LIVING WAGE INITIATIVES: NO REASON TO OBJECT

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I. INTRODUCTION

The International Labor Organization's constitution declares that "*universal and lasting peace … requires … the provision of an adequate living wage*."[2] This recognition goes back as far as 1919, more than a century, yet it remains an unfulfilled aspiration for many workers in the developing world, for example on cocoa, banana, coffee or flower plantations.[3] Those buying from the plantations often express willingness to pay more for their inputs, the plain purpose being to enable the plantation owner to pay a living wage to workers – indeed, to ensure that the owner hires workers at all, rather than relying on unpaid child labor.

In that real-world sense, supportive industry initiatives seek to do good rather than to cause harm. The *effects* of joint action on pricing must be for consideration, but it needs not be axiomatic that the *object* is to limit competition. The present contribution examines the law on object infringements, as well as the practice of the European Commission ("Commission"). As will emerge, the European Court of Justice ("ECJ") has not mandated an absolutist position: indeed, recent judgments show the court limiting the object category.

This branch of the sustainability/antitrust debate is especially challenging, given the neuralgic role of price in antitrust. Commissioner Vestager, in her October 2019 speech, focused on lower-hanging fruits, notably the adoption of standards for sustainable products,[4] but the challenge of living wage initiatives also calls for similar clarity. The fear of antitrust exposure is a known limiting factor, as reflected in the UK's Fair Trade Foundation report on Competition Law and Sustainability (2019).[5] A more

2 Preamble to the ILO Constitution.

3 According to the World Bank, 10.7 percent of the world's population still live in extreme poverty. See the UK's Fair Trade Foundation report on Competition Law and Sustainability - A Study of Industry Attitudes Towards Multi-Stakeholder Collaboration in the UK Grocery Sector (2019. The report shows that one of the major reasons for this is the gap between average incomes in the agricultural sector and living incomes in virtually all countries where extreme poverty is prevalent. The same report identifies price paid to producers as the main problem: farmers continue to be squeezed at the start of the supply chain. Some governments have tried to address the issue by imposing a national minimum wage, but these attempts have been unsuccessful. The report is available at:https://www.google.com/search?q=UK%E2%80%99s+Fair+Trade+Foundation+report+on+Competition+Law+and+Sustainability+-+A+Study+of+Industry+Attitudes+Towards+Multi-Stakeholder+Collaboration+in+the+UK+Grocery+Sector+(2019)%2C&rlz=1C1GCEB_enGB885GB886&oq=UK%E2%80%99s+Fair+Trade+Foundation+report+on+Competition+Law+and+Sustainability++-+A+Study+of+Industry+Attitudes+Towards+Multi-Stakeholder+Collaboration+in+the+UK+Grocery+Sector+(2019)%2C&aqs=chrome..69i57.10719j0j4&sourceid=chrome&ie=UTF-8.

4 Vestager Speech "*Competition and Sustainability*," GCLC and FTAO Conference, October 24, 2019, available at https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en.

5 *Supra* note 3. For example, Alistair Smith from Banana Link, part of the World Banana Forum, noted that pricing at all levels of the supply chain is an issue often discussed at the World Banana Forum meetings but that competition law restricts the participants from discussing price solutions for sustainability purposes.

affirmative position from the Commission on living wage initiatives would be transformative, rather than leaving industry to seek private advice that the Commission would be unlikely to make it an enforcement priority to pursue such initiatives.[6]

Much has been written, in the newly active debate on antitrust and sustainability, about interpreting the competition rules within the wider framework of the EU Treaties.[7] Those are important arguments, but beyond the ambitions of this contribution. Rather, we focus here on clearing the way for that good work, by removing the prior concern that the object box will ensnare living wage initiatives before they ever have the chance to benefit from the new and enlightened approaches to interpretation.[8] Existing case law already embraces this narrower approach to object infringements, although it is not a message that the Commission has chosen to amplify: a larger object box makes for simpler enforcement, no doubt. But it will assist, vitally, if official guidance and comments can confirm that bona fide sustainability agreements are not object infringements, in line with Commissioner Vestager's commitment that "*competition policy should support … businesses … in helping to create markets that are sustainable*."[9] The Commission should aim higher than the low-hanging fruit.

