

ANTITRUST, SUSTAINABILITY AND LIVING WAGES/LIVING INCOMES



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I. INTRODUCTION

“Most people in the industry recognise that we need collaboration to achieve meaningful progress on key sustainability goals. 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 [cocoa] and beyond. This really restricts further progress being made on other issues such as living incomes and wages.”² – Sophi Tranchell, former CEO of Divine Chocolate, a Fairtrade Certified company

Sophi Tranchell's statement raises a key issue which is echoed by a number of the stakeholders who have participated in the European Commission's public consultation on the Horizontal Co-operation Agreements Guidelines (the Horizontal Guidelines): is EU competition law resulting in, or being perceived as, an obstacle to attain legitimate policy goals? To what extent are the EU antitrust rules perceived as a burden to sustainable initiatives? And, if so, is this unavoidable or can this undesired effect be mitigated?

Trade and the functioning of businesses have an impact on the enjoyment of human rights. Since competition policy plays an important role in shaping the EU's economy and the action of our businesses, it seems evident that it has also an impact on human rights. In this context, the Fair Trade Movement has been looking at the question of competition law and sustainability for years, on the premise that some of the biggest challenges the world faces require companies to work together. These include the provision of adequate living wages, which according to the preamble to the Constitution of the International Labor Organization is one of the conditions for universal and lasting peace based on social justice.³

Coordinated action is often perceived as the key element to unblock the progress towards poverty eradication and other sustainability goals. “We need to sit around the table and align on what the biggest battles are and align strategically on what needs to happen on a bigger level and then individually each of us can take a piece of the puzzle” was stressed by a global chocolate company in an interview with the Fairtrade Foundation in the UK.⁴ However, having competitors sitting around a table discussing prices with no safeguards shall, of course, be avoided. In no way would it be desirable to open the door to retailers or brands increasing their power over consumers or producers by opening loopholes in the law. On the other hand, the reality is that many of the meaningful cooperation

² Long & Taylor (2019): p. 12. Competition Law and Sustainability. A study of industry attitudes towards multi-stakeholder collaboration in the UK grocery sector. In: <https://www.fairtrade.org.uk/Download.ashx?id=%7BEE9F8B75-8FFA-4E38-B87B-82BBE23A3D7C%7D>.

³ URL: https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO, last seen 25/05/2020

⁴ Long & Taylor (2019): p. 12.

agreements that aim to achieve legitimate policy goals do have an impact on prices; and that certain conversations in which *low farm-gate prices*, working conditions or production methods are discussed might be the only way forward, or at least the only one that will lead us to reaching the objective before it's too late.

Competition law cannot solve all the problems we are facing, but at the same time we need to ensure that competition law is not used as an excuse to do nothing: why is EU's competition law relevant for sustainability initiatives and how could it be part of the solution and not part of the problem?

II. HOW HAS COMPETITION LAW BECOME RELEVANT FOR SUSTAINABILITY DRIVEN COOPERATIVE INITIATIVES?

In Europe's internal market, competition is the mechanism that ensures innovation, a wide variety of products and services at the lowest price possible to the consumers. "Competition puts businesses under constant pressure to offer the best possible range of goods at the best possible prices, because if they don't, consumers have the choice to buy elsewhere. In a free market, business should be a competitive game with consumers as the beneficiaries."⁵ Thus, it is competition law that prevents restrictions on and distortions of competition to enable the proper functioning of the Union's internal market "as a key driver for the well-being of EU citizens, businesses and society as a whole."⁶

On the other hand, a competition law that focuses exclusively on consumers risks disregarding the impact of certain initiatives and practices in society as a whole. Fueled by the continuous struggle for businesses to produce optimal quantities at the lowest possible costs, it does not only exert downward pressure on prices, but is also likely to lead to unsustainable business practices, which trickle down to the producers who often face working conditions that do not assure a decent standard of living for their families.

