ETUC Submission to Commission Consultation on the draft revised Horizontal Guidelines

The European Trade Union Confederation (ETUC) is pleased to share its observations on the draft revised *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements*. ETUC is the cross-industry European level organisation of trade unions, and represents 92 national confederations from 39 countries with 45 million members. ETUC is a recognised social partner to the EU under the Treaties.

ENSURING FUNDAMENTAL PRINCIPLES OF FAIR COMPETITION

With this submission, ETUC wishes to share its views in particular on chapter 9 on 'Sustainability Agreements' of the draft revised Horizontal Guidelines. ETUC welcomes the ongoing review of the EU legal framework of competition in the light of sustainable development, and believes that also competition policy has a role to play when it comes to promoting greener, more socially responsible and inclusive business behaviour. As rightly pointed out by the draft Guidelines, sustainable development 'encompasses activities that support economic, environmental and social (including labour and human rights) development' (§ 543). However, environmental and social sustainability considerations are fundamentally different in nature, which also needs to be taken into account when assessing horizontal cooperating agreements under the revised draft Guidelines.

When it comes to social sustainability, it must be underlined that competition law cannot substitute itself for social policies, but can only be complementary to and supportive of such objectives. To promote social sustainability, competition law must ensure coherence with social policies, respecting also industrial relations and the role and autonomy of social partners in the labour market, in particular in terms of social dialogue and collective bargaining. These are fundamental principles affirmed in the Treaties as well as in the European Pillar of Social Rights, and as such must be given due regard in EU policy-making.

The fundamental values, rights, principles and objectives of the European Union are binding on competition policy in the same way as any other EU policy area. Pursuant to Article 3 TEU, the Union shall promote the well-being of its peoples and "work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment." Likewise, the Charter of Fundamental Rights of the European Union is binding on the EU and its Member States when acting within the scope of Union law.

This commitment to promote sustainable development and to ensure policy coherence does not only require increased attention to social objectives within the limits of competition law, but above all also obliges competition enforcers to ensure that competition or the lack of competition does not undermine social, workers' and trade union rights. Promoting sustainability does not necessarily mean making competition law more lenient. In fact, increased concentrations of economic power, capital and innovation risk enhancing social inequalities, taking expressions such as labour market concentrations, monopsony power, lack of workers' involvement and undermined collective bargaining.

For the revision of the Horizontal Guidelines, ETUC therefore supports a restrictive approach to social sustainability agreements between competitors. Importantly, these Guidelines should primarily clarify the kind of sustainability agreements that fall outside the scope of Article 101(1) TFEU. However, when it comes to social sustainability agreements within the scope of competition law, their permissibility calls for a strict assessment. Above all, it should be recalled that sustainable development can be stimulated also through sound, open and well-regulated competition, ensuring fair competition among businesses on equal terms.

CLARIFYING SUSTAINABILITY AGREEMENTS OUTSIDE COMPETITION LAW

ETUC shares the view of the Commission that many sustainability agreements do not raise competition concerns and in fact fall outside the scope of competition law (§ 551). Sustainability agreements are indeed no distinct type of cooperation agreement, but should be assessed in the light of the principles and considerations set out in the other chapters of these draft Guidelines, while taking into account the specific sustainability objectives pursued (§ 547, 556).

As examples of agreements falling outside the scope of Article 101 TFEU, the draft Guidelines mention e.g. cooperation around internal corporate conduct (§ 552) and the creation of data bases containing information about suppliers with sustainable value chains (§ 553). Such cooperation agreements are not necessarily limited only to environmental aspects, but can of course also relate to joint efforts among companies to **promote fundamental labour rights such as the right of workers to join trade unions and bargain collectively to improve their working conditions**. To ensure more socially responsible supply chains, competitors can develop joint databases with information about **suppliers who respect labour rights and apply collective agreements**. Likewise, joint commitments to only purchase products or services from suppliers or subcontractors (§ 557) covered by collective agreements should not be considered to raise competition concerns.

In this context it should of course be recalled that **collective bargaining agreements fall under social policy and are not to be considered as horizontal cooperation agreements between competitors**. In this sense, they are therefore excluded from the remit of competition law.