II. INFRINGEMENTS BY OBJECT: EU LAW AND PRACTICE

Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") sets out two categories of prohibited agreements: agreements having (i) the object or (ii) the effect of restricting competition. The ECJ defined object infringements as restrictions which *"by their very nature have the potential to restrict competition within the meaning of Article 101(1)*."[10] So the agreement "*reveals in itself a sufficient degree of harm to competition for it to be considered that it is not necessary to assess its effects*."[11] Agreements which are not considered "infringements by object" can still violate Article 101(1) TFEU if they prevent, distort or restrict competition to an appreciable extent.

There are types of agreements which the Commission typically finds to be restrictive by object. This includes agreements between competitors which lead to price fixing.[12] The Commission has in the past found that agreements between competitors which involved, among others, arrangements on the purchase price of raw materials from suppliers, were infringements by object.[13]

However, the treatment of an infringement as being by object is based on decisional practice and not established by law. There should be nothing automatic about it and it should only be used with caution. The ECJ has become more and more critical about characterizing an agreement as a by-object infringement without a thorough examination: since *Cartes Bancaires*[14] the Court has consistently held that the concept of restriction by object must be interpreted restrictively.[15] This means, as the ECJ has repeatedly ruled, that an agreement must be examined in

6 Fair Wear Foundation Competition Law Dos and Donts for FWF Members Collaborating to Pay Living Wages, available at https://api.fairwear.org/wp-content/uploads/2016/06/FWF-guidancecompetitionlawjuly15.pdf; and Arnold & Porter Opinion on The Application of EU Competition Law to the Adoption of the Living Wage Standard, available at https://api.fairwear.org/wp-content/uploads/2016/06/OpiniontoFWF-TheApplicationofEUCompetitionLawtoFWFLivingWageStandardfinal1.pdf.

7 Not least the contributions in this present CPI collection.

8 We also leave aside for purposes of this paper the point that even object violations can in principle benefit from Art 101(3) protection. Rather, our point of principle is that sustainability collaborations such as living wage initiatives should not be tarnished by an "object" characterisation.

9 *Supra* note 4.

10 Communication from the Commission, Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements ("Horizontal Guidelines"), OJ C 11, 14.1.2011, p. 1–72, para. 24; see for example Case C-8/08, *T-Mobile Netherlands and Others*, para. 29; C-209/07, *Competition Authority v. Beef Industry Development Society and Barry Brothers (Carrigmore) Meats* (*Beef Industry Judgment*), para. 16.

11 See for example the recent ECJ judgment in C-228/18, *Budapest Bank* (2020), para. 37.

12 There are other categories of agreements to which this applies as well, e.g. market sharing, group boycotts, etc. but for present purposes we focus on price fixing as it seems most relevant in the sustainability context of this article.

13 *Raw Tobacco Italy* case (setting of common final purchase prices and other trading conditions; *Zinc Producer Group* (involved a combination of fixed raw zinc purchase and selling prices of zinc metal). GCEU, T-217/03 and T-245/03, *Coop de France bétail et viande e.a. v. Commission* (*French B*eef) (2006).

14 ECJ, C-67/13 P, *Groupement des cartes bancaires* (2014), para. 58: "*the General Court erred in finding […] that the concept of restriction of competition by 'object' must not be interpreted 'restrictively'. The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.*"

15 ECJ, C-228/18, *Budapest Bank* (2020), para. 54 ; EJC, C-307/18, *Generics UK* (2020), para. 67; ECJ, C-67/13 P, *Groupement des cartes bancaires (CB)* (2014), para. 58.

light of its content, objectives and its legal and economic context.[16] In fact, two recent ECJ rulings dealing with the notion of restriction of competition by object have clearly established that each agreement needs separate consideration, with no presumption flowing from the way other agreements were assessed.[17] Each agreement should be carefully examined on its facts, even if a similar pattern of events was previously found to amount to an infringement by object. It is the context and the circumstances in which the agreement operates that determine whether the arrangement is an infringement by object, not the formal similarities with conduct previously considered anti-competitive by object.

