

FoodDrinkEurope's contribution on "Competition Policy supporting the Green Deal"

I. INTRODUCTION

FoodDrinkEurope very much welcomes the Commission's call for contributions and the possibility to participate in the policy debate around sustainability and competition law.

A. Individual and collective industry contribution to EU and United Nations' sustainability objectives

FoodDrinkEurope represents the European food and drink industry, the largest manufacturing sector in the EU in terms of turnover and employment. FoodDrinkEurope's mission is to facilitate the development of an environment in which all European food and drink companies, whatever their size, can meet the needs of consumers and society, while competing effectively for sustainable growth.

Food and drink count among our society's greatest traditions and pleasures. Today we have access to an impressive variety and quality of food and drinks. Our sector is an indelible part of Europe's social, economic and cultural fabric. But like most industries, our sector's growth comes with challenges.

Businesses have been embracing their responsibility to contribute to the United Nations' Sustainable Development Goals (UN SDGs), to reverse the damaging trends of climate change, water scarcity, growing inequality and other pressing environmental and human rights issues. Food and beverages companies have succeeded in delivering more sustainable sourcing and manufacturing practices and improving the nutritional and environmental footprint of their products. Consumers often reward these efforts and sustainability has proven an effective differentiator and driver of growth as purposeful brands see a surge across categories.

But while more sustainable products may often convey a competitive advantage for businesses together with benefits for society and the environment, more needs to be done. Individual companies can only achieve so much when fostering purpose, sustainability and good corporate citizenship while acting on markets that continue to be driven by price competitiveness. More concretely, where sustainability practices promise to be most impactful, unilateral action risks coming at the price of:

- Off-putting first mover disadvantages, given prohibitive costs of upfront investment such as the high costs associated with initial, small-scale technical solutions, or excessive degrees of commercial risk;
- Insufficient scale of even the largest multinational companies to create demand for supplies of more sustainable ingredients, other input or packaging materials;

- A lack of consumer buy-in if sustainable innovation remains limited to individual offerings¹;
- Sustainability benefits being limited to a single company's products and its customers.

These challenges – and potential market failures - clearly can and should be addressed by better, more targeted and sometimes also more regulation.² But regulation may fail for lack of political compromise or settle on a lowest common denominator. Further, legislation may provide the framework for action but leave the practical consequences to businesses that may struggle to achieve compliance with regulatory requirements unilaterally – take the examples of the implementation of the EU Single-Use-Plastics (SUP) Directive³ or national taxes on virgin plastics in an environment where already today supplies of recycled plastics do not meet demand.

In this and other instances, industry collaboration can play a critical complementary role as the food and drink industry wants to make the strongest possible contribution in realising the ambitions of the European Green Deal⁴, the Farm to Fork (F2F) initiative and other EU sustainability policies. Individual and collective pledges of FoodDrinkEurope's members underline the sector's strong ambition and commitment to move towards more sustainable food systems.⁵ Just like no single country (no matter its size or resources) can tackle climate change alone, and just like governments sign up to treaties and common initiatives, companies need to engage in concerted joint efforts. The importance of partnerships has been recognized by the UN – i.a. in SDG 17 – and by all leading institutions in international development.⁶

B. Scope and ambition of FoodDrinkEurope's response to the Commission's call for contributions

With a view to setting the scene for the examples of industry co-operation put forward under section II. below, we would first like to provide some context and explain scope and ambition of this paper:

¹ Take Unilever's experience in its UK personal care business with a more efficient compression technology for aerosol deodorants which enabled the production of smaller cans with the same amount of product while saving packaging waste. Unilever was first to market and made the science available to everyone to use with the hope that others would follow. However, no one did and since the products on shelf looked smaller, they were perceived by consumers as being of lower value. Sales were poor and the compressed cans were eventually delisted.

