

Joint letter to the European Commission

Brussels, 15 December 2021

Subject: Calling for competition rules that work for social sustainability

Dear Executive Vice-President of the European Commission,

The European Green Deal sets out that “[a]ll EU actions and policies should pull together to help the EU achieve a successful and just transition towards a sustainable future”.¹ Under the Treaties, sustainable development is an EU objective, and the EU must “ensure consistency between its policies and activities taking all of its objectives into account”.² Also, the UN Sustainable Development Goals are indivisible and balance three dimensions of sustainability: economic, social and environmental.

Any initiative aiming to boost sustainability can only succeed if it is consistent with the applicable policy frameworks at both the EU and global level. The European Parliament (EP) emphasised this point in its 2020 annual report on competition policy,³ stressing the need for “EU competition rules to be coherent with the European Green Deal, [...] the European Pillar of Social Rights and the UN Sustainable Development Goals”.⁴ The EP also clearly stated that the EU’s competition rules could significantly contribute to these global objectives.

**EU COMPETITION RULES SHOULD NOT STAND IN THE
WAY OF SUSTAINABLE DEVELOPMENT**

The European Commission’s (EC) recent competition policy brief rightfully points out that competition policy must reflect EU rules and values, and that competition authorities must not operate in a political vacuum.⁵ In addition, in its new Communication,⁶ the EC correctly states that “competition policy can help in further stimulating consumer demand for cleaner products and creating the right framework conditions.” We welcome this direction and look forward to seeing the ambitions of the EU’s Green Deal and Agenda for Sustainable Development translated into the revised EU competition rules, in particular the Horizontal Block Exemption Regulations (HBERs) and Horizontal Guidelines (HGL).

In its evaluation of the HBERs and HGL, the EC noted that the pursuit of sustainability goals was the most important development likely to affect the HGL. The proposed roadmap builds on this evaluation and aims to promote effective protection of competition and increase legal certainty for companies engaging in horizontal cooperation agreements, including sustainability initiatives. However, the EC’s policy brief focuses exclusively on the environmental part of sustainability, while the Inception Impact Assessment on the Revision of the HBERs and HGL⁷ highlights that the revised rules are expected to have a positive environmental impact, thereby overlooking the direct social impact and the potential impact on fundamental rights, which is worrisome.

¹ Commission Communication on the European Green Deal (COM(2019) 640 final) (European Green Deal), p. 19.

² Article 3 (especially 3(3) and 3(5)) TEU and Article 7 TFEU, respectively.

³ EP resolution of 9 June 2021 on competition policy – Annual report, 2020 (2020/2223(INI)) (EP Competition report 2020).

⁴ EP Competition report 2020; paragraph S.

⁵ European Commission, [Competition policy brief. 2021-01, September 2021](#).

⁶ European Commission, [A Competition Policy fit for new challenges](#), November 2021

⁷ European Commission, 7 June 2021, [HBERs Inception Impact Assessment](#).

We strongly believe that the notion of sustainability should include the social dimension of sustainable development and not focus exclusively on its environmental dimension. The former is a key component of the concept of sustainability, as defined in the 2030 Agenda for Sustainable Development,⁸ which was set up to “realize human rights of all” and “balance the three dimensions of sustainable development: the economic, social and environment”.

We would also like to draw attention to the approach retained by the Dutch Authority for Consumer and Markets (ACM) in its draft guidelines on sustainability agreements. Although these still privilege environmental over social sustainability, they acknowledge the interdependence of the different policy objectives included in the notion of sustainability and its multidimensional nature: “the other sustainability agreements, which ACM thus distinguishes from the environmental-damage agreements for the purpose of the application of the ‘fair-share’ criterion, concern, among other aspects, working conditions, animal welfare, social sustainability, and human rights.”⁹

ENVIRONMENTAL ISSUES CANNOT BE APPREHENDED IN ISOLATION BECAUSE THEY ARE CLOSELY RELATED TO SOCIAL ISSUES

While the direct link between social sustainability aspects, such as human rights, and adverse effects on the environment is widely acknowledged, it should also be recognised that it is unrealistic to expect that farmers and workers can meet higher environmental standards if they struggle to make a living from their production. Applying a broader sustainability lens throughout the HGL would offer urgently needed guidance to private sector actors willing to collaborate to achieve social objectives. This would also contribute towards enabling farmers to earn a living income, and workers to receive living wages, as part of a decent standard of living, which is considered as a human right.¹⁰

The lack of certainty on whether a particular cooperation initiative is permissible and how it can be structured deters market operators from collaborating on sustainability issues, particularly on social impact projects associated with low incomes and wages. Whereas great progress has been made in some areas due to multiple collaborative forums tackling sustainability issues, “there has been notably less progress on the issues of low wages and incomes”.¹¹

