

EU Competition Law and Agreements for Sustainability

- A success story

EU Competition Law. Technical legal language, highly complex and what does it actually have to do with just, fair and sustainable economies? To take the answer up front: A lot!

In 2014, the Fair Trade movement embarked on a journey to intersect with the intricate realm of Competition Law, and later “antitrust” in particular. This encounter sought to address anti-competitive agreements and regulations governing collaborations on critical sustainability issues within markets. It started with a report examining Competition Law and its intersection to Sustainability in the Netherlands commissioned by the Fair Trade Advocacy Office¹ and gained momentum when multi-stakeholder settings, some in which the Fair Trade movement was involved, revealed that EU Competition Law was perceived as a burden to agreements on some aspects around sustainability. The lack of clarity around the extent to which sustainability-oriented agreements could breach EU Competition Law led to a dichotomy where some market actors were afraid of collectively discussing price related issues such as the payment of Living Income or Living Wage, while others used it as an excuse to evade discussions on these crucial matters.

Studies, commissioned by the Fairtrade Foundation UK, found that the lack of clarity around EU Competition Law continued to prevent any meaningful progress in combating low prices to farmers, which is a major issue in the cocoa sector and beyond. According to the authors *“this really restricts further progress being made on other issues such as living incomes and wages.”*²

An EU Competition Law that works for people and the planet?

It was clear that the EU’s Competition Law enforcement must neither act, nor be perceived as, an unreasonable burden against any multi-stakeholder or business cooperation that aims to achieve legitimate sustainability goals, such as environmental sustainability and improved social standards, and especially the achievement of Living Incomes and Living Wages. On the contrary, the Fair Trade movement was certain it should encourage business initiatives pursuit of legitimate sustainability goals. Furthermore, it was also acknowledged that multi-stakeholder cooperation can effectively complement the EU’s sustainability legislation.³

¹ Irina Toma, [Competition Law and Sustainability in the Netherlands. Sustainability Exemptions to Competition Law as Role Model for Europe?](#) In: Fair Trade Advocacy Office Briefing – June 2016, Brussels

² Competition Law and Sustainability: URL: <https://www.fairtrade.org.uk/resources-library/researching/policy-resources/competition-law-and-sustainability/>

³ European Parliament resolution of 31 January 2019 on the Annual Report on Competition Policy (2018/2102(INI)), para 49; Commission, ‘Factual summary of the contributions received during the

But why cooperation and not unilateral action? The answer is simple: It will often be difficult for companies to implement sustainability initiatives unilaterally when they might face a first-mover disadvantage, since such initiatives usually increase costs. This is especially problematic when a company commits to stop offering less sustainable but cheaper products. Such a decision might result in a substantial loss of customers in very price-sensitive markets or where there is little scope for product differentiation.⁴

Bridging two worlds to enable a fairer economy

In December 2018 the Fair Trade Advocacy Office (FTAO) convened actors from the antitrust community in Brussels to identify potential routes for action in establishing sustainability as a factor in the agencies' competitive analysis, but also an action plan for practical implementation and upcoming political windows of opportunities.⁵

It was barely one year later, in October 2019, when the FTAO led initiative became suddenly more visible as well as political when the event "Sustainability and Competition Policy: Bridging two Worlds to Enable a Fairer Economy"⁶ was hosted at the European Committee of the Regions, and the European Economic and Social Committee organised together with the Global Competition Law Centre of the College of Europe and the Center for Economics, Law and Society at University College of London, and with the support of the German Federal Ministry for Economic Cooperation and Development. The debate revolved around the key question of whether EU competition policy can give weight to sustainability values, and avoid being seen as a barrier to private sector and civil society initiatives intended to deliver sustainability objectives. Until today the event, opened by Margrethe Vestager, European Commissioner for Competition and today's Executive Vice President of the European Commission, is seen as the kick-off to many other debates around sustainability in EU Competition Law and antitrust circles.⁷

"This conference reminds us that businesses have a vital role in helping to create markets that are sustainable in many different ways, and competition policy should support them in doing that." - Margrethe Vestager at FTAO Conference on EU Competition Law in 2019

It was not by chance that the European Commission launched its first public consultation process just a few days after the conference, in November 2019, to collect input from stakeholders on the revision of the Horizontal Guidelines. The process aimed to give more guidance on how to apply Article 101 TFEU on anti-competitive agreements between market actors. A great opportunity to address the need for legal certainty by including a comprehensive analysis of sustainability agreements in the Guidelines on Horizontal Cooperation Agreements. The Fair Trade movement was certain that this would facilitate and encourage genuine multi-stakeholder sustainability agreements involving competitors, while

public consultation on the evaluation of the two block exemption regulations and the guidelines on horizontal cooperation agreements', p 5; Linklaters, 'Competition law needs to cooperate: companies want clarity to enable climate change initiatives to be pursued' (survey results) 28 April 2020.