² FoodDrinkEurope has called on policy makers to "foster a regulatory and legislative culture that supports innovation and facilitates the transition towards more sustainable food systems", and to ensure that "all actors of the supply chain, in particular the agriculture sector, processors, retailers, public authorities and civil society organisations, contribute to the path towards sustainable food systems." (FoodDrinkEurope, 'The path of the food and drink industry towards Sustainable Food Systems', 2019, available at: https://www.fooddrinkeurope.eu/uploads/publications_documents/FoodDrinkEurope_-_The_path_towards_Sustainable_Food_Systems.pdf.) In respect of the Commission's own 2050 carbon neutrality goals, FoodDrinkEurope has equally called on regulators "to develop clear and ambitious plans to achieve net-zero emissions by 2050 engaging all public and private actors." (FoodDrinkEurope, 'FoodDrinkEurope follow up to the European Commission's proposal for a European climate law', April 2020, available at: https://www.fooddrinkeurope.eu/uploads/publications_documents/FoodDrinkEurope_position_-_proposal_for_an_EU_Climate_Law_.pdf).

³ Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment.

⁴ Communication from the Commission, The European Green Deal, 11 December 2019.

⁵ To name just a few (collective) examples: the "Circular Plastics Alliance", aiming to boost the EU market for recycled plastics (see <https://www.fooddrinkeurope.eu/news/press-release/circular-plastics-alliances-declaration/>); the "EU Pledge" to change the way leading food and drink companies advertise to children (see <https://eu-pledge.eu/our-commitment/>); "Every Crumb Counts", an initiative working towards preventing edible food waste (see <http://everycrumbcounts.eu/>); the 'UK Plastics Pact', aspiring to create a circular economy for plastics (see <http://www.wrap.org.uk/content/the-uk-plastics-pact>); the 'step up to the plate' pledge that commits businesses to halve their food waste outputs by 2030 (see https://www.fooddrinkeurope.eu/uploads/publications_documents/Let%E2%80%99s_step_up_to_the_plate_EU_food_and_drink_industry_priorities_for_the_EU_Institutions.pdf).

⁶ See, for example,

https://sustainabledevelopment.un.org/content/documents/2564Maximising_the_impact_of_partnerships_for_the_SDGs.pdf

1. The possible collaboration areas highlighted in this paper should not be confused or conflated with certain wider food or environmental/social industry policy positions (which FoodDrinkEurope and its members may or may not have defined and articulated).
2. FoodDrinkEurope's response to the Commission's call identifies areas for potential sustainability co-operations where we feel the food and drinks industry currently lacks guidance, legal clarity and comfort. The ambition of this paper is therefore *not* to point at types of collaboration:
 - That are unlikely to fall under Art. 101 (1) of the Treaty on the Functioning of the European Union (TFEU) - such as collective industry commitments that are already in place or fall within the thresholds of the existing Block Exemption Regulations;
 - Where the qualification of sustainability benefits, as e.g. qualitative improvements or innovations, is straightforward even within a narrow interpretation of Art. 101 (3) TFEU.
3. Rather, and as specified in section III. below, the food and drink industry's ask to the Commission is to shed more light on the less familiar spaces where current competition law doctrine may have to be revisited to enable change that is needed from a sustainability perspective, whilst maintaining high levels of competition across markets. We believe that one particular aspect merits to be singled out already at this point: we would find it particularly helpful for our, and certainly also other industries, to understand the Commission's position as to whether and how reductions of negative externalities (or "shadow prices") – that is to say, costs suffered by third parties outside of a transactional context (e.g. society at large) – can offset restrictions of competition.
4. The Commission has requested in its call for contribution examples of collaborations that have failed for fear of non-conformity with competition laws. All companies involved in the preparation of this paper have confirmed that competition compliance concerns have repeatedly been a constraint to exploring more ambitious co-operation opportunities, and sometimes co-operation in the first place. Indeed, cooperation, when pursued, often settles for the 'lowest common denominator' that is perceived as the easiest and most risk-free solution from a competition law perspective. In other cases, companies do not even reach-out to peers to jointly assess cooperation opportunities, as competition law (and to start with information exchange considerations) may be perceived as an obstacle from the outset.
5. Given the relatively short response period, FoodDrinkEurope has not been able to elaborate on all relevant areas or potential projects.⁷ We would welcome the opportunity for further engagement with the Commission on these topics, as it develops its policy and guidance. The fact that our contribution does not cover state aid and merger control or does not focus on abuse of dominance and vertical restrictions is not meant to indicate that we believe them to be less relevant in the effort to reconcile competition policy and sustainability. The focus on horizontal industry collaboration is due to a higher degree of visibility that the contributors from different FoodDrinkEurope's members currently have on areas that might be particularly suitable in this respect.

