De Minimis* notice.¹² The current HGL also provide useful guidance for other types of co-operation, such as voluntary joint standardisation.¹³ However, this is notwithstanding that further clarifications in the HGL would be most welcome.

a. Joint commitments to achieve sustainability targets without obligations to employ certain means

Agreements will not fall under Art. 101 (1) TFEU if:

- (i) no specific individual obligation is placed on the parties, or the parties are only loosely committed to contributing to a sector-wide sustainability target; and/or
- (ii) the parties enter into a binding agreement to achieve a certain objective but have discretion as to the technically and economically available means; the more varied such means, the more likely the cooperation to fall outside Art. 101 (1) TFEU.¹⁴

This category is rooted in earlier case law on sustainability collective action:

- In *ACEA*¹⁵ and *JAMA and KAMA*¹⁶, associations of automobile manufacturers made commitments on behalf of their members to reduce CO2 emissions from cars. The targets were set on behalf of all members collectively rather than individually, and as long as the average target was met, each member was free to apply more or less stringent targets. Members were free to determine how to meet the target, allowing for the development of competing CO2-efficient technologies.
- In *CEMEP*¹⁷, the principal European manufacturers of low voltage electric motors (jointly accounting for ca. 80% of EU sales) agreed to reduce sales of the least energy-efficient engines

¹¹ Vestager, speech at Conference "Chillin' Competition", Brussels, 20 November 2018.

¹² OJ [2001] C/368, p. 13.

¹³ Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), para. 277.

¹⁴ As per the previous Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001/C 3/02), para. 185.

¹⁵ Case COMP/37.231 ACEA (1998), Commission Press Release IP/98/865, 16 October 1998.

¹⁶ Case COMP/37.634 JAMA and Case COMP/37.612 KAMA (1999), Commission Press Release IP/99/922, 1 December 1999.

¹⁷ CEMEP (2000), Commission Press Release IP/00/508, 23 May 2000.

by at least 50%. They committed to reach a specific target but had discretion on how to contribute.

This approach provides useful guidance for a number of current industry initiatives where competitors are loosely committed to achieve a given objective, e.g.:

- industry targets to reduce sugar, salt or calories, etc.;
- the “New Plastics Economy” Global Commitment of 2018, signed by more than 450 packaging producers, brands, retailers and recyclers who committed (among further, less specific goals) to 100 % of plastic packaging to be reusable, recyclable or compostable by 2025¹⁸; or
- the “2050 Pathways Platform” to develop long-term, net zero-GHG, climate-resilient and sustainable-development pathways, joined by governments on all levels and 196 companies.¹⁹

b. Replacing non-sustainable products - without tangible impact on consumer price and choice

Agreements to replace non-sustainable products or production methods generally do not restrict competition if they have no appreciable effect on product diversity and if their importance is marginal for influencing purchasing decisions²⁰, e.g. in the absence of any, or more than marginal, cost increases:

- In 2008, the Dutch competition authority (ACM) did not object to an agreement between organisations at various levels of the food supply chain, which resulted in members of a supermarket trade organisation only selling fresh pork meat from pigs that were castrated with the use of anaesthesia.²¹ This involved a temporary marginal increase of the wholesale price, but supermarkets remained free to set their individual retail price. Slaughterhouses could still purchase pork meat from pigs castrated without anaesthesia for supply to other sales channels.
- In *CEMEP*, the Commission found that the energy efficiency of low voltage motors was at the time not subject to definitions and classifications. As such, energy efficiency wasn’t a significant criterion in purchasers’ decisions to buy one type of motor or another.²²

Not only the examples of this case law show that agreements between competitors to replace non-sustainable product settings or production processes are particularly effective:

- Compaction (of, e.g., detergent bottles) and compression (of, e.g., deodorant bottles) – reductions of weight and/or size of products – bring about substantial reductions of plastics and other packaging materials, decrease transport-induced GHG emissions and reduce the required quantities of ingredients. At the same time, there is no negative effect on consumer choice: Bulkier, heavier and less environmentally friendly packaging is unlikely to be missed if the product features remain otherwise unchanged.

¹⁸ New Plastics Economy Global Commitment, 2018, available at: <https://www.newplasticseconomy.org/assets/doc/global-commitment-download.pdf>.

¹⁹ <https://www.2050pathways.org/>

²⁰ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), para. 186.

²¹ Pig castration anaesthesia (2008), NMa Case 6456 (2008), see <https://www.acm.nl/en/publications/publication/6223/NMa-no-objections-against-agreements-on-the-castration-of-boars-with-the-use-of-anesthesia>.

²² *CEMEP* (2000), Commission Press Release IP/00/508, 23 May 2000.

- Similarly, businesses can significantly reduce packaging materials by agreeing on higher than legally required²³ fill levels for instance of food containers or shampoo bottles. Again, consumers get a better product than before and negative effects can generally be excluded.²⁴

FMCG industry experience shows that consumers are initially reluctant to buy compressed/compacted packs as they wrongly assume that they get less value for money, or to recognize (or even notice) the obvious upsides of higher fill levels – the case for collective action is thus particularly strong.

