



Brussels, 03 May 2022

**Joint Response to the European Commission’s public consultation
on the draft revised Horizontal Block Exemption Regulations and Guidelines**

***Joint Response on the Horizontal Guidelines’ Chapter 9 - Sustainability Agreements
by Fair Wear, ISEAL, AIM, and the Fair Trade Advocacy Office***

Introduction and summary

The European Brands Organisation (AIM), the Fair Wear Foundation (Fair Wear), ISEAL and the Fair Trade Advocacy Office (FTAO), (together “we”) welcome the European Commission (“EC”)’s draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines (“HG”) and the opportunity to comment on them as part of the public consultation.

We find it particularly positive that the EC introduced a standalone section on the application of competition law to sustainability agreements that defines sustainability by taking into consideration the economic, environmental and social dimensions of sustainability, as well as collective benefits, beyond the sole consumer benefits. We also welcome the reference to the UN’s Agenda 2030 on Sustainable Development, as we believe that it rightly defines the concept of sustainability by considering all its aspects. We very much welcome this direction, as this will encourage the development of genuine sustainable business practices.

However, we would like to draw attention to the social dimension of sustainability, which, in our view, does not find equal recognition in the draft revised HGs in comparison with the environmental dimension of sustainability. The strong focus on the environmental aspects of sustainability in the draft HGs tends to obscure the direct link between social sustainability aspects, such as human rights, and their potential adverse effects on the environment.

We are also wary that a price-centric approach to consumer benefits in the context of sustainability agreements will be problematic in many respects, as we explain below.

In addition, we find that the notion of “*individual non-use value benefits*” relies excessively on consumers’ opinions. While consumers value more than just their own individual benefit and become increasingly conscious of sustainability issues, willingness to pay studies tend not to fully reflect consumer support for broader objectives. When faced with a binary choice, the majority of consumers will actually tend to favour lower prices even if they would be willing to support the relevant sustainable objective overall. In that sense, adopting the draft HGs as they currently stand would prevent the conclusion of agreements meant to contribute to a more sustainable development.

Nonetheless, while opening up opportunities for undertakings to collectively pursue sustainability objectives, we also understand the concerns about “*greenwashing*” or “*ethics washing*”. In this regard, we welcome paragraph 560 demanding from competing undertakings that they bring forward all facts and evidence demonstrating that their agreement genuinely pursues sustainability objectives and is not used to disguise a “by object” restriction of competition. We understand that if the evidence ascertains that the agreement indeed pursues a genuine sustainability objective, its compliance with competition will have to be assessed according to the HGs. However, we invite the EC to also clarify the extent to which evidence of *greenwashing* (in the sense of a cartel-like arrangement disguised as a genuine sustainability agreement) might amount to a restriction “by object” or be considered as an aggravating circumstance, and should be reflected in the level of fines imposed.

In the light of these preliminary considerations, we would like to convey the following propositions:

- 1. As the social and environmental dimensions of sustainability are highly intertwined, we urge the EC to approach both in fairness, not prioritising one of them.**

The draft HGs rightly give a broad dimension to sustainability, referring to the UN’s Agenda 2030 of Sustainable Development. However, given the references and examples throughout chapter 9 of the draft HGs, we fear that the EC has overlooked the social dimension of sustainability, such as the payment of Living Wages or Living Incomes.¹ This would undermine the HGs’ definition of sustainability, as “eradicating poverty” is Goal 1 of the UN’s Agenda of Sustainable Development – one of the greatest global challenges that plays a central role for sustainable development. Not addressing living incomes and wages in global supply chains will make it impossible for a large part of the world’s farmers and workers to be lifted out of poverty and to reach the Sustainable Development Goals. For instance, how can we expect smallholder farmers to apply more environmentally friendly agricultural practices and to mitigate climate change if they do not receive a living income to provide nutritious food, education and essential medical services to their families?