⁷ For further examples of competitor collaborations in the FMCG industry see Unilever's submission in response to the Commission's consultation on the review of the Guidelines on Horizontal Agreements, available at https://www.unilever.com/Images/unilever_submission_sustainability_competition_law_tcm244-551751_en.pdf.

II. POSSIBLE COLLABORATION AREAS

There are clear legal grounds on which the European Commission and National Competition Authorities (NCAs) could take further action since broader sustainability development objectives are firmly enshrined in the EU Treaties.⁸

In this section, we set out some concrete examples of possible forms of collaboration in areas which are particularly relevant to the food and beverage industry, but certainly also to other industries more generally.

A. Plastic recycling

Today, less than a third of plastic waste in Europe finds its way back into the EU plastic market⁹ and the EU is at risk of failing to meet its plastic-packaging recycling targets for 2025 and 2030.¹⁰ This is due to a number of reasons, notably the lack of effective plastics waste collection, sorting and recycling infrastructures in many countries, persisting challenges to create the right quality output from recycling processes, to meet all application requirements (including food-contact materials), as well as the availability of relatively cheap “virgin plastic” made from fossil fuels. Demand for recycled plastics is stronger than supply.

What is the Green Deal objective?

“Taking further actions to tackle plastic pollution has been identified as a key priority in the EU new Circular Economy Action Plan to help European businesses and consumers to use resources in a more sustainable way. Better design of plastic products, higher plastic waste recycling rates, and more and better quality recyclates will help boosting the market for recycled plastics. It will deliver greater added value for a more competitive, resilient plastics industry. Europe's transition towards a circular economy will also contribute to reaching the SDGs, the global climate commitments and the EU's industrial policy objectives. This strategy will help protect our environment, reduce marine litter, greenhouse gas emissions and our dependence on imported fossil fuels. It will support more sustainable and safer consumption and production patterns for plastics.”¹¹

What are the challenges faced by the food and beverage industry?

Plastic recycling is arguably one of the hardest challenges that the food and beverage industry will face over the next decade.

Several (cross) industry initiatives have been set up to meet and address these challenges. For example, FoodDrinkEurope and many of its individual company and sector members have signed up to the Circular Plastics Alliance initiative¹² which was launched by the Commission in December 2018. The alliance today comprises 245 signatories from the plastics value chain, academia and public authorities working together towards reincorporating 10 million tonnes of recycled plastics into new products by 2025. In addition, many individual companies have been taking unilateral initiatives

⁸ For example, the economic, social and environmental aspects of sustainable development are highlighted in Article 3(3) of the Treaty on European Union. Moreover, Article 11 of the TFEU refers to an effective incorporation of the requirements of environmental protection in policies and measures with the aim to promote sustainable development and Commissioner Vestager explicitly indicated that competition policy should contribute to this incorporation: “*all of Europe's policies – including competition policy – will have their role to play in achieving the aims of the European Green Deal.*”

⁹ European Parliament, 'Plastic waste and recycling in the EU: facts and figures', December 2018, available at: <https://www.europarl.europa.eu/news/en/headlines/society/20181212STO21610/plastic-waste-and-recycling-in-the-eu-facts-and-figures>.

