

## Unilever's response to the ACM's consultation on its Sustainability Agreements Guidelines

### 1. Introduction

Unilever very much welcomes the ACM's draft Sustainability Agreements Guidelines (the "Guidelines"). They are a powerful encouragement for legitimate competitor collaboration in pursuit of more sustainable business practices. The Guidelines provide most useful orientation for businesses by clarifying which competitor collaborations are unlikely to restrict competition (*para. 19 - 23*) and present an innovative, nuanced framework for the consideration of sustainability benefits within section 6 NCA/Art. 101 TFEU (*para. 24 – 59*). They also increase legal certainty by establishing safe harbours (*para. 46-48*) and defining in which circumstances collaboration will not be penalized even if later found unlawful (*para. 60 -67*).

With the Guidelines, the ACM is pioneering efforts by competition authorities to specify – and revisit the interpretation of – the competition rules for sustainability collective action. We find it highly desirable that the ACM Guidelines will strongly resonate with and inspire other competition authorities in the EU and beyond. Similarly, as ACM Chair Martijn Snoep has recently put it, the Guidelines aspire to "*blow away a smoke screen behind which businesses could hide*"<sup>1</sup>. Companies active in the Netherlands would indeed have a hard time arguing that insufficient transparency or reluctance of the national competition agency to engage with businesses contemplating joint action would stand in the way of their initiatives.

Following the ACM's call for comments and contributions, Unilever would like to share some observations regarding certain aspects of the Guidelines. Our remarks focus on areas where we believe the Guidelines could and should better accommodate certain practicalities of sustainability co-operations and give more leeway for effective joint action without compromising on the ACM's mission to protect competition and ensure consumer welfare.

We would welcome the opportunity to discuss any of the issues raised in this paper with the ACM.

### 2. Sustainability agreements in the light of legitimate public interests and wider EU treaty goals

Unilever would find it most valuable if the Guidelines could elaborate on the relevance of the *Wouters* and *Meca-Medina* case law of the European Courts<sup>2</sup>, more specifically the question under which conditions legitimate public interest considerations would remove competitor agreements from the remit of section 6 NCA/Art. 101 TFEU. This has been established for the integrity and proper practice of professional services<sup>3</sup>, safeguarding the fairness of sports against doping practices<sup>4</sup> or upholding the quality of accountancy services<sup>5</sup>. If, as stated in *Meca-Medina*<sup>6</sup>, rules that "*were adopted [...] for*

<sup>1</sup> Martijn Snoep, IBA conference panel: Competition law and sustainability (9 September 2020), available at: <https://www.ibanet.org/conf1124-Wednesday-9-Sept.aspx>

<sup>2</sup> See Unilever, *Sustainability cooperations between competitors & Art. 101 TFEU: Unilever submission to DG COMP*, available at [https://www.unilever.com/Images/unilever\\_submission\\_sustainability\\_competition\\_law\\_tcm244-551751\\_en.pdf](https://www.unilever.com/Images/unilever_submission_sustainability_competition_law_tcm244-551751_en.pdf)

<sup>3</sup> Case C-309/99 - *Wouters and others*, Judgment of the Court of 19 February 2002

<sup>4</sup> Case C-519/04P - *Meca-Medina and Majcen v Commission*, Judgment of the Court of 18 July 2006

<sup>5</sup> Case C-1/12 - *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, Judgment of the Court of 28 February 2013.

<sup>6</sup> Case C-519/04P - *Meca-Medina and Majcen v Commission*, Judgment of the Court of 18 July 2006, para. 45.

*competitive sport to be conducted fairly*<sup>7</sup> in order to “ensure healthy rivalry between athletes”<sup>8</sup> and “to safeguard equal chances [...] the integrity and objectivity of competitive sport and ethical values in sport”<sup>9</sup> are outside Art. 101(1), then collectively agreed standards to safeguard sustainable business practices should not be treated differently.

We appreciate the challenges of translating the *Wouters/Meca-Medina* case law into guidance for a potentially indefinite variety of case scenarios, and the ACM would understandably refrain from a blanket exemption of all such agreements from section 6 NCA/Art. 101 TFEU without further substantive assessment. That said, established European case law leaves no doubt that legitimate public interest considerations may exclude the application of Art. 101 TFEU. We believe that the ACM should reference this body of case law in the Guidelines, even if only to indicate that it will be taken into account as an element of a case by case analysis.