The ECJ recently confirmed in *Budapest Bank* that evidence about the effects of an agreement cannot be ignored when determining whether the agreement is a by-object infringement: for example, if there are indications showing that the agreement had no upwards, but maybe a downwards, effect on price levels, this has an immediate bearing on the alleged anti-competitive object of the infringement. This is because, if an agreement does not pose a sufficient degree of harm to competition, it cannot be labelled as a by-object infringement.[18] In a later ruling, *Generics UK*, the ECJ pursued a similar line of reasoning but put more emphasis, based on the facts before it, on weighing the pro-competitive effects of a particular agreement. These effects may be sufficient to negate the characterization as an infringement by object: the pro-competitive effects of an agreement can be taken into account to assess whether an alleged unlawful agreement should be characterized as an infringement by object. While pro-competitive effects of an agreement do not preclude a finding that the arrangement amounts to an infringement by object, if the pro-competitive effects are clearly established, relevant, and specifically related to the agreement and sufficiently significant, they can create reasonable doubt as to the degree of harm to competition caused by the agreement and therefore the classification as an infringement by object.[19]

III. SUSTAINABILITY AGREEMENTS AND THEIR OBJECTIVES

At the risk of stating the obvious, the aim of a living wage collaboration is not to restrict competition, or to alter the structure of the market, but to inject more fairness in the supply chain, and to ensure that farmers or textile workers can afford to live on their income. Of course, it is a proper and natural thing for an antitrust enforcer to wonder about the bona fides of an arrangement. The Commission might wonder whether the collaboration is purely altruistic, or what commercial advantage companies pursue. It may often be a question of corporate image, a response to shareholder pressures, ESG[20] expectations, or for branding/marketing advantage. Likely there could be multiple motivations, but none of them obviously illicit or reason to assume anti-competitive intent. The *effect* of the collaboration will remain for close examination. But as a matter of ordinary language it is hard to say that the parties have set out with the object of distorting competition.

As living wage collaborations can take various shapes, it is impossible to cover all the different possibilities in one article. We will focus below on the likely hardest case: agreements between competitors agreeing on a uniform farm-gate price. Even then there is obviously no one-size-fits-all assessment, in view of the need to take into account the legal and economic context and objectives of each agreement. However, some of the discussion points below may have broad relevance.

Agreements on farm-gate prices do include an element of agreement on price, even if they concern only the floor price for one input into a final product. Such an agreement does not completely eliminate the freedom of each firm to negotiate the purchase price with the supplier; it could however be argued, due to the structure of the supply chain for agricultural or textile products and the strong downward pressure applying to such supply prices, that a floor price would in practice lead to a uniform purchase price for the relevant input.

16 ECJ, C-228/18, *Budapest Bank* (2020), para. 51.

17 ECJ, C-307/18, *Generics UK* (2020), para. 84, ECJ, C-228/18, *Budapest Bank* (2020); see also ECJ, C-67/13 P, *Groupement des cartes bancaires* (2014).

18 ECJ, C-228/18, *Budapest Bank* (2020), para. 82: in that case the ECJ found that there were a priori no strong indications capable of demonstrating that the interchange fee arrangement would have increased prices. According to the ECJ, there was contradictory and ambivalent evidence which the national court could not ignore when examining the by-object nature of the infringement. Based on the Commission's observations, the ECJ concluded that if there had been no interchange fee arrangement, the level of interchange fees resulting from competition would have been higher. This was found to be a relevant fact for the purposes of examining whether the agreement restricted competition because price specifically concerned the alleged anti-competitive object of the agreement, i.e. that the agreement limited the reduction of the interchange fees and, consequently, the downwards pressure that merchants could have exerted on the acquiring banks in order to secure a reduction in service charges.

19 ECJ, C-307/18, *Generics UK* (2020), paras. 107-108.

20 Environmental, social, and governance.

Even then, agreements on input prices, in the same way as any other agreement, cannot automatically be treated as by-object infringements as established by the ECJ's case law discussed above. As per the Commission's Horizontal Guidelines: agreements fixing "*purchase prices can have the object of restricting competition*"[21] but in line with recent jurisprudence the object infringement label cannot be applied mechanically and requires an assessment of the facts and circumstances.[22]

In the context of a living wage initiative focusing only on the harmonization of farm-gate price, this element of price fixing in itself would have to be sufficiently harmful to competition to render the agreement an object infringement. One aspect which can be used to test this is the degree of commonality of costs resulting from the agreement. The Horizontal Guidelines state that a high level of commonality of costs would allow the parties to coordinate market prices more easily.[23] However, in many sectors in which living wage initiatives would likely be implemented, the price of the raw product accounts for a (very) limited part of the price of the resulting intermediate product, even less by comparison to the final product. As such, an agreement on the price of the raw product will only neutralize competition on one element of costs, which in most cases will be a minor element of costs. For instance, the price paid to coffee beans growers represents approximately 10 percent of the wholesale cost of coffee, and less than 1 percent of a coffee cup sold in a café.[24]

