

Submission to the public consultation on the 9th July 2020 ACM Draft Sustainability Guidelines

Fairtrade Netherlands (in the Netherlands also known as Stichting Max Havelaar) and the Fair Trade Advocacy Office (FTAO) welcome the Netherlands Authority for Consumers and Markets (ACM)'s draft Sustainability Agreements Guidelines. We consider that they can unleash the potential of private sector actors to take their responsibility to meaningfully contribute to the achievement of the policy goals enshrined in the European Green Deal, the Paris Agreement, the United Nations' Sustainable Development Goals (UN SDGs), and the European Convention of Human Rights. We congratulate the ACM for its leading role in bridging the gap between sustainability and the perception of competition law constituting a burden to it.

Fairtrade Netherlands is the owner of the Fairtrade label in the Netherlands. The non-profit foundation is a member of the Fairtrade International association (Fairtrade Labelling Organizations International e.V. also known as Fairtrade International). Its aim is to improve the lives and working conditions of small-holder farmers and workers in poor countries. As such the organisation develops public campaigns to raise awareness about fair trade and lobbies supermarkets and companies for an increase in fair trade products. There are currently 157 companies in the Netherlands that market Fairtrade certified products. <https://www.fairtradenederland.nl/>

The FTAO speaks on behalf of the Fair Trade movement for Fair Trade and Trade Justice with the aim to improve the livelihoods of marginalised producers and workers in the South. The FTAO is a joint initiative of Fairtrade International, the World Fair Trade Organization-Global and the World Fair Trade Organization-Europe. Through these three networks the FTAO represents an estimate of 2.5 million Fair Trade producers and workers from 70 countries, 24 labelling initiatives, over 500 specialised Fair Trade importers, 4,000 World Shops and more than 100,000 volunteers. <https://fairtrade-advocacy.org/>

We thank the ACM for inviting stakeholders to submit comments on the Draft Sustainability Agreements Guidelines published on 9 July 2020. We **warmly welcome the definition of sustainability agreements as proposed in paragraph 6**. In particular, we appreciate the fact that ACM acknowledges the interdependence of different policy objectives included in the notion of

sustainability and its multidimensional nature. As such we fully support the definition used by the ACM encompassing not only environmental agreements but also agreements “*aimed at the identification, prevention, restriction or mitigation of the negative impact of economic activities on people including their working conditions*”.¹

We however regretfully observe that the agreements falling within this broad definition are not equally treated throughout the draft Guidelines. We would like to stress the need for a more comprehensive guidance for companies willing to pursue any of the policy objectives related to sustainable development described in the 2012 United Nations (UN) Resolution 66/288 (including “*the protection of the environment, biodiversity, climate, public health, animal welfare, and fair trade*”). Above and beyond the wealth of examples provided in the draft Guidelines on agreements pursuing environmental objectives, we would therefore welcome additional examples of competition-compliant sustainability agreements pursuing social goals. **Maintaining the broad approach to sustainability described in paragraph 6 throughout the text would offer an urgently needed guidance to private sector actors** willing to achieve social objectives, in particular to contribute to enabling farmers earn a living income, and workers to receive living wages.

We welcome the ACM’s willingness to help companies ensure the reliability of their self-assessment and the ACM’s commitment to not fine companies participating in public agreements which follow the Guidelines in good faith.² This is key to ensure that competition law does not deter companies from implementing genuine sustainability initiatives, as well as to avoid green washing.

Fairtrade Netherlands and the FTAO provide below some more detailed comments on the different sections of the guidelines.

1. Sustainability agreements without restriction of competition

We congratulate the ACM on the approach taken, which provides companies considering sustainability agreements with a relative safe harbour for certain categories of “*allowed sustainability agreements*”. This is an important step in the right direction. We however consider that some of these categories are unnecessarily limited to environmental agreements and/or could benefit from additional guidance:

- The second category³ of “*allowed sustainability agreements*” is currently limited to environmentally-conscious or climate-conscious codes of conduct. Fairtrade Netherlands and the FTAO consider that this category should be broadened to include codes of conduct adopted to achieve other sustainability goals. This could include for example **codes of conduct promoting social and labour standards, and the contribution to the achievement of living incomes/living wages in developing countries**. Such codes of

¹ ACM, Draft Guidelines on sustainability agreement, paragraph 9.

² ACM, Draft Guidelines on sustainability agreement, paragraphs 61 and 62.

³ ACM, Draft Guidelines on sustainability agreement, paragraph 20: “*codes of conduct promoting environmentally-conscious or climate-conscious practices*”.

conduct, subject to the criteria laid down in the Guidelines,⁴ are not anticompetitive and should benefit from the same safe harbour as their environmental counterparts.

