European Commission Consultation on Draft Horizontal Cooperation Guidelines: Unilever Response on Sustainability Agreements

1. Introduction and Summary

Unilever welcomes the chapter on Sustainability Agreements in the Commission's draft Horizontal Cooperation Guidelines (the "**Guidelines**").[1] This is a significant step forward in unlocking the benefits of sustainability collaborations for society and consumers. The Chapter also sends a signal to businesses that the Commission encourages co-operation types that industry peers may not yet have contemplated, notably for antitrust concerns.

We particularly support the decision to provide a dedicated chapter on sustainability, the notion of sustainability adopted *(para. 543)*, the recognition that first-mover concerns can restrain individual action *(para. 585)* and that reducing negative externalities can qualify as a benefit in the sense of Art. 101(3) TFEU *(para. 578/579).* Taking the collective impact of such benefits (in principle) into account in the Art. 101(3) assessment is also a crucial development *(Section 9.4.3.3)*.

In response to the Commission's request for feedback, we have identified areas where further changes are important. These are, in summary, that:

- The Guidelines' approach to Article 101(1) risks overly protecting unsustainable products.
- The detailed guidance on standards is very helpful. But the Guidelines should more clearly state that mandatory standards, if certain conditions are met, do not harm competition.
- We welcome the reading of the term "benefits" in Art. 101(3) that goes beyond a narrow notion of "efficiencies". However, the Guidelines unnecessarily discourage impactful initiatives by assuming that collaborating is always unnecessary where regulation is in place or where some companies have already acted individually. This restrictive approach plainly contradicts the Commission's concept of residual market failure which recognizes that both individual action and legislation may be ineffective remedies to sustainability challenges.
- The recognition of individual use-value benefits is encouraging in principle. However, it is unlikely to be relevant while it is tied to consumers' willingness to pay – a concept that is flawed and of little use in Art. 101(3) as collaborations will regularly fail to qualify as indispensable where consumers are willing to pay for more sustainability.
- Recognising collective benefits is vital to enable the most impactful sustainability co-operations. Unfortunately, the Guidelines remain half-hearted in requiring that those benefits are felt by current users, thus disregarding the negative externalities and harm imposed on non-users. Introducing such a "*polluter-must-benefit principle"* would disregard that the costs of an unsustainable product may only be felt by those who do not consume it. It is also disappointing that future users' benefits are not taken into consideration. In any event, requiring a full compensation of the users goes too far as it is not warranted by Art. 101 (3).

We would be very happy to discuss any aspects of our response with the Commission.

2. Sustainability and Article 101(1) – General Approach

We agree with the broad definition of sustainability used in the Guidelines. It is right that this goes beyond environmental factors, including respecting human rights, facilitating shifts to healthy and

[1] For our comments on the wider sections, please refer to the submissions by the European Brand Manufacturer Association (AIM) and ERT. We also support their submissions on Chapter 9 of the Guidelines.

nutritious foods, animal welfare and fostering resilient infrastructure *(para. 543).* We agree that many collaborations that pursue these aims will not impact competition *(para. 551).*

The Guidelines rightly consider sustainability when assessing if an agreement is a by object restriction *(para. 556-560)* and in respect of standards. **They should however be rebalanced in favour of more strongly protecting competition for sustainable, rather than unsustainable goods:**

- Principles such as the As Efficient Competitor Test recognise that consumers are not best served by protecting inefficient rivals. We believe the same applies for sustainability. We would therefore recommend removing "*foreclosure of alternative standards*" as an anti-competitive effect, where those standards are unsustainable and competition for sustainable products within the standard remains *(para. 569 and para. 573).*
- The Guidelines suggest that the Commission does not consider that the *Wouters* and *Meca-Medina* case law can extend to sustainability agreements *(para. 548 and footnote 315)*. These cases recognise that agreements fall outside Article 101 if the anticompetitive restrictions are inherent or necessary for a legitimate objective to be pursued.

  It would be helpful to clarify if this is the Commission's position. There are strong parallels between sustainability and the objectives protected in these cases (such as, in *Meca-Medina*, rules to safeguards "*equal chances, […] the integrity and objectivity of competitive sport and ethical values in sport*"). We would encourage the Commission to at least indicate that it will consider if legitimate sustainable considerations exclude Article 101 on a case-by-case basis.

