

**PRACTICAL EXAMPLES OF COOPERATION BETWEEN BUSINESSES TO WORK ON A MORE SUSTAINABLE BASIS WHICH MAY BE CAUGHT BY COMPETITION LAW BUT WHICH SHOULD USUALLY BE OK (EITHER BECAUSE THEY SHOULD NOT BE CAUGHT AT ALL OR BECAUSE THEY SHOULD BE EXEMPT)<sup>1</sup>.**

**NB. The examples in this document are taken from Unilever’s excellent submission to the European Commission in the context of the Commission’s plans to revise its guidance on so-called “horizontal agreements”<sup>2</sup>. These examples should be understood in the context of that paper and all cases need to be considered in their own legal and economic context.**

**This note has been prepared by Simon Holmes solely as an informal business aid to bring together some practical examples of the sort of vital initiatives which may be inhibited by an unwarranted FEAR of competition law but which, on a proper analysis, should not usually be caught by competition law.**

**Simon Holmes, 12 June, 2020**

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<sup>1</sup> The reference to competition law here is a reference to the prohibition on anti-competitive agreements in Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) and equivalent provisions under national law (eg the so-called “Chapter 1 Prohibition” in the UK’s Competition Act 1998).

<sup>2</sup> Here the link to the site where you will find the submission under (not surprisingly) “competition law and sustainability”: <https://www.unilever.com/sustainable-living/our-approach-to-reporting/engaging-with-stakeholders/>

## **1. SUSTAINABILITY AGREEMENTS THAT ARE UNLIKELY TO BE CAUGHT BY THE PROHIBITION ON ANTI COMPETITIVE AGREEMENTS<sup>3</sup>.**

**a. Joint commitments to achieve sustainability targets without obligations to employ certain means.**

**Examples from the case law:**

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<sup>3</sup> By this is meant that they should not normally be caught at all by the prohibition on anti-competitive agreements in Article 101(1) TFEU (and the national equivalents).

1. In ACEA and JAMA and KAMA , associations of automobile manufacturers made commitments on behalf of their members to reduce CO2 emissions from cars. The targets were set on behalf of all members collectively rather than individually, and as long as the average target was met, each member was free to apply more or less stringent targets. Members were free to determine how to meet the target, allowing for the development of competing CO2-efficient technologies.
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2. In CEMEP , the principal European manufacturers of low voltage electric motors (jointly accounting for ca. 80% of EU sales) agreed to reduce sales of the least energy-efficient engines by at least 50%. They committed to reach a specific target but had discretion on how to contribute.

**Examples of current industry initiatives:**

3. industry targets to reduce sugar, salt or calories, etc.;
4. the “New Plastics Economy” Global Commitment of 2018, signed by more than 450 packaging producers, brands, retailers and recyclers who committed (among further, less specific goals) to 100 % of plastic packaging to be reusable, recyclable or compostable by 2025; or
5. the “2050 Pathways Platform” to develop long-term, net zero-GHG, climate-resilient and sustainable-development pathways, joined by governments on all levels and 196 companies.

**b. Replacing non-sustainable products - without tangible impact on consumer price and choice.**

**Examples from the case law:**

1. In 2008, the Dutch competition authority (ACM) did not object to an agreement between organisations at various levels of the food supply chain, which resulted in members of a supermarket trade organisation only selling fresh pork meat from pigs that were castrated with the use of anaesthesia. This involved a temporary marginal increase of the wholesale price, but supermarkets remained free to set their individual retail price. Slaughterhouses could still purchase pork meat from pigs castrated without anaesthesia for supply to other sales channels.
2. In CEMEP, the Commission found that the energy efficiency of low voltage motors was at the time not subject to definitions and classifications. As such, energy efficiency wasn't a significant criterion in purchasers' decisions to buy one type of motor or another

**Other examples of desirable industry initiatives:**

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3. Compaction (of, e.g., detergent bottles) and compression (of, e.g., deodorant bottles) – reductions of weight and/or size of products – bring about substantial reductions of plastics and other packaging materials, decrease transport-induced GHG emissions and reduce the required quantities of ingredients. At the same time, there is no negative effect on consumer choice: bulkier, heavier and less environmentally friendly packaging is unlikely to be missed if the product features remain otherwise unchanged.