In *Budapest Bank*, referred to above, the ECJ found that an agreement fixing one element of the costs did not necessarily restrict competition by object. Although such an agreement offsets one aspect of competition and may therefore constitute a restriction of competition by object, this in itself is insufficient to conclude that the agreement has the object of restricting competition.[25] Absent other elements tending to confirm the reality of an anticompetitive objective, the effects of the initiative then need to be assessed.[26]

The ECJ indeed suggested that the referring court should take into account the fact that the aim of the agreement was distinct from pure price fixing. Asked for clarification on whether a partial harmonization of one element of the selling/purchasing price constituted an infringement by object, the ECJ suggested that the agreement will fall outside the object box if it can be demonstrated that the agreement was aiming not to set up a minimum price but to achieve a balance between divergent interests of the parties, to ensure that the costs related to the use of the products, in this case the use of credit cards, were covered. An agreement between suppliers of raw agricultural products and intermediaries, whereby all the parties agree a minimum selling/purchase price in order to ensure that the production costs are covered and that the supplier will be able to sustain its activity in the long term, could be assessed in a similar manner.

In the same vein, and in line with the *Generics UK* judgment, clearly established, relevant, specifically related to the agreement and sufficiently significant pro-competitive effects can cast a sufficient shadow on the aims of the agreement to move it out of the by-object box. Living wage collaborations could invoke one quite straightforward pro-competitive objective: ensuring a long-term supply of the relevant products. For example, following basic economics principles, if it is not sustainable for a supplier to produce one type of product, because the selling price it can achieve is too low, the supplier will at some point stop the production. If the reason behind the low resale price is a lack of demand from consumers for such product, it may not be such a bad outcome; the supplier will switch to producing some other product that is in higher demand. However, with regards to agricultural products, the specificities of the supply chains lead to a situation where the farm-gate price is completely disconnected from the consumers' desire for the product; and their willingness to pay for it. For instance, although the trading price of one kilo of coffee is around 2.3 euros,[27] the retail price varies between 10-12 euros for standard pre-ground coffee to more than 70 euros for coffee

21 *Ibid*. para. 206.

22 In many cases where the Commission or the ECJ found that an agreement on input prices constituted an infringement by object, such provisions were part of more complex agreements including other provisions restrictive of competition, market sharing for instance, making it easier to identify an anticompetitive objective. See, e.g. T-217/03 and T-245/03, *French Beef* (2006).

23 Horizontal guidelines, para. 36.

24 Financial times, From bean to cup, what goes into the cost of your coffee?, Chelsea Bruce-Lockhart and Emiko Terazono, June 4, 2019, available here : https://www.ft.com/content/44bd6a8e-83a5-11e9-9935-ad75bb96c849.

25 ECJ, C-228/18, *Budapest Bank* (2020), para. 65.

26 The limited significance of the input subject of the agreement would also allow to distinguish many living wages collaborations from previous cases where an agreement on the input price, or an element thereof, was qualified as a by-object infringement. For instance, in *T-Mobile*, the remuneration of the dealers was called a "*decisive factor*" of the price paid by the end-user (ECJ, C-8/08, *T-Mobile Netherlands* (2009), para. 37). In the *Raw Tobacco Italy* case, the raw tobacco was described by the Commission as a "*significant input*" of the downstream activities of the parties.

27 International Coffee organisation, Coffee daily prices, May 2020

pods.[28] Similarly, the kilo price of cocoa beans average around 2 euros,[29] compared to approximately 10-15 euros in supermarkets and close to 100 euros for fine chocolate.[30] While it is clear that processing is needed for the raw product to reach the consumer, this demonstrates at least that there is consumer demand – and willingness to pay – for such products. (And nobody, certainly not the authors, would want to be deprived of coffee or chocolate in the future because the farmers all decided to shift to other activities.) This is not a hypothetical risk; there are many reports of cocoa or coffee farmers abandoning farms in Latin America and Africa.[31]

Moreover, although the ECJ case law does not require a direct connection between the agreement and consumer prices,[32] for the agreement to be able to prevent, restrict or distort competition in Europe and fall within the by-object box,[33] it would have to be able to, at least, indirectly impact the resale price of the product on the downstream market. A similar approach was previously taken by the Commission in the *Zinc Producer Group* case when assessing an agreement on the purchase price of zinc concentrates. To conclude that the agreement had the object of restricting competition, it stated that "*the decisive point is that the agreed producer price was always used as a basis for the actual prices stipulated in [downstream contracts].*"[34] In the context of complex supply chains, the countervailing buyer power of retailers (for example) is a key element to take into account. In such a situation, intermediary undertakings (processors for instance) agreeing on the input price of one raw product may not have the ability or the incentive to pass the increase on to their customers. The parties to the agreement will then still try to improve their product offering by competing on other elements of the on-sale price rather than the price of the particular input. So potential harm to competition brought by the agreement would be less straightforward. Alternatively, an increase in the input price may be absorbed by the supply chain. This is another basis to establish that the agreement is a true sustainability initiative and not a covert anticompetitive agreement: an increased input price which cannot be passed on runs counter to the pure financial interests of the parties.