An increasing number of companies seek to do business in a way that mitigates their impact on people and the planet. But to create a sustainable positive impact, they most likely have to cooperate, as being a sole first mover often brings a decisive economic disadvantage. For companies it will often be difficult to implement sustainability initiatives unilaterally when they might face free-rider problems and/or the first-mover disadvantage since such initiatives usually increase costs. The former problem occurs, for example, when a company invests in marketing to diffuse information on the importance of fair trade, which might increase the sales of other fair-traded product sellers who have not incurred any additional costs. The latter problem occurs especially when a company commits to stop offering less sustainable but cheaper products. Such a decision might result in a substantial loss of customers especially in markets where consumers are price-sensitive or where there is little scope for product differentiation.⁷

While certain companies have already taken unilateral steps towards providing for living incomes/living wages in their supply chains. Given their market share, it is these larger players that need to take action to turn fair and sustainable production and consumption patterns into mainstream. A study by the Fairtrade Foundation UK on industry attitudes towards multi-stakeholder collaboration in the UK grocery sector found that the fear of competitive disadvantage is among the main contributors why market actors are not acting unilaterally on sustainability issues, in particular on paying and influencing higher prices to producers. Through a series of interviews with businesses, brands, retailers and industry experts, the Fairtrade Foundation revealed that collaboration amongst companies and industry actors is necessary to ensure businesses commit to paying living wages and incomes. The respondents to the survey believe that collaboration among the economic actors is necessary to achieve key benefits for both the producers and consumers while effectively also embodying the real environmental costs of production. It is – once again – stressed that the first-mover disadvantage is a real issue.⁸

In situations where there is an increasing willingness among economic entities to collectively implement more sustainable measures such as ensuring living incomes for farmers and producers, the current EU antitrust framework and enforcement might act as a deterrent, as agreements between competitors on prices, including low farm-gate prices, are likely to be illegal, and the conditions under which exemptions can be granted, in light of Article 101(3) are unclear.

5 URL: https://ec.europa.eu/competition/consumers/what_en.html, last seen May 5, 2020.

6 URL: <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy>, last seen May 21, 2020.

7 Monti & Mulder, 'Escaping the clutches of EU competition law - Pathways to Assess Private Sustainability Initiatives' E.L. Rev. 2017, 42(5), 635-656, p 636. See also the interviews in the FT Report on Competition Law and Sustainability in the UK Grocery Sector, p 12.

8 Cf. Long & Taylor (2019): p. 6.

In light of the EU's current policy objectives and political commitments, there is no doubt that competition policy must play an active role in its efforts to achieve sustainability objectives. The EU is committed to the implementation of the UN's 2030 Agenda for Sustainable Development and the European Green Deal. As the European Commission's ("EC's") Communication on the European Green Deal reads "all EU actions and policies will have to contribute to the European Green Deal objectives. The challenges are complex and interlinked. The policy response must be bold and comprehensive and seek to maximize benefits for health, quality of life, resilience and competitiveness."⁹

It would be contradictory if the EU's competition law framework acted as or was perceived as an unreasonable burden against any multi-stakeholder cooperation agreements that aimed to achieve legitimate sustainability goals, such as environmental sustainability, improved social standards or the achievement of living incomes or living wages. However, the fact is that, at the moment, the lack of clarity, coupled with the narrow interpretation of Article 101(3), is perceived as an "obstacle" against sustainability initiatives.¹⁰

The banana sector, that has been at the forefront of the debate, has established a working group, the World Banana Forum, to aim at taking into consideration the cost of producing sustainably and what measures could be undertaken collectively by the stakeholders throughout the chain to guarantee remunerative prices leading to a living income to farmers who are at the origin of the whole production. While great progress has been made in some areas, there has been notably less progress on the issues of low wages and incomes. Similar challenges are faced by the cocoa industry, in which when interrogated by a group of NGOs about the difficult situation in which many farmers find themselves and the environmental impact of their way of sourcing cocoa, many cocoa buyers and processors said to be amenable to agreeing on higher supply prices, but also admitted being extremely wary of falling foul of competition laws and therefore could not see any way to proceed with formal or informal talks.¹¹ "Price is the big elephant in the room no one dares to talk about," was stressed by Arjen Boekhold, co-founder of "Tony's Chocolonely," an enterprise producing and selling chocolate following fair trade practices.¹² The industry laments that the boundaries of Article 101 are unclear and do not seem to support a reading that favors dialogue among competitors, even when such efficiencies might be created.