- The third category⁵ would benefit from additional certainty to better understand which agreements fall outside the scope of the cartel prohibition. According to the Guidelines, this category of agreements “**may** fall outside of the scope of the cartel prohibition if they do not appreciably affect price and/or product diversity” (emphasis added). We consider that companies would benefit from more certainty if the sentence omitted the word “may”. Furthermore, we would welcome guidance as to what would qualify as an appreciable effect on price or product diversity and a clear confirmation that an increase in the sustainable nature of a product would be viewed as an improvement in product quality by the ACM.
- We view the fifth category of allowed agreements as particularly important, especially with regard to the prevention of child-labour. However, since poverty is considered to be the greatest single force driving children into the workplace⁶, in many cases the most efficient way to contribute to local laws banning child-labour being respected is to ensure that workers are paid a sufficient wage to eliminate the incentive to use children.⁷ We would appreciate guidance on whether and how an agreement between companies agreeing to enable the payment of a decent wage to ensure compliance with local child protection regulations could benefit from this safe harbour. We understand – and fully agree – that companies cannot agree to a coordinated increase of the resale price of their products, but we would like to better understand how the ACM would view a coordination regarding wages paid to the workers aiming to end child-labour.

2. Sustainability agreements with benefits that offset restrictions of competition

We thank the ACM for the extensive guidance provided on the application of the statutory exemption from the cartel prohibition to sustainability agreements, and for going beyond certain standard principles, e.g. the steps taken towards the inclusion of benefits accruing to society as a whole in the assessment of certain agreements.

We present below some more specific comments on key points of the guidelines.

- *Benefits that result from sustainability agreements*

We agree that claimed sustainability benefits must be objective and substantiated in order to avoid green-washing. Fairtrade Netherlands and the FTAO welcome the acknowledgement that

⁴ *i.e.* transparent participation criteria, reasonable and non-discriminatory access, and persistence of other alternative standards. (ACM, Draft Guidelines on sustainability agreement, paragraph 20)

⁵ ACM, Draft Guidelines on sustainability agreement, paragraph 21: “Agreements that are aimed at improving product quality, while, at the same time, certain products or products that are produced in a less sustainable manner are no longer sold”.

⁶ See: https://www.ilo.org/moscow/areas-of-work/child-labour/WCMS_248984/lang--en/index.htm

⁷ With poverty comes child labour as households use every available means to survive. Prospects vary by country, but causal estimates of elasticity are mostly above 0.7.¹³ In other words, a 1 percentage point rise in poverty leads to at least a 0.7 percentage point increase in child labour. See: <https://data.unicef.org/resources/covid-19-and-child-labour-a-time-of-crisis-a-time-to-act/>

improvements of the production process to eliminate the differences between operation costs and social costs are to be viewed as benefits from a competition law standpoint. We especially appreciate the fact that the ACM explicitly mentions the payment of a living wage in such benefits.

To better guide companies, Fairtrade Netherlands and the FTAO invite the ACM to also include studies and recommendations issued by international agencies (UN Agencies in particular) in its list of general sources available to substantiate such benefits.⁸

- *Agreements where no quantification of the benefits is necessary*

We appreciate that the ACM acknowledges that quantification of the pros and cons of an agreement is not always needed and identifies two specific categories of agreements where quantification is not required. We particularly welcome the second category, *i.e.* situations where “*the harm to competition is obviously smaller than the benefit of the agreement*”.⁹

We think however that this category would benefit from some additional guidance.¹⁰ It would be useful for companies to understand what magnitude of price increase would be considered as “limited”.¹¹ Similarly, we consider that the use of words like “obvious” and “enormous” does not provide companies with enough legal certainty.¹²

While example 4¹³ provides some explanation, it also raises questions. First, the fact that it is an environment-related example creates confusion as to the consumers that can be taken into account. For instance, it is not clear whether in this example the consumers that generally sympathise with reducing packaging waste are direct soda consumers or just Dutch consumers as a whole. It would be helpful to know if, by analogy, the fact that Dutch consumers generally sympathise with improving working conditions of farmers is enough to not require a quantification of the costs and benefits of an agreement improving the working conditions of, *e.g.* tomato growers, but resulting in a minor increase in the price of tomatoes. Or to the contrary whether a specific study carried out on Dutch consumers of tomatoes would be needed. Or finally whether such types of agreements would require quantification in any case.