¹⁰ European Court of Auditors (ECA) [report](#), 6 October 2020

¹¹ See https://ec.europa.eu/environment/waste/plastic_waste.htm. The Revised Waste Framework Directive, the Revised Packaging & Packaging Waste Directive, as well as the Single Use Plastics-Directive, have all been adopted as part of the EU Action Plan for a Circular economy, and more specifically the EU Plastics Strategy, and are aimed at contributing to the UN's SDG to ensure sustainable consumption and production patterns.

¹² See https://ec.europa.eu/growth/industry/policy/circular-plastics-alliance_en.

(such as pledges¹³, commitments, but also investments) that aim to increase recycled plastic in their packaging or to advance enhanced recycling technologies (see below). For example, a number of FoodDrinkEurope's members have pledged to reach very high percentages - up to 50%, and in some cases even 100% - of recycled plastic in their packaging over the next few years.

However, the food and beverage industry faces challenges in accessing enough volumes of suitable food-contact plastic at affordable prices to meet these ambitious goals:

- Given the price advantage of virgin resins over recycled resins, for manufacturers the use of recycled plastic involves a significantly higher cost.
- In addition, food and beverage manufacturers face competition from non-food manufacturers in accessing food quality recycled plastic which, due to its higher quality, is a desirable commodity also for many non-food industries. This means higher prices for food contact recycled plastics (which is sold by recyclers to the highest bidder irrespective of the industry). Once used for non-foods applications, food contact plastics cannot be re-used for food purposes when recovered through mechanical recycling.
- In addition, the industry is under strict regulatory obligations to meet plastic recycling targets in the EU Member States. For example, the EU SUP Directive already imposes specific requirements for the beverage industry to collect 90% of its plastic bottles by 2029 and to use 30% recycled plastics in their bottles by 2030. Some EU Member States go further and impose even higher targets of recycled content. These strict requirements are particularly difficult to meet for the food and drink industry given the necessary standards for food contact recycled plastic materials.

How can competitor collaboration address these challenges?

i. Collaboration in mechanical recycling

Against this background, quality waste collection, sorting and recycling infrastructures across Europe are still largely lacking. There is limited ability to separate food contact from non-food contact plastic packaging waste both at the curbside collection stage and at sorting/recycling stage. Sorting to a higher purity means polymers can be re-used multiple times and retain their value in the food manufacturing chain.

To meet the expanding demand, well-designed and harmonised Extended Producer Responsibility (EPR) and collection schemes must be implemented with the help of local and national authorities and legislators. In parallel, a common approach to recyclability and product design must be established.

Whilst initiatives such as Deposit Return Schemes (DRS) and other forms of EPR, for single-use drink bottles and caps can help make a difference in the amount of recycled plastics, these initiatives are either still in early stage in many Member States and/or are at risk of diverging implementation across Member States.

Investments are needed on the part of all stakeholders in the waste collection, sorting and recycling chain to facilitate the achievement of the ambitious goals of the Green Deal and Circular Economy agenda. This is particularly true for Polyethylene terephthalate (PET) recycling. As noted by the [European PET Bottle Platform](#), a voluntary industry initiative concerning PET bottle design, packaging and recycling solutions:

“The challenge for the PET value chain is to support the achievement of present and future plastic packaging recycling targets in the EU Member States whilst taking into account the shift in rPET

¹³ See for example, the voluntary pledges made by a number of stakeholders, including FoodDrinkEurope members, to produce or use more recycled plastics: https://ec.europa.eu/growth/content/european-strategy-plastics-voluntary-pledges_en.

demand from textile to bottle-to-bottle and other packaging applications. This implies maintaining the availability of high quality rPET material that will, in turn, enable the industry to use recycled content in bottles without processing issues, discoloration and other visual defects. Innovation in PET bottle design and performance is essential, nevertheless it is also crucial that the quality of recycled material over time is not allowed to deteriorate through the indiscriminate use of additives, barrier materials, glues, sleeves and other components or materials.”