We would also suggest that the Guidelines incorporate a more general recognition of the positive competitive impacts of sustainable collaborations beyond sustainability standards (similar to the effects recognised in *para. 568*) and like the Netherlands Authority for Consumers and Markets ("**ACM**"), would find it helpful for the Commission to also identify other examples of agreements that would fall outside Article 101(1).[2] While the guidance on sustainable standards is useful, it currently provides limited insights and examples of other types of sustainable arrangement.

In particular, it would be useful to discuss in more detail the analysis of joint purchasing agreements focused on sourcing sustainable products, e.g. to encourage and boost investment into the production of sustainable packaging materials such as recycled plastics. Similarly, the Guidelines identify as a by object restriction exchanges "*of future product characteristics which are relevant for consumers*" (*para. 424*), but discussing what the future characteristics of products *can and should be* is necessary for many sustainable initiatives, and this should be specifically recognised.

This could largely be addressed by including more examples of sustainable co-operations – within or outside Chapter 9 - as well as by incorporating a discussion of information flows within examples.

3. Sustainability and Article 101(1) – Standards Agreements

Sustainability standards are essential. Some key amendments should be made to the Guidelines so that standards can be developed and agreed with confidence.

i. Scope

We agree with the Commission that standards agreements may cover a large range of topics, including phasing out of products, harmonisation of materials and agreements to purchase inputs meeting specified standards (*para. 561*).

[2] See Response ACM public consultation horizontal block exemptions and guidelines, page 6.

Decisions by joint purchasing agreements to source sustainable products are however not made subject to the soft safe harbour in para. 333, though in principle their effects and aims could be broadly similar to an agreement to purchase inputs meeting specified sustainable standards. The Commission should consider extending the soft-safe harbour to such arrangements or provide an example showing its assessment of a scenario similar to para. 333 relative to agreements to individually and/or collectively purchase sustainable products.

ii. By Object Analysis

The Guidelines identify as a by object restriction an "*agreement between the parties to the sustainability standard to put pressure on third parties to refrain from marketing products that do not comply with the sustainability standard*" (*para. 571*).

We do not think such conduct is necessarily anti-competitive by nature. For example:

- if "*third parties*" is a reference to competitors, having market-wide standards is not necessarily harmful where parties can compete on other elements, and can prevent freeriding concerns where sustainable and non-sustainable standards co-exist (as recognised in *para. 605*);
- if "*third parties*" refers to downstream intermediaries or suppliers, it can be imperative for companies to ask those parties to comply with the standard for the sustainable benefits of the agreement to manifest (eg. it would be commercially unreasonable if, following an agreement among manufacturers to cease procuring unsustainable versions of a product, manufacturers were unable to ask suppliers to provide it solely with sustainable versions of that input). Considering such conduct to be a by object restriction would also be contrary to the Guidelines' position that a joint purchasing agreement where parties commit to source sustainable products requires an effects analysis (*para. 333*).

We therefore recommend removing this as a by object restriction. If not removed, the Guidelines should clarify what is meant by pressurising, obliging or imposing on third parties a requirement to comply with a standard.

iii. Mandatory Standards

In our experience, mandatory standards (where participants agree to be bound by the standard) are often critical for successful sustainable collaborations. This is especially the case where investments in adherence to the standard are substantial, which is typically the case for the most impactful sustainability industry co-operations.

We are therefore very supportive of the Guidelines' endorsement of mandatory standards (provided that participants can individually choose to adopt a higher standard) in that *para. 572* specifies that obliging *third parties* to comply falls outside the soft-safe harbour, i.e. obliging the *parties* to comply with the standard falls within it.