Similarly, the European Courts have emphasized that 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<sup>10</sup>. This applies notably to environmental protection (Art. 11 TFEU) and “the sustainable development of Europe” (Art. 3(3) TEU). We think the Guidelines should recognize that sustainability objectives which are expressly stated in the European treaties are relevant for the assessment as to whether an agreement falls under section 6 (1) NCA/Art. 101 (1) TFEU in the first place, or whether it may be justified as per section 6 (3) NCA/Art. 101(3) TFEU.

### 3. Sustainability agreements with benefits that offset restrictions of competition (*section 5*)

The Guidelines are particularly commendable in that, in section 5, they recognize reductions of negative externalities – also referred to as “true costs” (*para. 35*) or “shadow prices” (*para. 50*) – as objective benefits that can outweigh anti-competitive effects in the sense of section 6 (3) NCA/Art. 101(3) TFEU (*para. 30*). In furthering this approach, the Guidelines state that individual consumers on the relevant product market do not have to be fully compensated for e.g. higher prices if future users and society as a whole can reap their *fair share* of benefits from the sustainability agreement (*para. 36*). Consequently, also long-term effects can and must be considered (*para. 37*), and not every benefit has to be quantifiable (*para. 33, 45*).

#### a. “Environmental-damage agreements” vs. “other sustainability agreements” (*section 5, para. 39*)

These provisions (*para 29 ff.*) are certainly among the landmark sections of the Guidelines. Unfortunately, they are a bit half-hearted in that they only apply to “environmental-damage agreements” but not to “other sustainability agreements” (*para. 39, 43*). The Guidelines do not explain why they make this distinction, and it fails to convince: While there is no doubt as to the pivotal importance of environmental sustainability we believe it wouldn’t justify an inherent disincentivization of initiatives pursuing other important sustainability goals: from fair living wages

<sup>7</sup> Ibid, *para 43*.

<sup>8</sup> Ibid, *para. 45*.

<sup>9</sup> Ibid, *para 43*.

<sup>10</sup> Case 283/81 – CILFIT Srl v Ministry of Health, Judgement of 6 October 1982, *para. 20*.

and eradicating slave and child labour in global supply chains to the fight against bribery – arguably one of the main drivers of poverty and inequality – to adequate living conditions of migrant workers.

Such societal concerns are relevant for the competition law assessment of social sustainability agreements also if they don't materialize in Dutch society itself. Companies that sell their products in the Netherlands have to source inputs across geographies world-wide as many key ingredients of consumer goods such as palm oil, cocoa, vanilla, tea or coffee cannot be grown in Europe. But European consumers and societies embrace their moral responsibility for living and working conditions in the countries of origin. We believe that the ACM, consistent with its highly laudable recognition of negative externalities of environmentally harmful practices as a relevant element of competition law analysis, should equally factor in the true human and social costs of global supply chains.<sup>11</sup> As studies have evidenced, *“social sustainability appears to present different and more severe challenges [...] than environmental sustainability”*.<sup>12</sup>

It would not be plausible to indiscriminately privilege environmental sustainability agreements arguing the urgency to fight climate change because not all environmental initiatives have this ambition. More important, their impact – depending on scope, scale and intended measures – varies dramatically. So why should a ground-breaking industry co-operation to protect human rights and improve livelihoods of severely disadvantaged groups be treated less favourably than a mildly impactful environmental collaboration? Lastly, many individual and collective sustainability projects, notably in agriculture, pursue environmental *and* social objectives which makes a distinction often practically unfeasible.

#### **b. “Contribution to a policy objective laid down in international or national standards” (section 5, para. 41)**

The Guidelines specify that the ACM will only look at reductions of negative externalities where (environmental) agreements contribute to a policy objective laid down in international or national standards (*para. 41*). This limitation of the benefits analysis in Art. 6(3) NCA/Art. 101(3) TFEU is not explained but probably motivated by an understandable desire to align competition policy with already defined objectives of environmental politics.

#### What if, however,

- i. national or international standards have not been defined due to a lack of political compromise which can impede necessary regulation over years if not decades?;
  - Commissioner Vestager has rightly stressed that *“competition enforcement works best [...] when it works hand in hand with regulations that make companies bear the cost of the harm that they do”*<sup>13</sup> - but does the absence of such regulation justify that true costs are borne by society?