Examples of areas where competitor collaboration can help achieving higher plastic recycling rates and a truly functioning circular economy

1. Ensuring adequate **design requirements for recyclability** are in place – going beyond the current EU regulatory framework, such as:
 - Pursuing plastics standardisation, including mandatory standards (stricter than the law) to agree on specific rules for flexible and rigid packaging and what to eliminate to improve recyclability (e.g. remove colour from plastic, eliminate problematic materials that can contaminate recycling stream, separate out materials such as black plastics);
 - Facilitating the adoption of new technologies such as digital watermarking and fluorescent markers to sort food contact from non-food contact plastic packaging waste, and;
 - Increasing trust and traceability of the recycled materials by building on schemes such as [EuCertPlast](#) and aiming to establish an EU-wide certification for recycled materials to ensure the optimal uptake of recycled plastics.

*All above mentioned collaborations would require as a minimum some clear guidance and comfort on how the Commission would assess **mandatory** standardisation agreements between competing firms (see also further below under III).*

2. Cooperation aimed at **increasing the volume of food contact recycled plastics available to the food industry** by:

- Improved waste management collection schemes across Member States and allow food and beverage producers to access a fair share of the collected materials;

As some Member States are setting-up or improving waste collection schemes, uniform guidance from the Commission on how to assess the competition law aspects involved in these, would be welcome.

- Organising more efficient access to food contact recycled plastics, facilitating food industry’s access to safe and quality feedstocks where necessary. This could include creating joint demand vis-à-vis recyclers, for example in the form of:
 - common standards for recycled resins and minimum objective and non-discriminatory quality requirements expected from recyclers supplying recycled food-contact plastics;
 - joint offtake agreements for recycled plastics. Initiatives might include: i) developing recycling infrastructure through joint financing, ii) funding third-party recycling facilities with industry commitments to purchase all plastics collected/sorted, and iii) entering into collective offtake agreements

Again, for the above-mentioned collaborations to be realised, clear guidance and comfort on how the Commission would assess mandatory standardisation agreements between competing firms, is needed. In addition, more leeway to procurement alliances/joint offtake agreements than outlined in the existing horizontal guidelines would be required.

ii. Collaboration in enhanced recycling

Enhanced recycling – including chemical recycling – enables to break down plastic materials - even those which are heavily mixed or contaminated - into simpler building blocks and using them to produce new materials of virgin-grade quality (depolymerisation). Enhanced recycling technologies are crucial to creating a circular economy. They complement existing mechanical polymer recycling processes. For instance, they have the potential to upcycle lower grade PET that cannot currently be recycled via mechanical recycling and is instead downcycled, incinerated or sent to landfill and to provide a route to create food contact recycled PE/PP. It is therefore a highly effective complement to existing mechanical recycling that can help increase total recyclable plastic materials and significantly increase the supply of recycled materials, using hard-to-recycle plastic waste as feedstock. It can also help accelerate the transition to a circular economy for plastic packaging by dramatically reducing the reliance on virgin oil-based material.

However, these technologies are still far from having an effective market penetration due to a lack of scaled demand, making the case for collaboration particularly compelling.

Enhanced recycling is the most advanced method of recycling mixed, degraded or contaminated polypropylene (PP) and polyethylene (PE) streams – that together make up some 60 % of consumer plastics packaging – into high-value end applications. Under current European regulations, it is the only technically viable option today for large-scale conversion of flexible plastic packaging and other mixed, degraded or contaminated PE/PP streams into pure PP or PE suitable for use in new food-grade plastic. Enhanced recycling could support full circularity through virtually unlimited recycling loops without quality deterioration.

Recycling experts agree that available post-consumer recycled (PCR) plastic waste should be funnelled into mechanical recycling where technically feasible and economically viable due to the relatively higher energy demand (and therefore climate impact) (and higher costs) of enhanced recycling vs mechanical recycling. Nevertheless, the scope of application for enhanced recycling remains vast and potentially game-changing for industry efforts to meet plastics-related targets given the numerous advantages mentioned above, and in particular the ability to use hard-to-recycle waste as feedstock, which would otherwise be diverted to landfill or incineration.