III. THE WAY FORWARD: CREATING LEGAL CERTAINTY

A strong EU competition law framework that ensures a properly functioning market can be aligned with the vision and objectives of the EC's Communication on the European Green Deal. Competition policy plays an important role in shaping the EU's economy and the decisions taken by our businesses. As such, it should be sensitive to the fact that it is not only competition, but also necessary collaboration that fosters sustainability. More clarity and guidance on the quality and breadth of sustainability collaborations would encourage positive behavior in the markets and would greatly aid progress.¹³

The EC has committed in the Communication on the Farm to Fork Strategy to "clarifying the competition rules for collective initiatives that promote sustainability in supply chains,¹⁴ which will be a step in the right direction provided that it is aligned with the comprehensive and global approach of the Green Deal.

To provide companies with more clarification in the application of EU competition law, the EC has published various guidelines on the applicability of Article 101 over the past few years. The ongoing review of the Horizontal Guidelines represents a unique opportunity to address the challenges described earlier and ensure that the role of the private sector can be used as leverage to achieve the EU policy objectives. If the Horizontal Guidelines include clear provisions on cooperation aimed at facilitating sustainability-driven agreements, we will be unleashing the potential of the private sector to contribute to achieving the EU's policy goals. The EC could incorporate a section on "Sustainability Agreements" into the revised Horizontal Guidelines in the spirit of 2001 Horizontal Guidelines section on environmental agreements.¹⁵ This new section should

9 Communication on the European Green Deal https://ec.europa.eu/info/sites/info/files/european-green-deal-communication_en.pdf.

10 Fair Trade Advocacy Office (2020): Position Paper on EU Competition Law and Cooperation Agreements for Sustainability.

11 *Ibid.*

12 Tomaso (2019): URL: https://fairtrade-advocacy.org/wp-content/uploads/2019/04/FTAO-Briefing-note-Competition-Law-and-Sustainability_Addressing-the-Broken-Links.pdf, last seen May 21, 2020.

13 *Cf.* Long & Taylor (2019): p. 14.

14 Communication. A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system https://ec.europa.eu/info/sites/info/files/communication-annex-farm-fork-green-deal_en.pdf.

15 Fair Trade Advocacy Office (2020): Position Paper on EU Competition Law and Cooperation Agreement for Sustainability.

go beyond environmental sustainability and offer clarity to actors willing to implement initiatives aiming to, for example, mitigate poverty, eradicate child labor or strive for living incomes or living wages in developing countries.

Competition rules applicable to horizontal agreements should take greater account of non-monetary values when the lawfulness of an agreement is being assessed. The EC should therefore be in a position to outline its assessment framework for a range of non-price efficiencies which are capable of creating a broader range of benefits for consumers and citizens, for example, environmental quality, enjoyment of human rights and positive impacts on sustainable development and social conditions in the EU and in developing countries.

Safeguards will of course always be needed. Not just any collaboration among competitors should be allowed with the excuse of “promoting sustainability,” and in the context of sustainability-driven collaborative agreements, the enforcement of competition law to prevent hidden cartels remain as important as in any other field. The Horizontal Guidelines should facilitate meaningful cooperation while setting the conditions and the safeguards to prevent “Greenwashing” screens hiding cartels.

This article argues for a competition law that considers the long-term sustainability of supply chains alongside consumer interests. Addressing imbalances of power in global supply chains, inequalities and environmental degradation is urgent, and the private sector can be a contributor to solve many of these challenges. Enhanced clarity on the applicability of Article 101 would make this possible by ensuring that companies that are willing to tackle sustainability issues are not discouraged from acting and facilitating the upscaling of already-existing good practices.



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