Further examples where the cost impact on final products is likely to be marginal include:

- The harmonization of packaging formats to facilitate recycling, or, for instance in the food solutions industry, the standardization of refillable buckets to create a circular economy.
- Joint commitments to ensure living wages for workers, i.e. an income that meets basic needs (which in many emerging economies is not the case for statutory minimum wages).
- Commitments to respect labour law standards (specifically for migrant workers) where existing regulations are poorly enforced (e.g. on hazelnut plantations in Turkey, to name a commonly evoked example).

c. Creating new markets

The most impactful sustainability efforts are often only economically viable if competitors bundle and jointly create resources and demand, be it (i) for R&D required for product innovation, (ii) the collective demand for the development of a product mature enough and facilities sizeable enough for scaled production, and/or (iii) logistics infrastructures that, too, depend on scale. In such instances of new market creation there will generally be no restriction of competition if the parties would not be capable of conducting the activities in isolation and there are no alternatives available.²⁵

- The *DSD* case was about a countrywide collection and packaging recovery system in Germany. Contractors had to supply DSD exclusively and at a pre-set price. The Commission endorsed the co-operation agreements on the basis that they were necessary for "the establishment of a new, functioning market in the recovery of sorted plastic and composite packaging".²⁶

Looking at some of the currently most pressing sustainability challenges, the following examples may be helpful in delineating where agreements to create new markets would fall outside Art. 101 (1):

- Chemical (or “molecular”) recycling²⁷ is frequently put forward as the most effective response to the shortage of conventional post-consumer recycled plastics and surfactants which are largely insufficient to meet a surging demand, especially for plastics that fulfil regulatory requirements of the FMCG industry (“food-grade” being one of the most onerous ones). While mechanical solutions inevitably lead to “downcycling” to lower quality plastics, chemical recycling technology allows to reprocess highest-quality polymers. Collective action in this field could entail:

²³ Regulatory requirements vary significantly between countries and are often not very specific with regard to the fill levels, or non-existent.

²⁴ Both examples come with the obvious, but no less important caveat that companies agreeing on compaction/compression or fill levels may not in any way collude on the commercial implementation; Case COMP/39.579 - Consumer detergents, Commission Decision of 13 April 2011.

²⁵ Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001/C 3/02), para. 187; Case E-3/16 - Ski Taxi SA v Norwegian Government, Judgment of 22 December 2016, para 98.

²⁶ Case COMP D3/34493 – DSD, Commission Decision of 17 September 2001, para 114.

²⁷ I.e. plastic waste is broken down to original building blocks to remove color and impurities and then to create new high-quality plastics. The process is fully circular as it can be repeated over and over again.

- establishing adequate joint waste collection & sorting infrastructures for (chemically) recyclable plastics – often lacking even in EU member states, let alone in D&E countries;
- creating demand to take prototype technology to a level where mass production becomes viable – through volume commitments and/or joint sourcing.
- A pledge by industries such as carmakers to only buy carbon-neutral steel²⁸: The procurement costs for steel would increase significantly but the impact on the price of the final product would be limited – a market for carbon-neutral steel could be created via a specific demand route downstream, thus not weakening the price competitiveness of European steelmakers.
- Joint introduction of refill stations for reusable packs in supermarkets, be it via dispensing product bars or machines for consumer refill.
- Reflecting core ambitions of the Commission’s Farm to Fork initiative²⁹, creating markets for more environmentally sustainable, healthier foods to fix fundamental shortcomings in diets of European consumers (too few vegetables, too many calories), in agricultural practices (limited crop rotations, poor climate change adaptation) and livelihoods of farming communities would consist of a concerted diversification into more nutritious and varied foods, translating into e.g.:
 - collective commitments to buy – e.g. through joint procurement bodies/alliances – certain volumes of foods that drive the cultivation of more diverse crops³⁰, thus creating the necessary demand for farmers to start planting them and develop technological expertise and commercially viable input supply chains;
 - bundling of volumes to create a (currently often non-existing) logistics infrastructure for crop transportation from producers to processors and/or manufacturers;
 - joint commitments to use defined quantities of crops in products dedicated for European consumers and to deploy joint efforts improving acceptability of new, healthier crops.

d. Mutual - or unilateral - granting of open source access to IP to develop more sustainable products

Companies increasingly embrace the benefits of sharing proprietary information with peers in order to improve environmental efficiency of products and production processes across the industry.

- In *EUCAR*, the Commission endorsed a research cooperation, particularly on environmental issues, between leading European motor manufacturers. The intellectual property derived from the project would be freely accessible and usable by all participants. The Commission saw the agreements outside Art. 101 (1) TFEU as the research was at the pre-competitive stage, and the products obtained from it were not directly usable in a specific type of vehicle.³¹

The HGL should clarify that open source co-operations do generally not fall under Art. 101 (1) TFEU when the objective is a higher degree of environmental friendliness of the product.

- Consumer goods-industry relevant examples for open sharing of innovations and intellectual property are compaction and compression (see also under b.); in fact IP rights might be granted even unilaterally – technological advantages could otherwise be tainted by consumer reluctance to switch to more sustainable products for (unjustified) fear of buying a less effective alternative.

²⁸ See <https://www.camecon.com/blog/carbon-neutral-steel-making/>.

²⁹ See https://ec.europa.eu/food/farm2fork_en.

³⁰ See, for example, the Future50Foods identified by WWF and Unilever-brand Knorr; https://www.wwf.org.uk/sites/default/files/2019-02/Knorr_Future_50_Report_FINAL_Online.pdf.

³¹ Case No IV/35.742 – F/2 – Eucar OJ [1997] C 185/05.

e. Adherence to – not or poorly enforced – laws and regulations

Compliance with applicable laws is a seemingly straightforward expectation from responsible businesses. However, insufficient adherence to legislation up and down the value chain has proven a key impediment to sustainable business in many D&E markets where government enforcement powers are often weak. Agreements between competitors aimed at contributing to compliance with laws should be considered legitimate and outside of the Article 101 (1) TFEU prohibition – the impact on competition is not greater than if the law were properly enforced. This is true both for

- (i) agreements between competitors regarding their own adherence to legislation; and
- (ii) corresponding agreements between competitors to demand legal compliance from suppliers and other business partners.