Moreover, the UN’s Guiding Principles on Business and Human Rights expect companies to take their responsibilities. Accordingly, competition law rules, as part of a smart mix of various measures, should enable – if not entice – companies to work together on issues where the market requires them to do so to have these solved, in particular when (i) production takes place in a country where the laws are simply not strong enough to warrant good working conditions and payment of a Living Wage or Living Income² or (ii) in supply chains where a myriad of suppliers connected to many companies cater the EU market.³

- 2. The underlying essence of sustainable business practices lies in the proper consideration of (i) negative spill-over effects on the environment and animals, and (ii) all actors involved in the value chain of a product, from the raw material producers to the end consumers.**

We heard from – and do agree with – DG Competition, as our 5th January 2022 [joint letter](#) made clear, that European competition law cannot solve all the problems of the world.

¹ We refer to the following definitions of [Living Wage](#) and [Living Income](#).

² We recognise that living incomes and wages are human rights in themselves and, at the same time, a precondition to the fulfillment of other human rights.

³ United Nations, “[Guiding Principles on Business and Human Rights](#)”, 2012.

The stark focus of European competition law on consumer benefits makes that body of law rather difficult to reconcile with several other legitimate concerns around sustainability issues that European consumers are, at least partly, responsible for.

For example, if European consumers demand cotton T-shirts for €5, which entails that farmers and producers keep being exploited, why should European consumers be compensated if the industry agrees to improve the working conditions of these farmers and producers?

3. Consumers have other interests beyond prices.

A growing number of EU consumers have already adapted to contribute to sustainability and are willing to pay more for sustainable products. According to findings from the European Consumer Payment Report 2020 by Intrum, almost one in two respondents (47%) say that their interest in sustainability has motivated their spending in 2020.⁴

A research on supply chain trends and technology in the apparel sector found that consumers are willing to pay more for sustainable options, with 35% respondents willing to pay 25% more than the original price, and 12% willing to pay 50 – 100 percent more.⁵

With regards to more sustainable food, and the agricultural supply chain, research by the European Consumer Organisation (BEUC) found that over half of their respondents (EU consumers) agreed that sustainability concerns have either some (42.6%) or a lot of influence (16.6%) on their eating habits, concluding that two-thirds of consumers are open to changing their eating habits for social and/or environmental reasons.⁶

At the same time, European consumers also believe that brands must drive sustainability. 69% of them wish companies to be more transparent about their business practices, according to research by Forrester.⁷

4. Consumers benefit from social and environmental sustainable business practices because precarious working conditions along supply chains directly affects the security of supply of goods for EU consumers in the long run.

Beyond the pricing of energy, food and other essential products, having the security of their availability is equally, if not even more, important to European consumers, as the current war in Ukraine illustrates. While EU companies are currently scoping the risks and public sentiments around the war in Ukraine with regards to supply chain security, this sentiment can also be extrapolated to sustainable development goals, which will challenge the security of product delivery as we know it today.

In order to secure supply chains, EU companies and their supply chain partners might need to collaborate on environmental and economic aspects, but also to create social incentives. For example, a 2014 study by the Institute for Development Studies exploring attitudes of young

⁴ Intrum, "[European Consumer Payment Report 2020](#)", 2021.

⁵ CGS, "[Increasing Consumer Value Through Digital Transformation: CGS 2020 Annual Report: Supply Chain Trends & Technology](#)", 2020.

⁶ BEUC, "[Consumers and the Transition to Sustainable Food](#)", 2020.

⁷ Michelle Beeson and Mellisa Chaudet, Forrester, "[European Consumer Drive The Sustainability Demand](#)", 2022.

people in Africa, Asia and Latin America towards farming⁸ found that many view farming as an undesirable occupation due to unstable and low incomes. As a result, many countries struggle to retain young workers in the farming sector because they tend to move to cities in pursuit of more stable jobs with higher wages, which directly affects the security of agricultural supplies (e.g., cocoa, coffee, bananas) in Europe.

5. More sustainable business practices, such as paying a Living Wage or Living Income, does not have to lead to higher prices for the end consumers.