THE LACK OF CLEARER GUIDANCE WILL CONTINUE TO HAVE A CHILLING EFFECT ON INDUSTRY INITIATIVES ADDRESSING KEY SUSTAINABILITY ISSUES

We would appreciate guidance on whether and how an agreement between companies to enable the payment of a decent living wage can be put into practice. We believe that the best way to provide effective legal certainty in this respect would be to include a new section on “sustainability agreements” in the HGL that sets out in particular: (i) the cases where a sustainability agreement is unlikely to restrict competition within the meaning of Article 101(1) TFEU, and (ii) the conditions under which a sustainability agreement that may restrict competition can nonetheless benefit from an exemption under Article 101(3) TFEU.

While we understand – and fully agree – that companies cannot agree to a coordinated increase of the resale price of their products, we would like to know the EC’s views on collaborative approaches

⁸ [Transforming Our World: The 2030 Agenda For Sustainable Development](#).

⁹ ACM, [Draft Guidelines on sustainability agreement](#), paragraph 50.

¹⁰ United Nations Human Rights, [Universal Declaration of Human Rights](#). See also the following definitions of [Living Wage](#) and [Living Income](#)

¹¹ Fairtrade.org, [Competition Law and Sustainability - Fairtrade Foundation](#). For example, the need for collaboration in the cocoa sector to achieve progress on key sustainability goals has been recognised: “There has been tremendous effort by many players to work together to achieve the sort of progress we need. [...] However, the lack of clarity around competition law continues to prevent any meaningful progress on the issue of low farm-gate prices, which is a major issue in our sector and beyond. This really restricts further progress being made on other issues such as living incomes and wages”. Sophi Tranchell, Divine Chocolate.

regarding wages paid to the workers.¹² We call upon the EC to assess the situations under which private entrepreneurs can cooperate for initiatives related to sustainability or social fairness, with or without the intervention of public administrations. In any such assessment, the starting point should be that such arrangements inherently generate positive effects that can outweigh potential negative externalities on competition.

ENSURING A FAIR SHARE RATHER THAN PURSUING A PRICE-CENTRIC FULL SHARE APPROACH

We also invite the EC to clarify the notion of “fair share” for consumers under Article 101(3) TFEU in the context of sustainability. In line with the ACM’s approach per which “*consumers in the relevant market are also polluters who have a choice to modify their behaviour or not*”,¹³ but also because nothing in the EU Treaties says that consumers must be fully compensated where side effects of the agreement are felt, we believe that “fair share” should not be construed as “full share”. Indeed, the requirement that a “fair share” of the resulting benefits is passed on to consumers does not require that such benefits be passed on to the consumer in full. A “fair share” should presuppose that both the beneficial and adverse effects resulting from an anticompetitive agreement on the affected potential consumer groups are partially compensated.

While strong ethics, transparency and sustainable business models may appeal to consumers and thereby prove competitive, not all of them are ready to spend more for more sustainable products. In that sense, if the need to offer competitive products may help companies behave more sustainably, it still encourages them to produce cheaper, and therefore potentially less sustainable products, to meet all consumer demand. It would therefore appear reasonable to exempt an agreement between competitors that benefits society at large.

CONCLUSION

While companies can and do achieve some meaningful sustainability goals by acting alone, more deep-rooted structural issues require partnership and collective action involving a wide range of stakeholders. For many companies, this may mean engaging with the likes of government agencies, NGOs, researchers, healthcare professionals, farmers, suppliers, retailers, and/or peer companies, including competitors.¹⁴ The EC should therefore clarify whether and how EU competition rules allow multi-stakeholder initiatives on living wages or living income.



Michelle Gibbons,
Director General,
European Brands Association



Alexander Kohnstamm,
Executive Director,
Fair Wear Foundation



Sergi Corbalán,
Executive Director,
Fair Trade Advocacy Office



¹² Given that poverty is considered to be the greatest single force driving children into the workplace, ensuring that workers are paid a sufficient wage to eliminate the incentive to use children is in many cases the most efficient way to contribute to local laws banning child labour being respected. In that context, uncertainty around horizontal cooperation on living wages should be clarified. See International Labour Organization, [Causes \(of children work\)](#).

¹³ ACM, 27 September 2021, [What is meant by a fair share for consumers in Article 101\(3\) TFEU in a sustainability context?](#)

¹⁴ Martyn Chu, Danone, in [Competition Law, Climate Change & Environmental Sustainability - Concurrences](#), p. 333.