- *A fair share of the benefits for the users*

We appreciate the steps taken by the ACM to widen the concept of “*users of the products*” to include future users; allowing for the inclusion of long-term benefits in the assessment is key for many sustainability initiatives. We also congratulate the ACM for widening the notion of a “*fair share*” to include benefits accruing to society as whole. However, Fairtrade Netherlands and the FTAO consider that the category of agreements benefiting from this deviation from the basic principles is unnecessarily narrow. Indeed, we see no reason to limit this possibility to agreements aiming to “*prevent or limit any obvious **environmental damage***” while helping to “*comply with an*

⁸ ACM, Draft Guidelines on sustainability agreement, paragraph 29.

⁹ ACM, Draft Guidelines on sustainability agreement, paragraph 48.

¹⁰ We also assume that the word “quantitative” in the first sentence should be read as “qualitative”.

¹¹ ACM, Draft Guidelines on sustainability agreement, paragraph 48.

¹² *Ibid.*

¹³ ACM, Draft Guidelines on sustainability agreement, page 15.

international or national standard to prevent **environmental damage** to which the government is bound” (emphasis added).¹⁴ We think that this category should include agreements aiming to prevent or limit any obvious environmental damage **or negative social impact** and helping to comply **with any type of international or national sustainability standards** binding the government.

We understand the need to limit situations where affected users are not fully compensated for the harm suffered as a result of the agreement to situations where the agreement contributes to a policy objective laid down in an international or national standard, *i.e.* a policy objective democratically agreed upon. But this **should allow for consideration of policy objectives going beyond climate change and the environment**, when they have been transposed as national or international binding rules.¹⁵

If all non-environmental sustainability initiatives were to be assessed according to the current draft of the guidelines, *i.e.* via willingness-to-pay studies carried out on the users of the relevant products, we fear that social sustainability goals will remain far away dreams. We are deeply concerned that agreements that can significantly contribute to the achievement of the UN SDGs, the EU’s policy agenda and international standards to which the Dutch government is bound might be impeded by the results of the willingness-to-pay studies carried out on consumers who are “*harmed by the restriction of competition*”, as opposed to all Dutch citizens. If these specific consumers do not attach sufficient value to those quality improvements to offset the potential price increase, agreements which could have significantly contributed to the achievement of sustainable development goals democratically agreed upon by Dutch citizens would never see the light.

- *Quantitative assessment*

We are worried about the exclusive reliance on willingness-to-pay studies to quantify the benefits of non-environmental sustainability agreements. We are concerned that willingness-to-pay studies do not appropriately reflect the value consumers attach to progress towards sustainable development. This concern is well explained in the Greek competition authority’s recent Staff discussion paper on sustainability issues and competition law:¹⁶

“It is however also important to acknowledge the difficulties of a [willingness-to-pay] framework. It has been argued that “[o]ne of the implicit assumptions of revealed preferences theory is that the behaviour of the agent is consistent when exercising her/his choice in the marketplace”, this assumption “been largely questioned by recent work in behavioural economics”, but, also “work noting the ‘conflicting preference maps’ that most of us have, when acting as consumers in the marketplace, and as citizens in the political sphere”. Hence,

¹⁴ ACM, Draft Guidelines on sustainability agreement, paragraph 38.

¹⁵ Many non-environmental sustainability goals are included in binding national or international treaties. At the European level, Article 3(5) of the Treaty on the European Union mandates the Union to promote “*free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child*”. At the International level, Article 23(3) of the United Nations Universal Declaration on Human Rights provides that “*Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection*”.

¹⁶ Hellenic Competition Authority, Staff discussion paper on sustainability issues and competition law, 2020, paragraphs 23 et seq.

“[e]nvironmental economists have long noted the tension between the ‘utilitarian preference based’ approach used by the price-based revealed preferences approach and contingent valuation analyses, which focus on consumer wants as utility maximisers, and the ‘Kantian (principle-based)’ approach on what ‘we ought to do as a society’.”¹⁷

- *Remaining competition on the market*

We thank the ACM for clarifying that market-wide sustainability initiatives would not be viewed as eliminating competition on the market as long as participants continue to compete on key parameters.¹⁸

Fairtrade Netherlands and the FTAO would like to thank again the ACM for the proposed draft Guidelines and for its openness to receive input from stakeholders. We remain at your disposal for further clarification.

Sincerely yours,



Executive Director, Fairtrade Netherlands



Executive Director, Fair Trade Advocacy Office

¹⁷ *Ibid.*, paragraph 25.

¹⁸ ACM, Draft Guidelines on sustainability agreement, paragraph 59.