Reports by the “Fair Fashion Guide”, an initiative funded by the Fair Wear Foundation and the German Federal Ministry for Economic Cooperation and Development, have shown that the payment of a living wage does not have to result in higher consumer prices because they are composed of other (more significant) fixed and variable costs and markups applied by the seller to make profit. This can be demonstrated by the example of a t-shirt where labour costs for making the product only account for 0.6% of the consumer price.⁹ The cost breakdown summarises the data that Fair Wear collected, which pertains to pricing for a single t-shirt created using Fairtrade-certified cotton. It indicates the costs of the key inputs for production, as well as the prices paid as this particular t-shirt moves through the supply chain, ending at the retail level. In this case, the salary costs make up 0.6% of the retail price, and only 3,6% of what the factory receives for producing the t-shirt.¹⁰

EU companies that would like to increase labour costs to meet a living wage for workers in their production facility can implement various strategies to mitigate additional costs (for example as a result of compounding price escalation) for EU consumers, such as increased productivity and efficiency measures throughout the supply chain or adapting the company’s business model.

Hereafter we propose concrete amendments and modifications to the text of Chapter 9 on sustainability agreements of the [draft revised Horizontal Guidelines](#) published by the European Commission on the 1st of March 2022.

The changes that we suggest aim to translate the argumentation and key positions of this contribution as well as the [joint letter](#) that we sent to Executive Vice President Margrethe Vestager on the 5th of January 2022. Our suggestions aim to strengthen the HGs by making them more comprehensive and clearer around sustainability agreements.

⁸ Food and Agriculture Organization of United Nations, “[The future of food and agriculture: Trends and challenges](#)”, 2017.

⁹ Fair Fashion Guide, “[Was kostet mein T-Shirt?](#)”, 2022.

¹⁰ Fair Wear Foundation, “[Climbing the Ladder to Living Wages](#)”, 2012.

Proposed amendments to the HGs

About paragraphs 543 and 545: a need for equal treatment of social sustainability

Through the changes made in the below paragraphs, we would like to draw attention to the social dimension of sustainability, which, compared to the environmental dimension of sustainability, does not find equal recognition in the draft revised HGs. The strong focus on the environmental aspects of sustainability undermines the direct link between social sustainability aspects, such as human rights, and adverse effects on the environment.

It must be recognised that it is unrealistic to expect farmers and workers to meet higher environmental standards if they struggle to make a living from their production. Applying a broader sustainability lens and a greater balance of its two dimensions throughout the HGs 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 a human right.¹¹ The lack of certainty 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”*.¹²

Therefore, we call upon the EC to follow a more balanced approach addressing **both** the environmental and the social dimension of sustainability throughout the HGs because, as paragraph 542 recognises, sustainable development is a core principle and the EC has committed to implement the UN’s SDGs. We would also appreciate receiving guidance on whether and how an agreement between companies to enable the payment of a decent living wage can be put into practice. See more below on section ‘About 9.6 on Examples’.

The need for a more balanced approach to sustainability also applies to the rest of the sustainability section and we have included comments to that effect in other paragraphs.

543. In broad terms, sustainable development refers to the ability of society to consume and use the available resources today without compromising the ability of future generations to meet their own needs. It encompasses activities that support economic, environmental and social (including labour and human rights) development³¹². The notion of sustainability objective therefore includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), eliminating pollution, limiting the use of natural resources, respecting human rights, **including (but not limited to) the payment of living wages and incomes to farmers**, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, ensuring animal welfare, etc.

¹¹ United Nations Human Rights, [Universal Declaration of Human Rights](#). See also the following definitions of [Living Wage](#) and [Living Income](#).

¹² Fairtrade Foundation UK, [“Competition Law and Sustainability - Fairtrade Foundation”](#), 2018. 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.

545. However, a concern related to sustainable development is that individual production and consumption decisions can have negative effects (“negative externalities”), for example on **people in countries of origin/production and/or** the environment, that are not sufficiently taken into account by the economic operators or consumers that cause them. Such market failures can be mitigated or cured by collective actions, for example through public policies, sector specific regulations or cooperation agreements between undertakings that foster sustainable production or consumption.