<sup>11</sup> See Fair Trade Advocacy Office (FTAO), *Towards sustainable cocoa supply chains: Regulatory options for the EU* (June 2019), available at: <https://www.fern.org/fileadmin/uploads/fern/Documents/2019/Fern-sustainable-cocoa-supply-chains-report.pdf> and FTAO, *EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links* (February 2019), available at: [http://www.responsibleglobalvaluechains.org/images/PDF/FTAO\\_-\\_EU\\_Competition\\_Law\\_and\\_Sustainability\\_in\\_Food\\_Systems\\_Addressing\\_the\\_Broken\\_Links\\_2019.pdf](http://www.responsibleglobalvaluechains.org/images/PDF/FTAO_-_EU_Competition_Law_and_Sustainability_in_Food_Systems_Addressing_the_Broken_Links_2019.pdf)

<sup>12</sup> J. Bebbington, J. Dillard, *Social sustainability: an organizational-level analysis*, J. Dillard, V. Dujon, M. King (Eds.), *Understanding the Social Dimension of Sustainability*, Routledge, New York (2009), pp. 157-173

<sup>13</sup> Margrethe Vestager, *The Green Deal and competition policy*, Renew Webinar (22 September 2020). See [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en)

- ii. standards exist but they only represent a lowest common political denominator contested from all sides of the political spectrum, have proven ineffective and/or are outdated and do not reflect the rapidly evolving insights of, e.g., climate science?;
  - leading, e.g., to commitments among car manufacturers in California to lower CO2 emissions to a level lower than legally required;<sup>14</sup>
- iii. there are other legitimate reasons for companies to voluntarily surpass minimum requirements?, e.g.:
  - international (environmental) standards that may be adequate for developing or emerging countries but don't reflect the economic potency of a highly sophisticated and technologically advanced economy such as the Netherlands;
  - companies want to jointly address evolving perceptions of the right or wrong of harmful though not illegal R&D or advertising practices, for instance through collective voluntary bans on animal testing or the marketing of sugary snacks to children.

In summary, the *national or international standard* criteria envisaged in the Guidelines appears to be unsuitable for the large and colourful variety of legitimately ambitious sustainability agreements. We suggest to replace it with a more open definition of agreements that do not require full user compensation for anti-competitive effects.

#### c. Cases where a quantification of positive effects is not needed (*section 5, para. 46-48*)

Unilever agrees that positive sustainability effects cannot always and often do not have to be quantified (*para. 45*). At the same time, we believe that the types of cases that the Guidelines exempt from the quantification requirement is too narrow or of limited practical relevance:

- i. The 30% threshold for the combined market share of the participating companies in a sustainability agreement (*para. 47*) reflects the interplay of joint market power and potential competitive harm. It does however disregard the two most critical elements of impactful sustainability collective action: (1) **scale** – sustainable practices and innovation crucially depend on scaled demand upstream and scaled impact downstream – and (2) the elimination/attenuation of the **first-mover disadvantage**, i.e. cases where cost disadvantages linked to sustainable practices need to be communalized beyond a small group of sustainability pioneers to create a pre-competitive level playing field.
- ii. The second category of agreements lending themselves to a qualitative approach under the Guidelines – those for which it is obvious that the benefits offset the potential harm, namely when price increases are limited (*para. 48*) – is unlikely to be of significant practical relevance: (1) Peer collaboration will often already not be needed where individual companies can absorb the additional costs without suffering a first-mover disadvantage; otherwise (2) such agreements may not have an appreciable effect on competition and might therefore not fall under section 6(1) NCA/Art. 101(1) TFEU in the first place.

Here, too, it would be valuable if the Guidelines would broaden the scope of agreements that are exempted from the quantification requirement. The ACM may want to take inspiration from the

<sup>14</sup> See <https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html>.

authorization practice of the Australian Consumer and Competition Commission (ACCC) that widely relies on a qualitative approach, even for relatively radical types of collaboration where companies agree on levies to pass-on environmental costs to consumers.<sup>15</sup>

#### **d. Quantification of true costs (section 5, para. 49 – 54)**

Where the Guidelines require a quantification of sustainability benefits (i.e. when the conditions of *para. 46 to 48* are not met, see above), shadow prices based on prevention costs can be part of the equation (*para. 50/51*). As said before, the approach as such is highly commendable but we regret that the Guidelines restrict it to environmental damage agreements that pursue a defined political objective (*see above under 3.a. and b.*).