Despite its potential benefits, enhanced recycling is still a relatively novel technology, having not yet been adopted by industry at scale. To date, there are few (waste management) companies dealing with enhanced recycling technologies, and those that do tend to focus on the production of fuel, rather than re-production of plastic. The landscape is made up of many small technology providers who are developing the technical approaches, and the large-scale resin producers who are monitoring its evolution, or actively engaging to develop first commercial material solutions. Some potential customers have been shying away from sourcing enhanced recycled plastics due to concerns around quality, safety standards and price, whilst others are making first small-scale commercial launches as a stimulus for the industry developments.

At the same time, industry-wide demand promises to be massive if enhanced recycling technology can be brought to maturity and prices to levels that make it a viable alternative to virgin plastics.

There is growing consensus amongst recycling experts that the current weaknesses of enhanced recycling are, in addition to an appropriate EU regulatory framework, largely due to a lack of combined scale which would drive the necessary evolution of the technology to enable mass application. Recyclers have been hesitant to create large scale capabilities and build appropriate waste processing plants, fearing sunk investments and uncertainties around demand stability.

Examples of areas where competitor collaboration can help enhanced recycling technologies achieve sufficient scale to significantly increase the supply of recycled plastic materials

1. Joint offtake commitments for substantial volumes and significant time periods, e.g. within the framework of purchasing alliances amongst customers, many of them likely from the food and beverages industry. This promises to be the most effective remedy. If sufficient demand can be brought together, recyclers, public authorities and investors may agree to build enhanced recycling facilities that are currently missing.
2. In order for joint sourcing to be viable for supply and demand side, buyers may have to agree on harmonised specifications of the types of plastics they require.

Joint purchasing, potentially on a significant combined scale, might be the only means to bring an enhanced recycling technology to scale. Industry co-operation may however only be needed for a transitory period, i.e. until maturity and market penetration – i.e. higher quality and lower prices – have been achieved.

Similar joint industry initiatives as outlined above for mechanical or enhanced recycling are also conceivable to drive industry attempts at developing fully **biodegradable/compostable packaging** as another potentially more sustainable alternative to virgin materials. Obstacles to unilateral action are, once more, the necessity of heavy upfront investments in new technology and equipment, the need for the establishment of in-market end-of-life collection, bespoke segregation and processing which does not exist today, and a likely reluctance of third party suppliers to refuse to switch to such new materials, processes and machinery unless a critical mass of competitors also sign up to using this type of packaging.

For the above mentioned collaborations to be able to succeed, clear guidance and comfort on how the Commission would assess mandatory standardisation agreements between competing firms and more leeway to procurement alliances/joint offtake agreements than outlined in the existing horizontal guidelines would be required.

B. Fostering biodiversity through complementary foods and more sustainable agricultural practices

According to the WHO, biodiversity loss “*is happening at unprecedented rates. There is increasing recognition that this is a fundamental risk to the healthy and stable ecosystems that sustain all aspects of our societies*”.¹⁴ Peer co-operation to drive cultivation, production and consumption of complementary foods can provide a powerful remedy against this challenge. To illustrate the problem: It is estimated that 90% of the world's calorie intake comes from just 30 species of crops. Beyond that, of the more than 30,000 edible plants in existence worldwide, we cultivate just 150.¹⁵

What is the Green Deal objective?

The European Commission has adopted the new EU Biodiversity Strategy for 2030 and an associated Action Plan - a comprehensive, ambitious, long-term plan for protecting nature and reversing the degradation of ecosystems.¹⁶ It aims to put Europe's biodiversity on a path to recovery by 2030 with benefits for people, the climate and the planet. It is also the proposal for the EU contribution to the upcoming international negotiations on the global post-2020 biodiversity framework.

¹⁴ Dr Maria Neira, Director, Public Health, Environmental & Social Determinants of Health CBD speaking at the Convention on Biological Diversity, WHO (2015).

¹⁵ See facts available at: <https://www.food4ever.org/>.