About paragraphs 552-554: Sustainability agreements not raising competition concerns – A welcomed improvement

We appreciate the clarification that certain types of sustainability agreements will generally fall outside the scope of Article 101(1) TFEU altogether, as this provides much needed legal certainty to companies and civil society organisations.

We especially welcome paragraph 553 but invite the EC to clarify to what extent such a database can contain competitively sensitive information and still be regarded as outside Article 101(1) TFEU. For instance, it would be useful to clarify that such a database could include information as to whether suppliers pay Living Wages for their workers, without disclosing the actual wages paid but instead making reference to a third-party certification or other tools.

552. First, agreements that do not concern the economic activity of competitors, but their internal corporate conduct, will generally fall outside the scope of Article 101. Competitors may seek to increase the overall reputation of the industry of being environmentally **and socially** responsible and for this purpose agree, for example, on measures to eliminate single-use plastics in their business premises, not to exceed certain ambient temperature in buildings, or to limit the number of printed materials per day.

553. Second, agreements on the creation of a database containing information about suppliers that have sustainable value chains, use sustainable production processes and provide sustainable inputs, or distributors selling products in a sustainable manner, without requiring the parties to purchase from those suppliers or to sell to those distributors, will in general not raise competition concerns under Article 101.

554. Third, agreements between competitors relating to the organisation of industry-wide awareness campaigns or campaigns raising customers’ awareness of the **environmental footprint negative externalities** of their consumption, without such campaigns amounting to joint advertising of particular products, are also generally incapable of raising competition concerns under Article 101.

About paragraphs 561-562 and 572-574 on sustainability standardisation agreements

We are happy to see the development from Section 7 of the Horizontal Guidelines from 2011 that cover standardisation agreements including standards relating to the environmental performance of products or production processes as well as terms of access to a particular quality mark or for approval by a regulatory body. The new soft safe harbour condition for standardisation agreements introduced in the draft revised HGs does provide more detailed clarity on sustainability standards and would facilitate their developments.

We welcome paragraphs 572, 573 and 574, as they provide further certainty with regard to pricing tools of sustainability standards. Nevertheless, it is crucial to clarify what would constitute a “significant” price increase that may lead to the withdrawal of the safe harbour (*i.e.*, condition 6 in paragraph 572), especially which metrics should be used to determine whether a price increase is significant.

561. In order to contribute to sustainable development, competitors may wish to agree to phase out, withdraw, or, in some cases, replace non-sustainable products (e.g. fossil fuels such as oil and coal, plastics) and processes (e.g. gas flaring) with **more** sustainable ones. Competitors may also wish to agree to harmonise packaging materials to facilitate recycling or harmonise packaging sizes (and hence product content) to reduce waste. Competitors may also wish to agree on purchasing production inputs only if the purchased products are manufactured in a **more** sustainable manner (e.g. **without child labour**). Similarly, competitors may wish to agree on certain conditions improving animal welfare (e.g. agreed standards to provide animals with more space) **or working conditions along the supply chain (e.g. through the payment of living wages and living incomes¹³)**. For these purposes, competitors may agree to adopt and comply with certain sustainability standards. Such agreements are referred to as ‘sustainability standardisation agreements’ or ‘sustainability standards’ in this Chapter.

562. Sustainability standardisation agreements specify the requirements that producers, traders, manufacturers, retailers or service providers in a supply chain may have to meet in relation to possibly a wide range of sustainability metrics such as the **social and** environmental impacts of production. Sustainability standardisation agreements usually provide rules, guidelines or characteristics for products and production methods on such sustainability metrics and are sometimes referred to as sustainability systems. They are often private initiatives and can range from codes of conduct set unilaterally by undertakings, to civil society organization driven standards and multi-stakeholder initiatives that involve undertakings across the entire value chain³²¹. These Guidelines cover only sustainability standards developed by competitors or in which competitors participate, including quality marks or labels.

¹³ United Nations Human Rights, “[Universal Declaration of Human Rights](#)”. See also: International Labour Organisation, “[A fair wage, a human right](#)”, 2013. We also refer to the following definitions of [Living Wage](#) and [Living Income](#).