A few examples where the positive sustainability impact of agreements to comply with laws is particularly strong, and a clarification that they are outside Art. 101 (1) TFEU would be most useful:

- Labour-law protected human rights of farm workers in the economically most disadvantaged areas (for instance vanilla farming in Madagascar or cocoa plantations in Cote d’Ivoire and Ghana). Such laws cover a wide range of issues, from bans on slave and/or child labour to minimum wages and health and safety regulations;
- Deforestation legislation which applies to the cultivation of commodities such as palm oil, soya, beef or pulp and paper.³²
- Looking at the root causes of poor law enforcement in these, and many other, fields, corruption features as one of the most prevalent concerns, despite the univocal recognition of the economic damage it causes. Collective action can help mitigate the problem, e.g. via agreements to:
 - adhere to (often poorly enforced) anti-bribery laws – and to require the same from supply chain partners;
 - if necessary, blacklist suppliers or modify the terms of business with non-compliant entities;
 - explore and potentially agree on other protective measures.
- Similar considerations apply to other integrity-related legislation, from money-laundering regulations to restrictions of unfair advertising. Competition laws, last not least, are another relevant example given the persistent lack of antitrust enforcement in many young jurisdictions.³³

f. Exchanges of sustainability-related information between competitors

The success of individual companies’ sustainability efforts depends largely on access to pertinent information. A clarification that certain types of data exchanges fall outside Art. 101 (3) TFEU would be valuable, e.g. regarding business partner compliance with environmental or integrity legislation:

- Establishing central open source systems to conduct due diligence and monitoring of third parties:
 - Joint mapping of harvesting locations and deforestation incidents;

³² It is widely acknowledged that deforestation (particularly through forest fires) is predominantly due to insufficient enforcement of existing laws, not a lack of legislation; see <https://www.dw.com/en/lax-law-enforcement-causing-indonesias-forest-fires-greenpeace/a-50460060>.

³³ OECD, “Global Forum on Competition: Challenges Faced by Young Jurisdictions” (Eighth Meeting, 2009); available at: <https://www.oecd.org/daf/competition/GFC2009-Challenges-faced-by-young-competition-authorities.pdf>.

- Joint tracing of slave/child labour practices and other human rights violations outside and within the EU (e.g. in the trucking sector), notably regarding recruitment agencies; e.g. on the basis of joint risk-scoring systems and vetting processes;
- Collaborative and syndicated systems for anti-bribery due diligence and monitoring of suppliers and other business partners.
- Sharing of information regarding blackspots for bribe solicitation, either private or public, and about third parties that have been blacklisted for corrupt practices by other companies.
- Sharing of good practices, systems and tools to risk assess, control or monitor business activities from a sustainability perspective.

Of course, any information exchange would have to exclude commercially sensitive information, notably insights into competitor's commercial relationships with any of the business partners registered in jointly used tools, e.g. though Chinese walls, decentralized distributed ledgers (e.g. blockchain) and/or involving independent third parties as service providers.

2. Agreements that might come under Article 101 (1) TFEU

Sustainability agreements should of course be caught by Art. 101 (1) TFEU (and not exempted under Art. 101 (3)) if the cooperation does not truly concern sustainability objectives but rather uses these objectives as a pretext to engage in a disguised cartel: price fixing, the limitation of output or sales, or the allocation of markets or customers.

On a very different note, the potentially most transformational sustainability co-operations between competitors can potentially fall under Art. 101 (1) given their appreciable effects on competition (and in some instances potentially due to restrictions by object)³⁴; they may be admissible under the conditions outlined below under 3.³⁵ and 4. This section attempts to cluster such arrangements that might have restrictive effects on competition into three categories; whether they will actually be restrictive will of course require a case-by-case analysis:

a. Phasing-out of non-sustainable products with relevant cost increases

The following collaborations correspond to 1.b. but carry a higher likelihood of appreciable effects:

- The initiatives that were subject to the Commission's *CECED* case³⁶ (concerted outsourcing of less energy-efficient washing machines) as well as the ACM's *Energieakkoord* case³⁷ (about a deal between four electricity producers to close down older coal-fired power plants to cut CO2 emissions) - both were deemed to fall under Art. 101 (1) and/or its Dutch equivalent.
- Industry commitments to use only those types of plastics in packaging that are deemed safe for recycling, thus phasing out e.g. PVC or oxo-degradable additives.
- Collective commitments to (completely) replace conventional with products meeting certification or other defined sustainability requirements.³⁸

³⁴ For agreements that are not mere disguised cartels however, the Court interprets the concept of "by object" infringement restrictively (Case C-345/14 - Maxima Latvija v Konkurences padome, Judgement of 26 November 2015). Agreements that pursue a legitimate sustainability goal should therefore be assessed on their effect.

³⁵ In those instances, restrictive agreements would, technically speaking, remain outside Art. 101 (1) TFEU (at least in the case of 3.a.).

³⁶ Commission decision of 24 January 1999, (Case IV.F.1/36.718 CECEDE) OJ [2000] L 187/47, p. 47–54.

³⁷ ACM, *Energieakkoord*" (2013), available at: https://www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf.

³⁸ Regarding Lidl's failed attempt to introduce Fairtrade bananas unilaterally, see <https://www.bananalink.org.uk/news/lidl-backs-away-from-fairtrade-bananas/>.