However, the Commission should spell this out more clearly to avoid any perceived ambiguity. The current drafting leaves room for confusion on the ability to make standards mandatory for participants. In particular, that companies are "*free to also operate outside the label*" is cited as a reason why a collaboration may lack appreciable anti-competitive effects *(para. 575),* while the "*non-exclusive*" nature of a sustainable label is cited as one of the factors making appreciable negative effects unlikely *(page 146)*.

iv. Market Coverage

The Guidelines' general view is that the potential anti-competitive effects of a standard increase with the share of the market applying it (*para. 575*). However, even standards with a high market coverage (and thus potentially a particularly positive sustainability impact) can remain competitively neutral if the standard leaves room to compete on at least another key parameter, such as price, volume and branding around the (now more sustainable) product. We therefore suggest amending para. 575, which places too much emphasis on the ability to ignore or deviate from the standard.

4. Sustainability and Article 101(3) – Efficiency Gains and other Benefits

As a general point, it would be helpful for the Commission to emphasise in para. 576 that the Chapter 9 Article 101(3) framework applies to all agreements that pursue sustainability as one or more of their objectives, even if the agreement is covered by another chapter of the Guidelines.

Regarding the first condition of Article 101(3), the Guidelines use the term "*benefits*" as well as "*efficiencies*". We consider "*benefits*" to be more accurate. It not only corresponds to the wording of the TFEU, but allows a wider range of improvements to be more readily recognised as relevant. This includes cleaner technology, less pollution and water contamination (*paras. 577 and 578*).

In this spirit, we do suggest amending the benefits discussed in Example 4, which cites a collective sustainability standard which "*slows down but does not stop the reduction of forested areas and the degradation of their biodiversity*" and which is labelled by non-governmental organisations as being "*too little, too late*" *(page 147).* Sustainable collaborations aim to address complex challenges. Efforts that help reduce or slow negative externalities – even if unable to eradicate them – must still be encouraged. This text implies a negative view of such benefits and should therefore be removed.

5. Article 101(3) – Indispensability

We recommend casting a broader net around the initiatives that are indispensable. At present, the Guidelines are likely to undermine confidence in collaborations.

i. Achieving earlier and more effective benefits should be protected

First, we agree that collaborations may be indispensable to ensure that consumer-supported sustainable goals can be achieved in a more cost-efficient way (*para. 582*). This should be explicitly extended to also include cases where collective efforts ensure that the improvements obtained are more effective or can be delivered sooner (as recognised by the ACM).[3] Meaningful sustainability improvements often require scale not only to overcome first mover disadvantages related to cost increases, as the Commission recognizes, but also in order for environmental or social benefits to materialize as broadly as possible.

ii. Assumptions on legislative intentions should be removed

The Guidelines state that "*where EU or national law requires undertakings to comply with concrete sustainability goals, cooperation agreements and the restrictions they may entail, cannot be deemed*

[3] ACM Draft Guidelines, para. 65, available at: Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law (acm.nl).

indispensable for the goal to be achieved" (para. 583). This is also reflected in Example 5, which states that "*the reduction in electricity consumption leads to less pollution from electricity production and this benefits consumers, to the extent that the pollution-related market failure is not already addressed by other regulatory instruments (e.g. the European Emissions Trading System, which caps carbon emissions)*" (*page 149*).

This is too broad an assumption in our view, given the multitude of regulations that will address sustainable initiatives, and effectively renders collaborations that operate in the same space as those regulations legally unfeasible or highly risky.

This assumption also contradicts the concept of residual market failure that the Commission very helpfully, and correctly, introduces into the Guidelines (*para. 586*). For example, regulatory standards sometimes only reflect the lowest common political denominator at the time of their introduction. Where individual action is unlikely to effectively remedy the consequences of unsustainable business and related negative externalities, collaboration should be allowed to fill the gap – in such cases, banning additional standards, notably those more stringent than the law, would lead to absurd results.

The Guidelines' assumption is also unlikely to hold in practice, as collective action can still be the best, or only, means of achieving individual legislated goals. For example, attaining legally mandated recycling targets (e.g. via plastic taxes) may require industry players to jointly source recycled plastics, thus inciting recyclers to increase currently scarce plant capacities, or to align packaging materials or formats to ensure a more effective national recycling system. The Guidelines' blanket assumption however risks rendering such a cooperation illegal, or high risk, and the cost-efficiency carve-out in *para. 582* is too narrow to capture these scenarios.