About section 9.4.1. on efficiency gains and benefits

We welcome the clear acknowledgement that a broad spectrum of sustainability benefits can be taken into account as efficiency gains in the context of Article 101(3) TFEU. However, we note that the HGs use the term “*benefits*” as well as “*efficiencies*”. With regard to the first condition of Article 101(3) TFEU, we consider “*benefits*” to be more accurate. It not only corresponds to the wording of the TFEU, but also allows a wider range of improvements to be more readily recognised as relevant.

About section 9.4.2. on Indispensability

We agree that only restrictions that are indispensable to achieve the stated sustainability goals could benefit from the Article 101(3) TFEU exemption; however, we consider that, in comparison with other regulations, the EC has retained too demanding an approach to indispensability.

Indeed, paragraph 583 of the HGs states 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 indispensable for the goal to be achieved*”. This is too broad an assumption in our view.

First, a multitude of regulations address sustainable initiatives, and the HGs’ assumption would render competitors’ collaborations highly risky from a legal standpoint, particularly where existing laws and regulations are silent – or at least not concrete – about how undertakings may reach a required sustainability goal.

Second, existing legislation may sometimes be insufficient, especially where regulatory standards reflect the lowest common political denominator achievable at the time of their introduction. Many initiatives may pursue sustainability objectives that go beyond binding national law on sustainability goals. Going even one step further, in the absence of effective legislation on some key sustainability issues, such as Living Wages and Living Incomes in global value chains, a coordinated stance of relevant industry actors is required to avoid a “first-mover disadvantage” in the market while still reaching the UN Agenda 2030 on Sustainable Development and other sustainability objectives of the European Union.

Third, considering the diversity of national legal frameworks, the fact that a single member state has adopted a national law with regard to a specific sustainability goal should not prevent the implementation of an EU-wide sustainability initiative. And finally, cooperation arrangements may facilitate more rapid and more effective realisation of the goals pursued by the regulations.

Where neither individual action nor regulation effectively remedies the consequences of unsustainable business practices and related negative externalities, collaboration should be allowed to fill the gap. In this regard we are also asking the EC how to reconcile the concept of “market failure” (see for instance paragraph 546) with the need for a sustainability agreement that goes and/or the adoption of certain standards that go beyond existing regulations.

Both paragraphs 582 and 583 use the concept of reaching sustainability goals in a “more cost efficient way”, which would be the only reason to recognise sustainability agreements as indispensable in cases where (1) there is in any event demand for the sustainable products covered by the agreement or (2) EU or national law requires cooperation. Interpreting indispensable as “more cost efficient” is very limited, as there can be many more reasons why sustainability agreements are indispensable even in the case of existing demand and/or EU or national collaboration requirements, (*e.g.*, achieving environmental improvements or Living Wages more quickly).

The consortium commends the EC for including in paragraph 586 that the indispensability of sustainability agreements is not undermined by the fact that consumers may not be in a position to see that short-term effects such as price increases may be outweighed by longer-term benefits. We regret, however, that the practical application of this principle is significantly limited by the narrow approach that the HGs take to out-of-market benefits, as discussed further below.

Finally, we would like to invite the EC to provide additional guidance on the impact of the adoption of new EU or national laws for existing sustainability initiatives to mitigate companies' fears that an initiative compliant with EU competition law might suddenly be treated as an infringement, should it no longer be seen as indispensable.

About 9.4.2.1 on individual use value benefits

We invite the EC to also include the future availability of the relevant products (*i.e.*, security of supply, as precarious working conditions along supply chains lead to more fragile supply chains and therefore directly affect consumers in the long run)¹⁴ in the list of individual use value benefits for consumers. Indeed, it can be safely assumed that the current consumers of a product would value the future availability of the same product, as well as the increased longevity of the product (as the EC acknowledges in paragraph 591). This is especially true for consumable products that a typical consumer would purchase on a regular basis (*e.g.*, coffee, cocoa, bananas, *etc.*). We would argue that, as long as the impact of the sustainability agreement on the continued supply of a specific product can be sufficiently substantiated, it should be taken into account as part of the individual use value benefits.