- Temporary fishing moratoria to stop overfishing and ensure long-term survival of fishing industry and biodiversity.
- Moratoria on conversion of natural habitats to put an end to, for example, soy expansion into natural habitats in Latin America.

b. Setting of – mandatory – sustainability standards & standards stricter than the law

Voluntary standardization agreements can benefit from the safe harbor rule in the HGL³⁹ or are unlikely to bring about appreciable effects on competition (see above *under 1.b.*). However, *mandatory* standards in the following areas are potentially covered by Art. 101 (1):

- A concerned cold-chain warm-up, i.e. an industry agreement to -10 to -12 Celsius freezer temperatures for a wide range of frozen products (to reduce energy consumption & improve freezer utilization).
- The integration of regenerative and low carbon farming practices into binding common certifications standards agreed amongst commodity traders and FMCGs; this could include (1) agreed criteria for premiums paid to producers that comply with certain practices and/or deliver a specific impact, as well as (2) grounds for exclusion of suppliers that are not willing to remediate.
- Collective commitments on the integration of vulnerable parties in the supply chain, including transparency and reporting obligations; again, criteria could be defined in a certification standard.
- Mutually binding commitments to replace virgin plastics by recycled plastics.
- Collective commitments to replace conventional flexible packaging – which cannot be recycled with today’s processing technology – with mono-materials (e.g. all-polyethylene) which are fully recyclable, e.g. for sachets (without foreclosing future solutions for innovative materials).
- Uniform industry-wide definitions of claims such as “sustainably sourced”.

In a similar vein, cross-industry commitments to adhere to standards stricter than the law may fall under Art. 101 (1), for example:

- Bans on marketing of sugary snacks to children or bans on animal testing that exceed current regulatory requirements.
- Commitments to lower than legally required CO2 emissions, e.g. among car manufacturers.⁴⁰
- Agreements to impose stricter than legally required integrity standards on supply chain partners (outside EU): e.g. living wages, stricter than legal health & safety / “deforestation-free” standards.
- Commitment between competitors not to engage in bribery, anti-competitive practices, etc. in the absence of legislation (outside EU).

c. Joint voluntary investments or payments to offset negative environmental or social impact

In various fields, industry peers are exploring the benefits of joint financial contributions to advance sustainable objectives; depending on the relative amount of the envisioned payments, the corresponding arrangements may or may not come under Art. 101 TFEU:

³⁹ Under the current HGL(2011), competitors can enter into standard-setting agreements, provided that participation in the standard-setting is unrestricted, the standard is set through transparent procedures, there is no obligation for participants to comply with the standard, and any third party can obtain access to the standard on FRAND terms – in line with the “safe harbour” conditions for standardisation agreements determined by the HGL.

⁴⁰ See <https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html>.

- In *ZVEI/Arge Bat*⁴¹, the Commission endorsed an industry-financed take-back and recycling scheme for used batteries; the (variable) disposal costs would be an integral part of the price and shown separately on producer and importer invoices.
- Industry-funding of plastics collection infrastructures – e.g. through voluntary extended producer responsibility schemes – helps respond to the ubiquitous lack of collection systems in many countries (most conspicuously in South and Southeast Asia); this is a waste issue but also a root cause for a chronic shortage of recycled feedstock that is a pre-condition for a circular economy.
- The “Sea The Future” initiative foresees voluntary industry contributions payable on plastics produced from fossil fuels. The idea is to increase demand for plastic waste to drive collection efforts and the development of recycling technologies competitive against plastic from fossil fuels. The funds raised will be channeled into new recycling technologies, collection infrastructure, and the recovery, where possible, of existing marine and terrestrial pollution.⁴²
- Higher than legally-required emission payments to offset negative climate impact and support industry-wide “carbon-neutral” claims.
- Joint business contributions to finance officially recognized and/or third party-certified labor and environmental inspectors (outside the EU), notably where regulations – on, e.g., labor conditions or deforestation – exist but enforcement is ineffective due to lack of government resources.

3. Sustainability agreements that pursue legitimate public policy goals and wider treaty objectives

The European courts have developed a line of cases where agreements had an appreciable effect on competition but were not subjected to Art. 101 TFEU. The following section tries to draw conclusions from the courts’ case law for sustainability agreements.⁴³

We ask the Commission to explain, in the revised HGL, its views regarding the admissibility of sustainability agreements in the light of the below referenced decisional practice and treaty provisions.

a. Recognition of public interests within Art. 101 (1) TFEU by the European courts

Building on the *Wouters* judgement⁴⁴, the Court of Justice has held that Art. 101 (1) TFEU does not apply to certain restrictive practices between competitors if they serve a legitimate public interest, such as: ensuring the integrity and proper practice of the legal/pharmaceutical profession⁴⁵, protecting the fairness of sports against doping practices⁴⁶, or upholding the quality of accountancy services⁴⁷.

In assessing whether co-operation pursues a “legitimate object”⁴⁸ in that sense, the Court established, i.a. in *Meca-Medina*, a reasoning that equally applies to sustainability agreements: If rules that “were adopted [...] for competitive sport to be conducted fairly”⁴⁹ in order to “ensure healthy rivalry

⁴¹ Case IV/F1/36.172 - Arge Bat [1998], OJ C172/13 (ZVEI/).

⁴² Minderoo Foundation, “Global industry initiative launched to end plastic pollution”, 25 September 2019, available at: <https://www.minderoo.org/minderoo-foundation/news/global-industry-initiative-launched-to-end-plastic-pollution/>.