The Guidelines should instead draw inspiration from the example of Article 210(a) of Regulation No. 1308/2013. This explicitly empowers agricultural product producers to enter into agreements that aim to apply a higher sustainability standard than is mandated by law.

iii. Necessity of mandating minimum standards should be recognised more fully

As above, we consider mandating minimum standards is key to the success of sustainable initiatives (provided that there is room to individually apply a higher standard).

That one or more companies have already chosen to apply a higher standard does not make common minimum standard agreements unnecessary. For example, the commitment of an important industry player may be needed to provide comfort to rivals to join the standard, even if their individual actions already exceed the mandated level. The Commission's reasoning in Example 4 below should therefore be revisited and removed:

"it seems unlikely that the agreement is indispensable to raise sustainability standards for the cultivation of wood. This is shown by the fact that some of the parties to the agreement and other furniture producers already use higher standards and labels. In other words, it is not clear why the agreement is necessary in order to raise sustainability standards and why individual action by each furniture producer would not enable them to raise standards in a similar way or – as a result of competitive pressure – in an even better way" (page. 148).

6. Article 101(3) - Pass on to consumers

The Guidelines take important steps to reject a narrow view of pass-on benefits, by recognising collective benefits *(section 9.4.3.3)* and benefits to indirect users *(para. 588).* The approach remains

too limited, however, to truly empower sustainable action and avoid inconsistency and unnecessary complexity. We suggest the following changes.

i. Individual benefits

We agree that consumers value more than just their own individual benefit, and the recognition of individual non-use value benefits is therefore, in principle, helpful. **However, tying these benefits to the willingness to pay principle materially undermines their use.**

First, the Guidelines state that cooperation will not be indispensable where there is demand for sustainable products. With this in mind, and except where co-operation is necessary to produce those products more cost-efficiently *(para. 582)*, every time consumers are willing to pay a premium for a more sustainability product, co-operation wouldn't be indispensable and thus fail to meet the Art. 101(3) requirements.

Second, consumers are increasingly conscious of sustainability issues. However, an inherent challenge, recognised by the Commission is that negative externalities, "*are not sufficiently taken into account by the economic operators or consumers that cause them*" *(para. 545).* Willingness-to-pay is therefore an unsuitable measure to assess individual non-use benefits - a finding that is underlined by the often striking differences between stated and revealed preferences, as the Commission acknowledges *(paras. 597-598)*. Cognitive biases, as expressed in hyperbolic discounting, add further complexity when trying to capture consumer appreciation of sustainability.

ii. Collective benefits

These issues would not be as problematic if businesses could pursue joint initiatives delivering collective benefits with confidence. While it is highly commendable that the Commission endorses collective benefits as relevant within Art. 101(3) TFEU, unfortunately, the ability to do so is significantly limited by the requirement that actual direct users must be beneficiaries. In other words, unless the polluters themselves (and more generally consumers whose otherwise unsustainable behaviour would cause negative externalities) benefit, collective benefits are irrelevant and co-operations achieving such benefits risk being legally unviable.

This *polluter-must-benefit* requirement is very undesirable. It disregards the protection of those who must pay the cost for unsustainable consumption but cannot reduce it. Competition policy cannot turn a blind eye to this fundamental concern.

The restrictive notion of collective benefits adopted by the Guidelines would result, in many cases, in geographic and social boundaries being drawn around issues for which collective responsibility should be taken. Inequalities will be perpetuated: while the affluent are typically the heaviest polluters, they will be shielded from responsibility for the consequences of consumption if they are unwilling to pay for it.[4]

[4] United Nations Environment Programme, Emissions Gap Report 2020 cited a "*highly unequal global distribution of consumption emissions"* citing studies that *"estimate that the emissions share of the top 10 per cent of income earners is around 36-49 per cent of the global total, whereas the lowest 50 per cent of income earners account for around 7-15 per cent of all emissions*".

Further, given the Commission's leadership in competition policy internationally, this individualistic (and euro-centric) approach could translate into similar policies in other countries, and undermine the spirit of global solidarity required to meet the UN's sustainable development goals.[5]

Not only is the *polluter-must-benefit requirement* highly undesirable, it is also unnecessary.