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4. Similarly, businesses can significantly reduce packaging materials by agreeing on higher than legally required<sup>21</sup> fill levels for instance of food containers or shampoo bottles. Again, consumers get a better product than before and negative effects can generally be excluded.
  5. The harmonization of packaging formats to facilitate recycling, or, for instance in the food solutions industry, the standardization of refillable buckets to create a circular economy.
  6. Joint commitments to ensure living wages for workers, i.e. an income that meets basic needs (which in many emerging economies is not the case for statutory minimum wages).
  7. Commitments to respect labour law standards (specifically for migrant workers) where existing regulations are poorly enforced (e.g. on hazelnut plantations in Turkey, to name a commonly evoked example).

### **c. Creating new markets**

1. The DSD case was about a countrywide collection and packaging recovery system in Germany. Contractors had to supply DSD exclusively and at a pre-set price. The Commission endorsed
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the co-operation agreements on the basis that they were necessary for "the establishment of a new, functioning market in the recovery of sorted plastic and composite packaging".

2. Chemical (or “molecular”) recycling is frequently put forward as the most effective response to the shortage of conventional post-consumer recycled plastics and surfactants which are largely insufficient to meet a surging demand, especially for plastics that fulfil regulatory requirements of the FMCG industry (“food-grade” being one of the most onerous ones). While mechanical solutions inevitably lead to “downcycling” to lower quality plastics, chemical recycling technology allows to reprocess highest-quality polymers. Collective action in this field could entail:

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- a. establishing adequate joint waste collection & sorting infrastructures for (chemically) recyclable plastics – often lacking even in EU member states, let alone in D&E countries;
  - b. creating demand to take prototype technology to a level where mass production becomes viable – through volume commitments and/or joint sourcing.
  - c. A pledge by industries such as carmakers to buy only carbon-neutral steel: The procurement costs for steel would increase significantly but the impact on the price of the final product would be limited – a market for carbon-neutral steel could be created via a specific demand route downstream, thus not weakening the price competitiveness of European steelmakers.
  - d. Joint introduction of refill stations for reusable packs in supermarkets, be it via dispensing product bars or machines for consumer refill.
  - e. Reflecting core ambitions of the Commission’s Farm to Fork initiative, creating markets for more environmentally sustainable, healthier foods to fix fundamental shortcomings in diets of European consumers (too few vegetables, too many calories), in agricultural practices (limited crop rotations, poor climate change adaption) and livelihoods of farming communities would consist of a concerted diversification into more nutritious and varied foods, translating into e.g.:
  - f. collective commitments to buy – e.g. through joint procurement bodies/alliances – certain volumes of foods that drive the cultivation of more diverse crops, thus creating the necessary demand for farmers to start planting them and develop technological expertise and commercially viable input supply chains;
  - g. bundling of volumes to create a (currently often non-existing) logistics infrastructure for crop transportation from producers to processors and/or manufacturers;
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**h.** joint commitments to use defined quantities of crops in products dedicated for European consumers and to deploy joint efforts improving acceptability of new, **healthier crops**.

**d. Mutual - or unilateral - granting of open source access to IP to develop more sustainable products**

1. In EUCAR, the Commission endorsed a research cooperation, particularly on environmental issues, between leading European motor manufacturers. The intellectual property derived from the project would be freely accessible and usable by all participants. The Commission saw the agreements outside Art. 101 (1) TFEU as the research was at the pre-competitive stage, and the products obtained from it were not directly usable in a specific type of vehicle.
2. Consumer goods-industry relevant examples for open sharing of innovations and intellectual property are compaction and compression (see also under b.); in fact IP rights might be granted even unilaterally – technological advantages could otherwise be tainted by consumer reluctance to switch to more sustainable products for (unjustified) fear of buying a less effective alternative.