⁴³ For a comprehensive overview and thorough analysis of the Courts’ and the Commission’s decisional practice see Nowag, *Environmental Integration in Competition and Free Movement Laws* (2016), 215ff.

⁴⁴ Case C-309/99 - *Wouters and others*, Judgment of 19 February 2002.

⁴⁵ *Ibid.*

⁴⁶ Case C-519/04P - *Meca-Medina and Majcen v Commission*, Judgment of the Court of 18 July 2006.

⁴⁷ Case C-1/12 - *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, Judgment of 28 February 2013.

⁴⁸ Case C-519/04P - *Meca-Medina and Majcen v Commission*, Judgment of 18 July 2006, para. 45.

⁴⁹ *Ibid.*, para 43.

between athletes”⁵⁰ and “to safeguard equal chances, [...] the integrity and objectivity of competitive sport and ethical values in sport”⁵¹ are outside Art. 101 (1), then collectively agreed (minimum) standards to safeguard other sustainable business practices should not be treated differently.

Adopting this reasoning for “adherence-to-laws” agreements (above under 1.e.) is particularly straightforward given the purpose of, e.g., anti-corruption laws to protect ethical and fair competition. But it doesn’t take much to transfer the concept to other societal or environmental sustainability goals. It would therefore be helpful if the revised HGL clarified that joint industry commitments are outside Art. 101 (1) if and to the extent that they create and protect the longer than short-term requirements that ensure a sustainable – or “healthy” – level-playing field between competitors.

b. Sustainability arrangements pursuing objectives covered by European treaty objectives

Beyond the *Meca-Medina* logic which permits to qualify sustainability goals as “legitimate objectives” capable of preventing the application of Art. 101 (1) TFEU, “every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole”⁵². I.e. sustainability objectives should be considered in Art. 101 TFEU, as expressed in the European treaties:

- most prominently in Art. 11 TFEU that states that “environmental protection requirements *must* be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development” [emphasis added].
- According to Art. 3 (3) TEU the Union shall work for “the sustainable development of Europe based on [...] a high level of protection and improvement of the quality of the environment. [...] It shall promote social justice and protection.” Art. 3 (5) TEU articulates the global scope of this ambition, stating that the EU shall “contribute to [...] the sustainable development of the Earth”.

Since *Cassis de Dijon*, the Courts have developed a sophisticated framework to balance environmental protection and other horizontal integration clauses with the market freedoms. State aid law, too, has been addressing environmental protection since the 1990s. And the Courts have held “that environmental protection requirements must be integrated into the Community policies [...] which include competition policy”⁵³, reflecting “the principle whereby all Community measures must satisfy the requirements of environmental protection”⁵⁴. Guidance from the Commission⁵⁵ on its reading of Art. 101 TFEU in the light of the treaties’ sustainability objectives would be most valuable.⁵⁶

4. Admissibility of sustainability agreements under Article 101 (3) TFEU

In case an effects assessment *does* lead to the conclusion that an agreement is caught by Article 101 (1) TFEU, and where the block exemptions namely for pre-market R&D agreements⁵⁷ or for production specialisation⁵⁸ don’t apply, the HGL should provide guidance where the promotion of sustainability

⁵⁰ Ibid, para. 45.

⁵¹ Ibid, para 43.

⁵² Case 283/81 - CILFIT Srl v Ministry of Health, Judgment of 6 October 1982, para. 20.

⁵³ Case T-210/02 - British Aggregates v Commission, Judgment of 7 March 2012, para. 117.

⁵⁴ Case C-62/88 – Greece v Council, Judgment of 29 March 1990, para. 20.

⁵⁵ Further to its 2010 Report on Competition Policy which stated (on page 32) that “another essential area where competition policy has evolved to take into account a long-term challenge to the Union is in the protection of the environment and the promotion of sustainable growth. [...] the Commission has ensured that competition policy supports the shift towards a more sustainable economy.”

⁵⁶ For a detailed and conclusive analysis on the balance of the environmental integration clause in Art. 11 TFEU, the market freedoms, state aid and competition law see Nowag, Environmental Integration in Competition and Free Movement Laws (2016).

⁵⁷ Regulation (EU) 1217/2010, OJ [2010] L 335.

⁵⁸ Regulation (EU) No 1218/2010, OJ [2010] L 335 .

objectives has the potential to outweigh the negative effects of the cooperation on competition in the sense of Art. 101 (3) TFEU. We follow below the structure of Art. 101 (3) TFEU and its elements to highlight which considerations we believe the Commission should take into account.

a. 1st condition of Art. 101 (3) TFEU: Sustainability benefits as economic benefits

Many competitor collaborations lead to direct cost efficiencies that are easily addressable under the current HGL; the energy cost savings brought about by the concerted outsourcing of less energy-efficient washing machines in *CECED*⁵⁹ are a good example. As another example, more regenerative farming practices by smallholder farmers (see example under 2.b.) lead to higher yields.