About 9.4.3.2. on 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 helpful, in principle. However, the narrow focus taken in this section risks emptying out the notion of non-use value benefits altogether.

First, the concept of "willingness to pay" is an unsuitable measure to assess the individual non-use benefits of a sustainability agreement. It will be very difficult for firms to engage in collaborations with confidence if non-value benefits are tied to consumers' willingness to pay. While we welcome the EC's acknowledgment that stated preference studies are not an exact proxy for consumers' true preference, we consider that such a drawback cannot be remedied merely by providing "useful and appropriate context", as suggested in paragraph 598.

Second, consumers should be fully aware and informed of the effect of their consumption for a willingness-to-pay study to have any value. While consumers are increasingly conscious of sustainability issues, an inherent challenge recognised by the EC is that negative externalities "*are not sufficiently taken into account by the economic operators or consumers that cause them*" (paragraph 545). Such a challenge is a significant hurdle to using consumer surveys to assess sustainability agreements until the underlying lack of information has been addressed. The surveys should also be

¹⁴ Fairtrade Foundation UK, "[Competition Law and Sustainability](#)", 2018: "A 2014 study by the Institute for Development Studies exploring attitudes of young people in Africa, Asia and Latin America towards farming found that many view farming as an undesirable occupation due to unstable low incomes. As a result, there is a risk that many countries will struggle to retain young workers in the farming sector as workers move to cities in pursuit of more stable jobs with higher wages. This directly affects agricultural supply chains in Europe."

appropriately drafted to avoid incorporating demand-side market failures that would then turn into self-fulfilling prophecies. For instance, questions in a survey asking whether consumers are willing to pay for a fair wage for cotton T-shirt producers should be based explicitly on the presumption that other consumers would pay the same extra amount. If not, free rider concerns would depress a respondent consumer's willingness to pay.

Third, the draft HGs fail to address a key part of the second condition under Article 101(3) TFEU, namely the notion of "fair share". The current draft focuses on the type of benefits that can be taken into account to compensate for restrictions, but says nothing about how these benefits should be counted against such restrictions. We invite the EC to provide guidance on this point and clarify that the benefits do not need to fully compensate for the restrictions as long as the consumers still receive a fair share. We invite the EC to draw on the work carried out by the Dutch Authority for Consumers and Markets in that respect.¹⁵ We also invite the EC to develop a principle analogous to the "polluter pays" principle: if these negative externalities are caused by businesses producing goods to satisfy the demand of European consumers, the latter should carry the cost of addressing the externalities.

Finally, the EC should recognise that the burden of proof (*i.e.*, submitting consumer surveys) to show that a fair share of the benefits of a sustainability agreement are passed on to consumers is particularly high for SMEs (see paragraph 597), as they may not have the financial means to provide such surveys.

About 9.4.3.3. on Collective benefits

While it is highly commendable that the EC endorses collective benefits as relevant within the scope of Article 101(3) TFEU, it is unfortunate that the *effet utile* of this endorsement remains significantly limited by the requirement that the beneficiaries substantially overlap with the relevant consumers. In other words, unless the polluters themselves (and, more generally, those responsible for unsustainable production and consumption patterns entailing negative externalities) form a significant part of the benefitting community, collective benefits are irrelevant and co-operations achieving such benefits are not legally viable.

First, at a low level, the requirement that the consumers affected by the restriction and benefitting from the efficiency gain are "substantially" the same goes against the notion of "fair share": it would be fairer to limit this requirement to a need for the consumers affected by the restriction to reap a reasonable part of the efficiency gains.

Second, the HGs only make a brief reference to "*positive externalities that may be enjoyed by the society today or in the future*" (paragraph 593). Future consumers merit a much more central role because sustainability agreements are forward-looking in facilitating a better future. As such, the draft HGs should make clearer reference to the long-term analysis of the collective benefits.