Scientists have established and often quantified negative externalities for all kinds of environmental damage and societal harm. As an example, in a recent study economists from the University of Augsburg have calculated the specific true costs for a selection of eight conventional and organically produced foods by factoring in the impact of nitrogen, greenhouse gases, energy, and land-use change from each product’s supply chain, based on a methodology that can be extended to other products.<sup>16</sup> Where such shadow prices exist and parties to a sustainability collaboration can demonstrate how it helps to reduce them, we believe the ACM should recognize these offsetting benefits within section 6(3)/Art. 101(3) TFEU; a clarification in the Guidelines would be most valuable.

#### **e. Consideration of benefits of “other sustainability agreements” (section 5, para. 53/54)**

Consistent with the narrow application of the *true costs* standard, the Guidelines demand a full compensation of the individual consumers of the respective product wherever sustainability agreements are not determined by environmental standards established by the Dutch government or through international governmental bodies. Consequently, a wide range of – social *and* environmental – sustainability collaborations would remain within the remit of conventional consumer welfare-based competition analytics, effectively setting the true costs of damaging and harmful business practices completely aside.

This is a disappointing result, the more so as the Guidelines propose “willingness to pay” assessments – which try to quantify the value consumers assign to sustainability improvements – as the only remedy to mitigate this shortcoming (*para. 53*). If consumers, however, are indeed ready to pay a premium for more sustainable products, businesses have little incentive to explore peer collaboration: Given the competitive advantage conveyed by a more sustainable product in these cases, coordinated action is likely to be undesirable for competing firms – and potentially also *unnecessary* in the sense of the Guidelines (*para. 55-58*), thus rendering collective action in this space already legally unfeasible.

Even more important, if society and businesses want to drive meaningful change, scale is of the essence (*see above under c.*). A *willingness to pay* approach however implies that often only niche and/or premium products would benefit from a favourable competition law assessment. We suggest

<sup>15</sup> Levies have been applied to 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. See OECD Competition Division, The OECD holds a roundtable on horizontal agreements in the environmental context, e-Competitions Bulletin October 2010, Art. N 85630. See also most recently the ACCC’s authorization of a levy on batteries, passed on to consumers, and later used to subsidise battery collection and recycling.

<sup>16</sup> See at: <https://www.rewe-group.com/en/newsroom/press-releases/1710-penny-labels-its-first-products-with-true-prices>

that the Guidelines adopt a more long-term approach – maybe also inspired by the Hellenic Competition Commission’s recent working document<sup>17</sup> –, (1) to integrate, as said, negative externalities, but also (2) to create incentives for trailblazing innovation and its scaled implementation:

- The introduction of more sustainable practices and technologies frequently comes with more or less temporary cost increases that, especially where the sustainability gain is substantial, businesses are forced to pass on to consumers until the initial investment has paid itself off.
- The most ground-breaking environmental technological advances may depend not only on significant investment but also on companies coordinating their demand through, e.g., joint offtake agreements and harmonized specifications to incite upstream market players to develop, introduce, permanently improve and scale the new technology – all this with a view to make the new technology cheaper and ultimately mainstream and to create an infrastructure that can effectively respond to increased demand for more sustainable products.
- A lot could be accomplished if companies are given a chance to jointly adopt potentially game-changing technologies and practices that they currently shy away from for fear of first-mover disadvantages (*see above under c.*). *Willingness to pay* studies are unfit to capture these scenarios as they take no account of long-term benefits.

It would be most useful if the Guidelines could lay out how the ACM would view and assess scenarios like the ones we have tried to outline above.

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<sup>17</sup> Which suggests that the assessment under Art. 101(3) TFEU should go beyond the benefit to actual (or future) consumers of the *specific relevant market* and should be extended to consider all benefits of the conduct found restrictive of competition under Article 101(1) TFEU more broadly to ensure that “*benefits of sustainability for the economy and the long-term interest of consumers*” are recognised; see Hellenic Competition Commission, *Competition law & Sustainability*, 17 September 2020, available at: <https://www.epant.gr/en/enimerosi/press-releases/item/1089-press-release-initiative-competition-law-and-sustainability.html>