We believe the Commission should recognize more explicitly that *qualitative efficiencies* - where the value is created in the form of new or improved products, greater product variety, etc. - are relevant under Art. 101 (3) TFEU. From a consumer perspective, a more sustainable product is often a better product so that product sustainability itself is a qualitative benefit. In a similar vein, the Dutch competition authority (e.g. in *Chicken of tomorrow*⁶⁰) and the OFT have acknowledged that animal welfare, product biodegradability or “rainforest friendliness” can be qualified as direct economic benefits if consumers place a value on those features.⁶¹ To the extent that collectively agreed sustainability criteria reflect European laws or standards, their application elsewhere should also be taken into consideration as a a positive objective, as warranted for by Art 3 (5) TEU.⁶²

Similarly, especially environmental co-operations will often contribute to *technical and economic progress* in the sense of Art. 101 (3) TFEU.⁶³

It would also be most helpful if the HGL would provide the Commission’s take on *negative externalities* that are reduced through sustainability co-operations. Negative externalities, e.g. plastics waste or CO2 emissions, and their impact on subsidized or unpriced resources (e.g. water), are costs that may largely be indirect from the perspective of the individual consumer of a given product - but they are very real: someone will pay them, though often not the manufacturers or the consumers but society as a whole. Should these tremendous costs⁶⁴ really be excluded from the benefits test under Art. 101 (3) TFEU, as current decisional practice suggests?⁶⁵

These considerations may also illustrate why price-centric analysis within Art. 101 (3) TFEU would risk being counter-productive in respect of environmental and societal concerns: Excessively low prices pose a threat to scarce resources and discourage sustainable land use practices. Similarly, when looking at the most vulnerable members of the least advantaged societies, a strong case can be made for the merits of higher commodity prices – as long as they translate indeed into improved livelihoods and working conditions brought about by collective action.

⁵⁹ Commission decision of 24 January 1999, Case IV.F.1/36.718 (CECED), OJ [2000] L 187/47.

⁶⁰ ACM, “ACM’s analysis of the sustainability arrangements concerning the Chicken of Tomorrow” (2015), available at <https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow/>.

⁶¹ Ibid; OECD, “Policy Roundtables: Horizontal Agreements in the Environmental Context” (2010), p. 102.

⁶² “In its relations with the wider world, the Union shall uphold and promote its values and interests [...]. It shall contribute to [...] the sustainable development of the Earth.

⁶³ Commission Decision of 18 May 1994 (IV/33.640 - Exxon/Shell) OJ [1994] L 144/20, paras 76-68 and 71; Commission Decision of 21 December 1994 (IV/34.252 - Philips-Osram) OJ [1994] L 378/37, paras 25-27; Commission Decision of 23 December 1992 (IV/33.814 - Ford Volkswagen) OJ[1993], OJ L 20/14, para. 26.

⁶⁴ As an example, best estimates suggest that plastics-related pollution alone costs humanity over US\$2.2 trillion a year in environmental and social damage. See Minderoo Foundation, “Global industry initiative launched to end plastic pollution”, available at <https://www.minderoo.org/minderoo-foundation/news/global-industry-initiative-launched-to-end-plastic-pollution/>.

⁶⁵ While in CECED, the Commission explicitly recognized negative externalities; Commission Decision of 24 January 1999 (Case IV.F.1/36.718 CECED) OJ [2000] L 187/47, para. 56.

Until the turn of the century, the Commission repeatedly and consistently recognized sustainability benefits as benefits in the sense of Art. 101 (3), even if they wouldn't meet narrow consumer welfare standard requirements.⁶⁶ The revision of the HGL presents an opportunity to revisit assumptions made over the last two decades and to clarify the scope of Art. 101(3) with a view to the horizontal integration objectives anchored in the treaties (above under 3.)⁶⁷ and, correspondingly, Commission policy priorities as articulated namely with the European Green Deal.

The Australian Consumer and Competition Commission (ACCC)⁶⁸ has accepted environmental benefits to a large extent when assessing arrangements between competitors. The cases are remarkable in that industry agreements were cleared that foresaw fixed levies on consumers - on greenhouse gas refrigerants in one case and on the sale of agricultural or veterinary chemicals to fund programs for the collection and disposal of unwanted, empty chemical containers and chemicals in another.⁶⁹ According to the ACCC, the positive impact on Australia's efforts to comply with international climate commitments and on effective waste disposal respectively justified the imposition of the levies.

The Australian approach may also serve as a blueprint in that it demonstrates that economic benefits do not have to be explicitly quantifiable in all instances. The ACCC, when assessing the levy program for chemical waste, held consultations and obtained submissions from state and commonwealth agencies and agricultural and veterinary industry associations that showed great support for the program. Environmental and societal impact valuation methods⁷⁰ can often deliver more scientifically sound results, including for negative externalities⁷¹, and there is a wealth of data available on short and longer term economic benefits of sustainable practices.⁷²

Conceptually, however, there is no legal basis in the EU for concluding that non-quantifiable benefits are less relevant than quantifiable benefits. Courts and competition authorities should exercise their judgment in evaluating these benefits. In the words of senior Commission official Maria Jaspers, "sustainability goals can be taken into account if they are valued by the consumer that is being harmed by that arrangement. Balancing done in that context is certainly not restricted to a mathematical exercise of clearly identified quantified price and profits."⁷³

b. 2nd condition of Art. 101 (3) TFEU: Fair share for consumers

Consumers clearly receive their fair share of the benefits whenever they are the immediate and only beneficiaries, e.g. in the event of direct cost savings and qualitative improvements which are consequences of sustainability arrangements between competitors.

⁶⁶ Ibid; Case COMP D3/34493 - DSD, Commission Decision of 17 September 2001, para. 148: environmental benefits as consumer benefits. For further references see Nowag, *Environmental Integration in Competition and free movement laws*, p. 225-226.

⁶⁷ See also Coates/Middelschulte, *Getting Consumer Welfare Right: the competition law implications of market-driven sustainability initiatives*, ECJ 2019.

⁶⁸ That is admittedly overseeing a competition law regime that expressly recognizes public interest considerations.