Third, the approach in the draft HGs with regards to the geographic location of the efficiency gains completely disregards the indirect effects of unsustainable production and consumption. It is rather simplistic to state that reduction in chemical spread in water in an ex-EU country relating to the production of sustainable clothing does not result in any benefit for EU consumers. It for instance disregards the fact that the same water can also be used in production of vegetables that would be supplied to EU consumers, and would as such be of better quality. More broadly, it also disregards the fact that all water is connected and that the decrease in pollution of one stream also benefits water

¹⁵ ACM Legal Memo, [What is meant by a fair share for consumers in article 101\(3\) TFEU in a sustainability context?](#), 27 September 2021.

quality globally – including in the EU. This is even more obvious when considering countries like Turkey, who are a significant exporter of clothes to the EU and whose waters cannot be separated from EU waters. In the agriculture sector, there is a strong link between the lack of a living income paid to farmers and supply security in Europe. As mentioned above in section ‘*About 9.4.2.1 on individual use value benefits*’, precarious working conditions along global supply chains are likely to lead to more fragile supply chains and therefore will affect European consumers in the long run.¹⁶ We strongly urge the EC to redraft paragraph 604 to provide more nuanced examples, accounting for the world realities.

Even more importantly, that *polluter-must-substantially-benefit requirement* is highly undesirable from a policy perspective, as it disregards the protection of those who must pay the cost of unsustainable consumption.¹⁷ This is a fundamental concern that competition policy cannot turn a blind eye to.

In many cases, the restrictive notion of collective benefits adopted by the HGs would result 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.¹⁸ Further, given the EC’s leadership in competition policy internationally, this individualistic – and euro-centric – approach would undermine the spirit of global solidarity required to meet the UN’s sustainable development goals.¹⁹

It is not compatible with the concept and definition of sustainability (as laid out in paragraph 543) that an agreement between competitors to tackle unsustainable production processes could benefit from Article 101(3) TFEU if the factories in question are located in the EU, but it could not benefit from the exemption if the factories are located outside of the EU. This difference in treatment is all the more problematic as the need for sustainability cooperation is more acute outside of the European Union, where governmental regulation of working conditions, polluting emissions or hazardous chemicals is generally much less stringent than in Europe.

The relevance of out-of-market benefits was also acknowledged by the ACM. Following discussions of the text of Article 101(3) TFEU and the CJEU’s case law, the sustainability context “*is generally that of initially negative but potentially (once remedied) positive externalities affecting society as a whole. Where sustainability issues result from negative externalities, consumers in the relevant market are also polluters who have a choice to modify their behaviour or not. The out of market consumers share in the negative effects of the pollution without having this choice or the option of forcing in market consumers to modify their polluting behaviour.*”²⁰ We encourage the EC to consider this and reflect it in the final HGs.

¹⁶ Fairtrade Foundation UK, “[Competition Law and Sustainability](#)”, 2018.

¹⁷ True Price Foundation, “[Principles for True Pricing: True Price Manifesto](#)”, 2020.

¹⁸ United Nations Environment Programme, “[Emissions Gap Report 2020](#)”, 2020. This report points to 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*”.

¹⁹ United Nations, “[Transforming our world: the 2030 Agenda for Sustainable Development](#)”, 2015: see Recital 39.

²⁰ ACM Legal Memo, [What is meant by a fair share for consumers in Article 101\(3\) TFEU in a sustainability context?](#), 27 September 2021.

About 9.6 on Examples

We regret that none of the examples given concerning agreements on social sustainability issues, such as mitigating human rights violations.

While we recognise that Living Incomes and Living Wages are human rights in themselves and at the same time a precondition to the fulfillment of other human rights, we urge the EC to provide an example on agreements around the payment of Living Wages and Living Incomes along global value chains. Not addressing Living Incomes and Living Wages will make it impossible for a large part of the world's farmers and workers to be lifted out of poverty and to reach the Sustainable Development Goals.²¹

We therefore provide hereafter two examples in which discussions around agreements on Living Incomes or Living Wages have faced uncertainty within competition law. Both cases were approved by competition authorities, formally or informally, and could serve as a template to draft an example to be included in the HGs.