⁴ FTAO position on "EU Competition Law: Cooperation Agreements for Sustainability"

⁵ FTAO Discussion Paper: URL: <https://fairtrade-advocacy.org/wp-content/uploads/2019/10/FTAO-Competition-Law-and-Sustainability-Initiative-Discussion-Paper-and-Action-Plan-December-2018.pdf>

⁶ More information on event here: <https://cor.europa.eu/en/events/pages/cor-eesc-sustainability-competition-policy.aspx>

⁷ URL: <https://fairtrade-advocacy.org/other-information/the-link-between-the-eu-competition-law-and-sustainability-rises-in-the-eu-agenda/>

making clear that sustainability cannot be invoked as a smokescreen for anti-competitive behaviour.

Capitalizing on this great political window of opportunity the FTAO used the momentum to get other like-minded organisations, academics, lawyers and businesses on board to join forces and get involved in the process of influencing the upcoming guidelines and make sure a reference to sustainability agreements finds its way in the final document.

Since then the Fair Trade movement has remained one of the few civil society actors in the debate. EU Competition Law was and still is perceived as highly technical (rightly so) which has brought many civil society organizations to dedicate their resources elsewhere. Often argued that other regulations are better placed to achieve more sustainable markets and supply chains. Nonetheless, the need for more clarity around sustainability within EU Competition Law became increasingly urgent in the rise of Human Rights and Environmental Due Diligence and other EU initiatives concerning corporate responsibility.

Leveraging that momentum the Fair Trade movement partnered up with other relevant actors in the debate to raise awareness around the issue. First to mention, is the collaboration with the European Brand Organization AIM and the Fair Wear Foundation who got highly involved in the revision of the Horizontal Guidelines by joining the Fair Trade movements campaign and policy demands.

Articulating policy demands collectively contributed to gaining leverage at EU level, which translated to a key milestone: the EC's first draft of the new Horizontal Guidelines revealed a stand-alone section on "Sustainability Agreements". The first sustainability chapter in the EU's Guidelines on Horizontal Agreements ever!

While welcoming the great developments, the coalition emphasized the need to shift from an quasi-exclusive focus on the environmental dimension of sustainability to a multidimensional one that included social sustainability aspects. "[...] *it is unrealistic to expect that farmers and workers can meet higher environmental standards if they struggle to make a living from their production.*" - was part of the message and part of the letter sent to Vestager.⁸ Moreover, multi-stakeholder initiatives around sustainability were particularly unclear when it came to prices paid to workers and smallholder farmers along the supply chain. Therefore, a reference to the achievement of Living Incomes and Living Wages was seen as indispensable.

Addressing social sustainability equally to environmental aspects became the main objective of the coalition between the Fair Trade movement, AIM and the Fair Wear Foundation. Intensified efforts and relentless pursuit to convey the right message to the right person at the right time was the recipe that eventually led to the result published by the Commission in June this year. The final [Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements](#) now include a whole chapter on sustainability including references to Living Income as well as Living Wages and aspects of social sustainability. Remarkably while the first draft entailed examples merely on environmental aspects, the final Guidelines revealed two newly drafted examples: one on minimum conditions and fair wages as part of a non-governmental labelling organisation and another one on agreements around Living Wages in the textile sector. The presence of these new examples called "Fair Tropical Fruit" and "Fair Clothing" leave no doubts of the value provided by the Fair Trade movement, the Fair Wear Foundation, and its broader coalition.

⁸ Joint letter to the Executive Vice-President of the European Commission: URL: <https://fairtrade-advocacy.org/wp-content/uploads/2022/01/Joint-letter-on-competition-law-and-social-sustainability.pdf>

Walking the talk: the hard day after a successful one

The new Guidelines have the potential to foster tangible contributions to sustainability worldwide and to the well-being of millions, but are nothing but paper if there is no implementation. The companies who have pledged allegiance to sustainability must now go ahead and “walk the talk”. The updated guidelines provide market actors with an unprecedented level of clarity and guidance around more sustainable business practices, setting the stage for meaningful change. Furthermore, the European Commission, alongside competition authorities in various Member States, have signalled their readiness to engage in constructive dialogues and discussions regarding specific cases.

In this transformative juncture, the private sector, civil society, and regulatory bodies stand at a critical crossroads. It is only through collective efforts, unwavering commitment, and a shared vision of a fairer, more sustainable economy that the true potential of the new guidelines can be fully realized. By walking the talk and actively pursuing genuine sustainability objectives, businesses can help pave the way toward a future where economic success is intricately linked with social and environmental responsibility.

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