⁶⁹ OECD Competition Division, *The OECD holds a roundtable on horizontal agreements in the environmental context*, e-Competitions Bulletin October 2010, Art. N 85630.

⁷⁰ E.g. SAVi by IISD (<https://www.iisd.org/project/SAVi-sustainable-asset-valuation>), "Impact Valuation" by SAM (<https://yearbook.robecosam.com/articles/impact-valuation-holding-sustainability-to-account/>) or "Valuing Sustainability" by PwC (<https://www.pwc.com/my/en/services/sustainability/valuing-sust.html>); more generally on sustainability assessment techniques see at <http://www.oecd.org/greengrowth/48305527.pdf> and <https://www.lifecycleinitiative.org/wp-content/uploads/2012/12/2011%20-%20Towards%20LCSA.pdf>.

⁷¹ In CECED, the Commission estimated "the saving in marginal damage from (avoided) carbon dioxide emissions (the so-called 'external costs') at EUR 41 to 61 per ton of carbon dioxide"; Commission decision of 24 January 1999 (Case IV.F.1/36.718 CECED), OJ [2000] L 187/47, para. 56.

⁷² See for instance at <https://www.ellenmacarthurfoundation.org/publications>.

⁷³ Maria Jaspers at conference "Sustainability and Competition Policy: Bridging two Worlds to Enable a Fairer Economy", 24 October 2019, available at <https://www.youtube.com/watch?v=7mpWAOhkQbY>, at 4:59:35.

Other benefits of sustainability co-operations – less greenhouse gas emissions, improved livelihoods of farmers, less child labour, and many others – may be more difficult to integrate into the currently prevailing, narrow interpretation of Art. 101 (3). The following alternative readings might be helpful:

- Where co-operation brings about globally tangible benefits, such as reduced CO₂ emissions, the fact that EU consumers generally also benefit should lead to a presumption that they are receiving a fair share of the benefit. The Commission has recognised this, even in circumstances where the direct purchasers of goods derive no particular benefit from the goods themselves.⁷⁴
- In *EACEM*⁷⁵, the Commission qualified a joint commitment of TV and video recorder manufacturers to reduce energy consumption when on stand-by mode as restrictive but endorsed energy saving *and* environmental benefits as representing technical and economic progress which would be passed on to consumers: Indeed, where individual and potentially more-than-individual benefits come together, it seems adequate to assume that consumers receive their fair share.
- The 2011 HGL recognized benefits not only at an individual but also an aggregate consumer level.⁷⁶
- The CFI has held that so-called out-of-market benefits may well fall under Art. 101 (3) TFEU.⁷⁷ The benefits of this holistic approach are striking when looking at the *Energieakkoord* decision⁷⁸ where the ACM found that higher costs for consumers of EUR 75 m p.a. through increased energy prices weren't offset by air quality improvements in the Netherlands amounting to EUR 30 m p.a. – thus disregarding effects outside the territory of the Netherlands and positive impact in neighboring member states, the EU more generally, let alone the positive effect on global climate change.
- A review of the *Energieakkoord* case⁷⁹ may have inspired the ACM to recognize, in its “Vision document”, benefits that “cover an extended period of time, and if they occur within a larger group than the current consumers of the relevant product”.⁸⁰ In other words, the ACM now opens the door for the consideration of (1) out-of-market benefits, thus deviating from the path taken in *Energieakkoord*⁸¹ and *Chicken of tomorrow*⁸², as well as (2) benefits for future consumers or, more generally speaking, positive effects which will materialise with a time lag.
- Such future benefits are of particular practical importance: Most examples of joint commitments to voluntary payments put forward above under 2.c. are unlikely to produce immediate benefits. Rather, increased investment in measures for better plastics recycling, strengthening workers' human rights or improving their livelihoods materialize and literally pay out at some point in the

⁷⁴ Commission decision of 24 January 1999 (Case IV.F.1/36.718 CECEDE), OJ [2000] L 187/47, para. 56.

⁷⁵ European Commission, XXVIIIth Report on Competition Policy (1998), p. 152.

⁷⁶ Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001/C 3/02), paras. 193.194.

⁷⁷ See Case T-86/95 - *Compagnie générale maritime and Others v Commission of the European Communities*, Judgment of 28 February 2002.

⁷⁸ ACM, *Energieakkoord* (2013), available at https://www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf.

⁷⁹ *Ibid.*

⁸⁰ ACM, “Vision Document: Competition & Sustainability” (May 2014), p. 16, available at https://www.acm.nl/sites/default/files/old_publication/publicaties/13077_vision-document-competition-and-sustainability-2014-05-09.pdf.

⁸¹ *Ibid.*

⁸² ACM, *ACM's analysis of the sustainability arrangements concerning the Chicken of Tomorrow* (2015), available at <https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow/>.

future. But we don't think they should be disregarded within Art. 101 (3) TFEU. Societal and environmental sustainability is a marathon, not a sprint, since goals are often not immediately attainable. The Commission has adopted a similar logic with the 2030/2050 milestone arguments of the European Green Deal⁸³ - wouldn't it be both timely and coherent to include future consumers in the consumer concept of Art. 101(3) TFEU?