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**e. Agreements between competitors aimed at contributing to compliance with laws.**

1. Labour-law protected human rights of farm workers in the economically most disadvantaged areas (for instance vanilla farming in Madagascar or cocoa plantations in Cote d'Ivoire and Ghana). Such laws cover a wide range of issues, from bans on slave and/or child labour to minimum wages and health and safety regulations;
  2. Deforestation legislation which applies to the cultivation of commodities such as palm oil, soya, beef or pulp and paper.
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3. Looking at the root causes of poor law enforcement in these, and many other, fields, corruption features as one of the most prevalent concerns, despite the univocal recognition of the economic damage it causes. Collective action can help mitigate the problem, e.g. via agreements to:
4. adhere to (often poorly enforced) anti-bribery laws – and to require the same from supply chain partners;
5. if necessary, blacklist suppliers or modify the terms of business with non-compliant entities; - explore and potentially agree on other protective measures.
6. Similar considerations apply to other integrity-related legislation, from money-laundering regulations to restrictions of unfair advertising. Competition laws, last not least, are another relevant example given the persistent lack of antitrust enforcement in many young jurisdictions.

#### **f. Exchanges of sustainability-related information between competitors**

1. Establishing central open source systems to conduct due diligence and monitoring of third parties:
2. Joint mapping of harvesting locations and deforestation incidents;

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3. Joint tracing of slave/child labour practices and other human rights violations outside and within the EU (e.g. in the trucking sector), notably regarding recruitment agencies; e.g. on the basis of joint risk-scoring systems and vetting processes;
  4. Collaborative and syndicated systems for anti-bribery due diligence and monitoring of suppliers and other business partners.
  5. Sharing of information regarding blackspots for bribe solicitation, either private or public, and about third parties that have been blacklisted for corrupt practices by other companies.
  6. Sharing of good practices, systems and tools to risk assess, control or monitor business activities from a sustainability perspective.

## **2. Agreements that might be caught by the prohibition on anti-competitive agreements but which may be exempt if the 4 conditions for an exemption are met.<sup>4</sup>**

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<sup>4</sup> These conditions are set out in Article 101(3) TFEU (and national equivalents such as Section 9 of the UK's Competition Act 1998). In summary the agreement must:

1. “contribute to improving the production or distribution of goods or to promoting technical or economic progress”;
  2. allow “consumers a fair share of the resulting benefits”;
  3. be no more restrictive than necessary (ie the restrictions must be “indispensable” to achieving the objectives in condition 1 above);
  4. must not eliminate “competition in respect of a substantial part of the products in question”.
- ALL 4 conditions must be satisfied for the agreement to be exempt.

**a. Phasing-out of non-sustainable products with relevant cost increases**

- i. The initiatives that were subject to the Commission's CECEC case (concerted outsourcing of less energy-efficient washing machines) as well as the ACM's Energieakkoord case (about a deal between four electricity producers to close down older coal-fired power plants to cut CO2 emissions) - both were deemed to fall under Art. 101 (1) and/or its Dutch equivalent.
- ii. Industry commitments to use only those types of plastics in packaging that are deemed safe for recycling, thus phasing out e.g. PVC or oxo-degradable additives.
- iii. Collective commitments to (completely) replace conventional with products meeting certification or other defined sustainability requirements.

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- iv. Temporary fishing moratoria to stop overfishing and ensure long-term survival of fishing industry and biodiversity.
  - v. Moratoria on conversion of natural habitats to put an end to, for example, soy expansion into natural habitats in Latin America.

**b. Setting of – mandatory – sustainability standards & standards stricter than the law.**

- i. A concerned cold-chain warm-up, i.e. an industry agreement to -10 to -12 Celsius freezer temperatures for a wide range of frozen products (to reduce energy consumption & improve freezer utilization).
  - ii. The integration of regenerative and low carbon farming practices into binding common certifications standards agreed amongst commodity traders and FMCGs; this could include (1)
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agreed criteria for premiums paid to producers that comply with certain practices and/or deliver a specific impact, as well as (2) grounds for exclusion of suppliers that are not willing to remediate.

- iii. Collective commitments on the integration of vulnerable parties in the supply chain, including transparency and reporting obligations; again, criteria could be defined in a certification standard.
- iv. Mutually binding commitments to replace virgin plastics by recycled plastics.
- v. Collective commitments to replace conventional flexible packaging – which cannot be recycled with today’s processing technology – with mono-materials (e.g. all-polyethylene) which are fully recyclable, e.g. for sachets (without foreclosing future solutions for innovative materials).
- vi. Uniform industry-wide definitions of claims such as “sustainably sourced”.
- vii. Bans on marketing of sugary snacks to children or bans on animal testing that exceed current regulatory requirements.
- viii. Commitments to lower than legally required CO2 emissions, e.g. among car manufacturers.
- ix. Agreements to impose stricter than legally required integrity standards on supply chain partners (outside EU): e.g. living wages, stricter than legal health & safety / “deforestation-free” standards.
- x. Commitment between competitors not to engage in bribery, anti-competitive practices, etc. in the absence of legislation (outside EU).