The above reasoning could be transposed in whole or in parts to other types of living wage collaborations. And it some cases some additional arguments could be put forward. For instance, in the hypothesis of agreements between competitors to pay producers of raw products a fixed "living wage" premium on top of a freely negotiated price for the supply, the element of price fixing would then not be so straightforward. As recently recalled by the ECJ, when an agreement standardizes only one aspect of the cost, an assessment is needed to conclude that the agreement falls within the scope of indirect price fixing.[35]

Any industry initiative will of course need to be structured with sufficient safeguards to avoid any spill-over coordination on price setting going beyond farm-gate prices, any sensitive information exchange, any further unlawful collaboration. If it does not do so, the agreement may still rightfully be treated as a by-object infringement. These matters will of course be equally relevant in the assessment of effect, but getting them wrong risks failing even before that hurdle.

28 Based on sample observations in France, DMEPP, Café: Comment le choisir? Quel est le prix du café? Comment préserver son budget?, May 2, 2020, https://dmepp.com/prix-du-cafe.

29 International Cocoa Organisation, daily price of cocoa beans June 2020, https://www.icco.org/statistics/cocoa-prices/daily-prices.html.

30 Based on sample observations in Belgium.

31 See for instance Financial Times, The abandoned farms behind the global coffee craze, 20 May 2019, Emiko Terazono, Jude Webber in Mexico City and Andres Schipani, https://www.ft.com/content/5009be96-7569-11e9-be7d-6d846537acab; NPR, Why The World Might Be Running Out Of Cocoa Farmers, July 3, 2015, Eliza Barclay, https://www.npr.org/sections/thesalt/2015/07/03/419243305/why-the-world-might-be-running-out-of-cocoa-farmers.

32 ECJ, C-8/08, *T-Mobile Netherlands* (2009), para. 39.

33 *Ibid*, para. 43.

34 Commission, IV/30.350, *Zinc Producer Group* (1984), para. 66.

35 ECJ, C-228/18, *Budapest Bank* (2020), para. 62.

IV. CONCLUSION

The goal of this article is in no way to argue that all agreements between competitors on input prices, and claiming sustainability benefits, should be shielded from competition law enforcement. The limited, but important ambition, is to vindicate the truth that they are not inevitably condemned to infringe by object. The question of effect remains, but allows for a more nuanced approach. In this way, true living wage initiatives may flourish in ways that we have not seen to date.

As argued above, there is important reason for the Commission to confront these issues head-on in the various sets of upcoming guidelines and guidance, in particular the revamped Horizontal Guidelines[36] and the new guidance on collective action.[37] It should call out not only the more obviously benign forms of sustainability cooperation, but also the challenging ones. Environmental concerns are rightly much in mind, but so too must be other sustainability goals, including living wage initiatives – in particular living wage initiatives, given their neuralgic connection to price. The draft Dutch guidelines[38] which were issued just as this paper was going to press are admirable in their clarity that firms following the guidance will not be exposed to fines, and refer in numerous places to living wages – but do not tackle the "object" question.

Collectively the Commission, together with NCAs such as the Dutch, may in this way move towards the objectives set out in 1957, and still proclaimed in the fourth sentence of the preamble of the TFEU, "*steady expansion, balanced trade and fair competition.*"

36 On-going evaluation of EU competition rules on horizontal agreements between companies, final report expected in the first quarter of 2021.

37 DG COMP website, in the context of the Farm to Fork initiative, it is anticipated that "to encourage collective cooperation and ensure that the threat of non-compliance with competition rules does not stand in the way of any sustainability initiatives, the Commission will issue guidance on the scope of collective action permissible under EU competition rules," https://ec.europa.eu/competition/sectors/agriculture/overview_en.html.

38 Netherlands Competition Authority, Draft guidelines, Sustainability agreements – Opportunities within competition law, published for consultation on July 9, 2020, available here https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.

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