1. Obstacle analysis on the costs for paying a Living Wage by the Fair Wear Foundation

During Fair Wear's 2015 Annual Conference, a number of garment brands came together with trade union and NGO representatives and hatched a plan for innovative collaboration to raise wages in garment factories. The enthusiasm in the room was palpable. At some point, however, it was pointed out that such collaboration among garment competitors represented a real risk with regard to competition law. No one in the room was a competition lawyer, and the threat remained undefined. Yet, it was clear that many in the room – particularly company representatives – perceived this as a very real obstacle to moving forward as competition law violations can lead to expensive fines or even criminal sanctions.

According to the European Outdoor Group and a member of Fair Wear's Board back in 2015, "*There is a conventional wisdom among outdoor and sports companies – and probably most garment companies – that you don't go near anything that could be misconstrued as a violation of competition law.*"²²

The impact for Living Wages in the garment industry is real, but collaboration is needed to raise wages: because most of the garment production takes place in shared facilities where a single factory produces for numerous brands, generating the funds to cover the costs of increased wages requires support from various garment brands. However, competition law has a chilling effect on agreements among competitors relating to costs. In this context, Fair Wear approached the globally-recognised law firm Arnold & Porter²³ with this legal quandary in the context of European competition law and issued a guidance paper for Fair Wear member brands that work together to make Living Wages a reality in the garment sector.²⁴

²¹ United Nations, "[Transforming our world: the 2030 Agenda for Sustainable Development](#)", 2015: "*Goal 1: Eradicate poverty in all its forms [and] Goal 8: Promote [...] decent work for all*".

²² Business & Human Rights Resource Centre, "[Why competition law shouldn't stop collaboration on living wage](#)", 2015.

²³ Arnold and Porter, Opinion, "[The Application of EU Competition Law to the Adoption of the Living Wage Standard](#)", 2015.

²⁴ The Fair Wear Foundation, "[Competition Law Do's and Don'ts](#)", 2015.

2. German retailer working group on Living Incomes in the banana sector

The goal of the German Retailers Working Group on Living Income and Wages, which was launched by the German Agency for International Cooperation and Development (GIZ) on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ), is to proactively contribute to a transformation of the banana sector through various means, such as enabling farmers in global supply chains to earn Living Wages and Living Incomes. Therefore, Working Group members ALDI Nord, ALDI SÜD, Kaufland, Lidl, REWE Group and dm-drogerie markt have collectively agreed to integrate Living Wage criteria into their own brands' entire banana portfolio. Living Wage criteria and responsible purchasing practices will be developed and piloted in 2022 by means of a participatory horizontal dialogue. As of spring 2023, bananas fulfilling Living Wage criteria are expected to be available for consumers in the mentioned German retailers' markets.

The Working Group is convinced that action on Living Wages throughout the entire European market is needed in order to effect sustainable change and provide secure livelihoods for local communities. Previous German Federal Development Minister Gerd Müller described the alliance as a milestone on the way to fairer global supply chains: *“Seven major German retailers have committed themselves to ensuring a living income along their supply chains. It’s good to see movement in food retail. A short while ago, no one would have thought this was possible, and it also shows that consumer pressure is effective.”*²⁵

However, the sustainability initiative consists of agreements concluded between competing companies on issues related to competition, such as prices and conditions. Accordingly, the Bundeskartellamt assessed the initiative to make sure that sustainability and public interest objectives could be achieved, and that choices remain available to consumers in line with competition requirements. Although the Bundeskartellamt had no competition concerns after its examination,²⁶ the case shows not only the need and willingness of market actors to align on some key social sustainability issues, but also the need for profound guidance around agreements on the payment of Living Wages and Living Incomes along global supply chains.

²⁵ Initiative for Sustainable Agricultural Supply Chains, [“German Retailers Working Group on Living Income and Living Wages”](#), 2021.

²⁶ Bundeskartellamt, [“Achieving sustainability in a competition environment - Bundeskartellamt concludes examination of sector initiatives”](#), 2022.