Collective bargaining is an intrinsic element of social dialogue between management and labour, represented on the one side by trade unions and on the other side by employers and employers' organisations. Deriving from collective bargaining between social partners, these agreements aim to improve working conditions and ensure a level playing-field among companies. As such, they pursue legitimate social policy objectives falling completely outside the scope of competition law, as affirmed by the Court of Justice of the European Union in the C-67/96 *Albany* line of case law. **Importantly, collective agreements are bargained through bilateral negotiations between workers and employers as counterparties, and not unilaterally agreed between employers representing competing undertakings**.

ASSESSING SUSTAINABILITY AGREEMENTS WITHIN COMPETITION LAW

When sustainability agreements affect one or more parameters of competition (§ 555), they necessitate an assessment under Article 101 TFEU. Such agreements may nevertheless pursue **legitimate social objectives, such as the respect for human rights or facilitating a just transition through the promotion of retraining, up-skilling and creation of quality**

employment. To this end, the close involvement of workers and trade unions in such cooperation agreements is essential to always ensure their genuinely sustainable nature. Similarly, the Court of Justice of the European Union in e.g. case C-309/99 *Wouters* has notably acknowledged that certain professions escape the prohibition of Article 101(1) TFEU where the restrictive effects on competition resulting from their agreements are inherent in the pursuit of legitimate objectives (§ 548).

While cooperation agreements may pursue genuine sustainability objectives, any appreciably negative effect on competition must nevertheless be strictly assessed (§ 560), in order **not to open the door to 'sustainability washing'**. The cooperation in question **must be limited to what is strictly necessary** to achieve the sustainability aim envisaged. Permissible agreements **must demonstrate effects which cannot be attained by any of the actors acting alone, nor by public authorities through sectoral legislation or by social partners through collective bargaining**.

These criteria are particularly relevant for the assessment of sustainability standardisation agreements with social objectives, such as codes of conduct (§ 562)**. The development of social standards by their very nature require those concerned by the standards in question to be consulted and involved in the process.** Moreover, sustainability agreements aiming to introduce social standards **must not be misused in joint attempts by employers to unilaterally fix working conditions**, thereby circumventing collective bargaining with trade unions. As previously pointed out, the regulation of working conditions exclusively belongs to social policy and social dialogue. Competition law must not undermine existing industrial relations systems by opening up for business-driven initiatives to one-sidedly replace, challenge or by-pass the prerogatives of social partners as regards the regulation of working conditions.

For the above-mentioned reasons, **ETUC calls for a particularly cautious and restrictive approach to any kind of flexibilization of competition rules** when it comes to social sustainability agreements that could be considered as exempted under Article 101(3) TFEU. Although e.g. improved conditions of productions (§ 578) might entail social sustainability, this objective does not as such justify restrictions to competition if the same objectives may be obtained through less intrusive and more appropriate measures, such as the improvement of working conditions through collective bargaining between employers and trade unions.

In other words, **if the same results can be achieved through social policy or collective bargaining, the sustainability agreement in question is not indispensable** (§ 581). With the aim of improving working conditions, collective agreements ensure fairness for workers as well as a level playing-field for employers by establishing minimum standards of decency, while not preventing individual undertakings from guaranteeing higher standards (§ 585). Although collective agreements may apply to whole sectors they do not as such eliminate competition in the market (§ 611), but rather ensure fair competition by preventing a race to the bottom in terms of working conditions. Labour is not a commodity and cannot be made subject to the same market dynamics as other factors of production in quest for the lowest price or the highest profit. This being said, it should nevertheless be recalled that **while collective agreements pursue social objectives, they are fundamentally different from horizontal cooperation agreements. As such, they fall outside the remit of antitrust control and do not require any justification under Article 101 TFEU**.