- Probably not every relatively distant economic efficiency should receive the same weight in the Art. 101 (3) TFEU test as an immediate, quantifiable benefit. A possible remedy might be to assume that the greater the time lag, the greater the efficiencies must be.

c. 3rd condition of Art. 101 (3) TFEU: Indispensability

Cooperation between competitors must be necessary to attain sustainability objectives. In many of the examples put forward in this paper, collective action will indeed be indispensable in that sense:

- Whenever only collective demand enables the creation and development of sustainable technologies or infrastructures:
 - The basic R&D for chemical recycling has been around for years, but the investment required to refine and mature the technology has kept undertakings from pursuing its development.
 - Creating effective supply and logistics structures for healthier and more environmentally sustainable foods may not be feasible without joint action and pooled purchasing power.
- Where individual businesses – even with comparatively strong buying power – lack the necessary leverage to induce systemic changes required in supply chains:
 - Fishing moratoria are an instructive example as they only work if respected by everybody.
 - Experience shows that child and slave labour and other human rights violations in the supply chain cannot be eliminated absent industry-wide bans and rigorous, coherent action against non-compliant suppliers in the most disadvantaged jurisdictions with poor law enforcement.
 - Similarly, many suppliers will not agree to pay living wages as long as there are customers willing to accept exploitative working conditions.
 - In the face of public and private governance weaknesses, corrupt practices will persist absent a consistent and potentially concerted zero-tolerance approach across industries.
- Where individual companies are ready to consider pioneering new technologies or standards but are deterred by the risk of first-mover disadvantages⁸⁴:
 - Compaction is an illustrative example: studies, as well as Unilever's experience, confirm that consumers don't switch to smaller packs if conventional packs remain available since they (wrongly) assume to get more value for money.
 - Similar concerns apply to other initiatives outlined under 2. – from cold-chain warm-up for frozen products to a conversion to plastics packaging that is more easily recyclable: Voluntary standardisation can only attain piecemeal improvements, if at all, while mandatory standards may be indispensable to establish a level-playing field.

⁸³ Available at https://ec.europa.eu/clima/policies/strategies/2050_en.

⁸⁴ Ref. e.g. Business and Sustainable Development Commission, Better Business Better World, p. 55: "Business leaders that choose to align their strategy with the Global Goals anticipate that, sooner or later, their business will start to incur costs that their competitors don't face. This is true across all industries. In commodity sectors, current low prices are aggravating cost pressures, making it hard for progressive businesses to 'internalise' environmental or social costs that competitors are not willing to bear. Even in more differentiated sectors, such as consumer goods, cost pressures are intense, partly because of slow growth in middle-class purchasing power".

- International and sometimes global collaboration will often be a precondition for change given the risk of supply shifting to countries with lower standards if the stricter ones are only applied on a limited geographic scale.
- iv. Where only collective voluntary financial efforts of industry peers create the incentives or infrastructures for the most impactful sustainability measures:
- In the example of the “Sea the Future” initiative (under 2.c.), contributions payable on plastics produced from fossil fuels are necessary to increase demand for plastic waste and thus to drive collection efforts and the development of recycling technologies.
 - When downstream infrastructures – e.g. for collecting and sorting of plastics waste – are insufficient, and where governments lack the means to establish them, collective industry efforts and investment can turn out to be the only remedy.

It is true that consumers increasingly consider sustainability to be part of the quality dimension of a product (see above under a.). Consequently, a more sustainable product delivers a competitive advantage to companies if consumers are willing to pay a mark-up for the associated costs. And while this works often particularly well for premium and/or niche products, consumers of mass market brands have proven less inclined to embrace higher prices for more sustainability:

“Consumers in general rely on companies to meet basic environmental and social standards in their operations, allowing them to get on with hunting down the best value. They don’t pay attention to how products are made every day.”⁸⁵

In other words, collective action may be indispensable especially where willingness-to-pay surveys alone cannot capture consumer awareness and appreciation of the sustainability of sourcing, production and the product itself. This is likely to be the case for the biggest segments of consumer markets, and the most scaled cross-industry initiatives. Clarification from the Commission as to how to resolve the tension between such transformational sustainability co-operations and the consumer welfare approach that currently governs the application of Art. 101 (3) TFEU would be critical.

Conversely, upfront and coherent collaboration (e.g. through certification and labelling) can be a precondition for consumer acceptance, giving consumers reassurance that the claimed superior sustainability performance of the product is not based on arbitrary or biased criteria of individual companies.

Sustainability labels and more generally the promotion of environmental and societal objectives through collective industry initiatives may also be indispensable to enable SMEs to adopt more sustainable sourcing standards or production methods that they otherwise couldn’t afford to introduce given their lesser financial clout compared to bigger companies.

A common feature of many sustainability agreements (notably those aimed at creating new markets (2.c.)) is their limited duration. Once a new product/production methodology has gained foothold, the co-operation could and - unless relevant efficiencies justify an extension - should be dissolved.

d. 4th condition of Art. 101 (3) TFEU: No elimination of competition

Sustainability agreements must not lead to an elimination of competition in terms of products or process differentiation, technological innovation or market entry. Co-operations which only cover a small part of the relevant market are by definition unable to eliminate competition. But even broader co-operations with a more than marginal impact on costs and thus price competition do not necessarily eliminate competition - provided that the co-operation does not wholly determine retail

⁸⁵ “This makes it very difficult for an individual company to raise its standards on its own, even though many might want to be better employers and stewards of the environment. All the players have to agree to raise and maintain standards at the same time to keep the playing field level.” (Business and Sustainable Development Commission, Better Business Better World, p. 56.)



prices and that there are other significant competitive parameters on which the parties can continue to compete in other ways, i.e. by way of a combination of factors such as price, quality, innovation, branding, etc.

Any co-operation to achieve sustainability objectives should be strictly limited to that which is necessary for those objectives, and safeguards must be put in place to ensure that the co-operation does not spill-over into other areas. The parties must remain wholly free to compete on all other parameters of competition.

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