### **c. Joint voluntary investments or payments to offset negative environmental or social impact**

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- i. In ZVEI/Arge Bat, the Commission endorsed an industry-financed take-back and recycling scheme for used batteries; the (variable) disposal costs would be an integral part of the price and shown separately on producer and importer invoices.
  - ii. Industry-funding of plastics collection infrastructures – e.g. through voluntary extended producer responsibility schemes – helps respond to the ubiquitous lack of collection systems in many countries (most conspicuously in South and Southeast Asia); this is a waste issue but also a root cause for a chronic shortage of recycled feedstock that is a pre-condition for a circular economy.
  - iii. The “Sea The Future” initiative foresees voluntary industry contributions payable on plastics produced from fossil fuels. The idea is to increase demand for plastic waste to drive collection efforts and the development of recycling technologies competitive against plastic from fossil fuels. The funds raised will be channeled into new recycling technologies, collection infrastructure, and the recovery, where possible, of existing marine and terrestrial pollution.
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- iv. Higher than legally-required emission payments to offset negative climate impact and support industry-wide “carbon-neutral” claims.
- v. Joint business contributions to finance officially recognized and/or third party-certified labor and environmental inspectors (outside the EU), notably where regulations – on, e.g., labor conditions or deforestation – exist but enforcement is ineffective due to lack of government resources.

## Indispensability

**NB. Cooperation between competitors must be necessary to attain sustainability objectives<sup>5</sup>. In many of the above examples, collective action will indeed be indispensable in that sense:**

- i. Whenever only collective demand enables the creation and development of sustainable technologies or infrastructures:**
  1. The basic R&D for chemical recycling has been around for years, but the investment required to refine and mature the technology has kept undertakings from pursuing its development.
  2. Creating effective supply and logistics structures for healthier and more environmentally sustainable foods may not be feasible without joint action and pooled purchasing power.
- ii. Where individual businesses – even with comparatively strong buying power – lack the necessary leverage to induce systemic changes required in supply chains:**
  1. Fishing moratoria are an instructive example as they only work if respected by everybody.
  2. Experience shows that child and slave labour and other human rights violations in the supply chain cannot be eliminated absent industry-wide bans and rigorous, coherent action against non-compliant suppliers in the most disadvantaged jurisdictions with poor law enforcement.
  3. Similarly, many suppliers will not agree to pay living wages as long as there are customers willing to accept exploitative working conditions.
  4. In the face of public and private governance weaknesses, corrupt practices will persist absent a consistent and potentially concerted zero-tolerance approach across industries.
- iii. Where individual companies are ready to consider pioneering new technologies or standards but are deterred by the risk of first-mover disadvantages:**
  1. Compaction is an illustrative example: studies, as well as Unilever’s experience, confirm that consumers don’t switch to smaller packs if conventional packs remain available since they (wrongly) assume to get more value for money.
  2. Similar concerns apply to other initiatives outlined under 2. – from cold-chain warm-up for frozen products to a conversion to plastics packaging that is more easily recyclable: Voluntary standardisation can only attain piecemeal improvements, if at all, while mandatory standards may be indispensable to establish a level-playing field.

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<sup>5</sup> See Condition 3 referred to in footnote 4 above.

3. International and sometimes global collaboration will often be a precondition for change given the risk of supply shifting to countries with lower standards if the stricter ones are only applied on a limited geographic scale.
- iv. **Where only collective voluntary financial efforts of industry peers create the incentives or infrastructures for the most impactful sustainability measures:**
1. In the example of the “Sea the Future” initiative (referred to above), contributions payable on plastics produced from fossil fuels are necessary to increase demand for plastic waste and thus to drive collection efforts and the development of recycling technologies.
  2. When downstream infrastructures – e.g. for collecting and sorting of plastics waste – are insufficient, and where governments lack the means to establish them, collective industry