The Charter of Fundamental Rights of the European Union under Article 12 on freedom of assembly and of association provides that "Everyone has the right to freedom of peaceful

assembly and to **freedom of association** at all levels, in particular in political, trade union and civic matters, which implies **the right of everyone to form and to join trade unions** for the protection of his or her interests." Article 28 of the Charter further recognizes the **right of collective bargaining and action**. Improved working conditions and proper social protection also constitute core principles of the European Pillar of Social Rights, under which "social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices" and "shall be encouraged to negotiate and conclude collective agreements in matters relevant to them".

PREVENTING ABUSE AND WAGE-FIXING PRACTICES BETWEEN EMPLOYERS

ETUC reiterates the need to ensure that the revised Horizontal Guidelines do not open up for **social sustainability agreements as a means for companies to circumvent collective agreements or as an excuse not to engage in collective bargaining** negotiations with trade unions representing their workers. Clearly, sustainability agreements must not become a tool for employers to undermine fundamental labour rights, enshrined in EU primary law as well as in European and international human rights instruments.

Against this background, **ETUC is particularly concerned about calls expressed by certain stakeholders to promote cooperation agreements on 'living income' and 'living wages' for workers** through the revision of these Horizontal Guidelines. Such calls are inappropriate under competition law, since issues relating to wages and working conditions pertain to social policy and collective bargaining. Allowing competitors to one-sidedly agree on wages without bilateral negotiations with the trade union side would **not only result in increased concentration of economic power in the labour market, but also undermine the counter-balancing function that collective bargaining fulfils**. Any such flexibilization of competition rules would only favour the creation of labour market monopsonies and a downward pressure of wages dictated by employers alone. These kinds of problems of wage-fixing practices among employers are increasingly recognised also by competition enforcers around the world.

Against this background, the promotion of sustainability agreements under the revised Guidelines **must not open the door to illegal unilateral wage-fixing practices between employers**, but such anti-competitive business conduct must remain prohibited under EU competition law in the same way as e.g. no-poach agreements. To this end, the Commission needs to also ensure internal coherence with its 9 December 2021 draft *Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons*, which inter alia affirm that 'The first arrangement is likely to infringe Article 101 TFEU by object, as it restricts competition between the sports clubs to hire the best athletes in the marketplace. The second (wage-fixing) arrangement, is also likely to infringe Article 101 TFEU by object, since it is in essence an agreement between competitors (the clubs) to reduce their input costs.'

Margrethe Vestager, Executive Vice-President of the European Commission, has also been clear on the prohibition of collusion among employers in her recent statements: "Buyer cartels […] make our economy work less efficiently. And they still have direct victims – even if it's suppliers, not consumers, who suffer. **And some buyer cartels do have a very direct effect on individuals, as well as on competition, when companies collude to fix the wages they pay; or when they use so-called "no-poach" agreements as an indirect way to keep wages down**, restricting talent from moving where it serves the economy best. And that's not the only way that an agreement not to poach each other's staff can create a cartel."

This being said, **ETUC is equally concerned about calls for competition law promoting 'multistakeholder initiatives' for 'living wages' and decent working conditions**. As already outlined in this submission, working conditions and wages not only pertain to social policy and collective bargaining, but collective bargaining is prerogative of social partners in general and of trade unions in particular. The ILO has repeatedly condemned any attempts to dilute collective labour and trade union rights such as allocating collective bargaining prerogatives to other non-legitimate actors (Freedom of Association Compilation of decisions of the Committee on Freedom of Association, § 1214-1347).

To conclude, working conditions and wages one-sidedly imposed by colluding employers can never be considered as fair or decent, but rather stand in stark contrast to the genuine enjoyment of fundamental labour rights, in particular the right of everyone to join a trade union, to engage in collective bargaining and to enjoy protection under collective agreements. Wages or working conditions unilaterally agreed by employers must not enjoy protection under competition law, disguised as "social sustainability agreements". For employers genuinely wishing to commit to paying decent wages and working conditions, there is no need to resort to horizontal cooperation agreements under competition law, but rather they should encourage their workers to organise and subsequently engage in collective bargaining with their trade unions. Paving the way for more sustainable competition policies, **the primary aim of the revised Horizontal Guidelines should therefore be to promote a human right compliant interpretation and application of competition law, in full respect of fundamental social, workers' and trade union rights**.