First, in our view, it is not necessary to limit the notion of "consumer" in Art. 101 (3) TFEU to consumers of the very product in question, or demand that those consumers are fully compensated for any harm (which *para. 588* seems to require). The Commission in *CECED*, for instance, when examining the benefits of a collective agreement to remove outdated washing machines (and upon which Example 5 of the Guidelines appears to be based) recognised that "*such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines*".[6] This is in contrast to Example 5's more individualistic approach, which states that "*as users of washing machines make up the overwhelming majority of the overall population, a share of these environmental benefits accrues to the consumers in the relevant market that are affected by the agreement*."

We therefore suggest amending the Guidelines to recognise that reducing negative externalities is in fact a relevant benefit to the user/polluter, as the user foregoes a liability that they incur – regardless of whether legislation is in place to recover from the polluter the costs of the negative externalities that society would have to bear, or whether the polluter wishes to pay those costs. Demonstrating that a legitimate sustainable benefit is expected to accrue should therefore be sufficient, without it needing to be traced back to the direct consumers in question.

Alternatively, the Commission could follow the proposal the European Brand Manufacturer Association (AIM) has made in its contribution to the consultation, which recognises that fairness requires that before there is an assessment of the benefit to consumers, the full social cost of production and consumption is internalised in transactions with the consumer.

Second, even if the Commission does feel the need to limit the analysis to consumers of the product in question, this should not be limited to current users. The Guidelines make only a brief reference to "*positive externalities that may be enjoyed by the society today or in the future*" *(para. 593)*. Future consumers merit a much more central role. Unlike the Commission's Article 101(3) Guidelines, which consider that in principle future gains are of lesser value to consumers, the opposite is true for sustainability agreements.[7] It is future generations who will exponentially bear the cost of inaction, and therefore for whom the benefits of sustainable actions are most value. While, for example, the tangible impact of deforestation in South America or South-East Asia may be more limited on EU consumers of the related products today, this will certainly not remain the case in the future, with the knock-on effects of the loss of arable and habitable land (among other factors) impacting the global community at large.

Third, again, even if the Commission does feel the need to limit the analysis to current/future consumers of the product in question, this should not require that those consumers be compensated in full where demonstrable out-of-market benefits can be identified. Art 101(3) TFEU requires "*fair*" rather than "*full*" benefits for consumers, and it is indisputably fair to include those who bear the cost of consumption in that cost/benefit analysis, regardless of whether they consume the specific product in question. This would also reflect the ACM's call for a "*broader policy reading of the term 'fair share'*",

[5] United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Recital 39.
[6] Case IV.F.1/36.718.CECED, para. 56.
[7] Article 101(3) Guidelines, para. 88.

where "*collective benefits can count towards the fair share for consumers where they accrue to parties that are not (also) consumers within the relevant market*".[8]

This broader approach to benefits would of course not leave current consumers unprotected. The fourth condition of Article 101(3) requires that substantial competition is not eliminated. Our suggested approach enables users to benefit from competition but for a more sustainable product.

7. Article 101(3) – No elimination of competition

We agree with the Commission that market-wide sustainability agreements do not necessarily eliminate competition where businesses can compete on at least one important aspect of competition *(para. 611).* Properly addressing negative externalities in fact requires industry wide collaborations. This can make significant market coverage highly beneficial for sustainability agreements (indeed, we note that the Commission suggests that wide coverage might even be necessary for collective benefits in *para. 605*).

The potential benefits of market-coverage should be consistently highlighted. Example 4, for instance, raises competition concerns due to market coverage of a label, but does not analyse whether that label leaves room for parties to compete on other parameters, such as price, design, service and product type.

8. Future guidance

We would like to congratulate the Commission on the extensive work it has undertaken to reach this important milestone, and hope that our suggestions can help to close important gaps. Given this is a developing area for us all, we welcome Commissioner Vestager's statements that the Commission would be willing to provide guidance to businesses on specific initiatives.[9] We would also be grateful if the Commission could publish regular insights into its thinking as its practice in this area develops.

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[8] Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law (acm.nl), page 8.
[9] Commissioner Vestager, Speech "*The Green Deal and competition policy*", 22 September 2020.