¹⁶ Source: Communication from the Commission, EU Biodiversity Strategy for 2020, 20 May 2020

In the post-COVID context, the Biodiversity Strategy aims to build our societies' resilience to future threats such as climate change impacts, forest fires, food insecurity or disease outbreaks, including by protecting wildlife and fighting illegal wildlife trade.

A core part of the European Green Deal, the Biodiversity Strategy will also support a green recovery following the pandemic.

How can competitor collaboration address these challenges?

Companies that collaborate by (1) jointly sourcing complementary foods and/or (2) committing to bringing them to market (independently) can increase their cultivation, production and consumption, thus contributing to more biodiversity and a more nutritionally diverse portfolio of foods and drinks for European consumers. In many instances, collective action will be necessary to *initiate* the cultivation of complementary foods in the first place, given their quasi non-existence on European consumer's menus due to a lack of sufficient demand.

More specifically, industry co-operation can:

- Complement and/or replace intensive production practices that lead to land degradation and intensive use of artificial fertilisers which in turn leads to higher levels of pollution and the disruption of natural ecosystems.¹⁷
- Reduce reliance on a handful of species and varieties of crops and animals, thus exposure to food crisis in the face of climate change, population increase, depletion of natural resources and spread of diseases.¹⁸
- Incentivise farmers to intercrop or rotate crops, in order to achieve more stable income, improve the overall quality of their land and the consistency of harvests¹⁹, often contributing to climate change adaption especially in the most vulnerable geographies.

Introducing complementary crops/foods independently has proven difficult for business absent enormous individual scale since even large multinationals often lack the necessary scale that is required to:

- Create volumes that instil confidence in farmers that (1) the diversification of their output, away from a commodity crop, will not pose a risk to their income, (2) they do not depend on a single customer and (3) the risk of losing harvests in the event individual customers cease sourcing from them;
- Bear significant investment into the construction of (1) new technical and agricultural capacities on the ground and/or (2) local processing facilities that are contingent on sufficient scale;
- Establish the necessary logistics infrastructure and more broadly supply chain for distinct foods;

¹⁷ John Barwise, 'Biodiversity loss and the threat to food production', July 2019, available at: <https://app.croneri.co.uk/feature-articles/biodiversity-loss-and-threat-food-production#WKID-201907161224210335-05406328>.

¹⁸ Bioversity International, 'Mainstreaming agrobiodiversity in sustainable food systems: Scientific foundations for an agrobiodiversity index', 2017, available at: <https://cgspace.cgiar.org/handle/10568/89049>.

¹⁹ Take the example of the Belize 'milpa' system which demonstrates how hosting an assortment of crops within the same field, each of which provides nutrients that another requires, can ensure that the soil never fully depletes and therefore no loss in productivity: Drexler, K. A. 'Government extension, agroecology, and sustainable food systems in Belize milpa farming communities: A socio-ecological systems approach. *Journal of Agriculture, Food Systems, and Community Development*, March 2020, available at: <https://doi.org/10.5304/jafscd.2020.093.001>.

The Food and Agriculture Organization of the United Nations (FAO) has emphasised that joint sourcing of complementary foods is essential to create significant demand²⁰ as *"food system changes must involve the efforts and interactions of diverse yet interdependent stakeholders. Partnership between them is vital"*.²¹

From a consumer perspective, scaling-up demand through joint action is indispensable:

- To generate critical mass to render complementary food products affordable for a group of consumers as broad as possible, reducing the risk of product launches remaining pricy and niche, only reaching consumers with the highest spending power and health awareness; and
- To ensure that as many people as possible get access to a diversification of their diets through complementary foods, it is desirable to include them as a key ingredient in as many formulations as possible.

Collaboration between competitors can come in different shapes and sizes. Developing an effective supply chain likely requires agreements as to the geography where complementary foods are to be sourced since the combined volume effects would otherwise not materialise. Procurement alliances with clear offtake commitments vis-à-vis farmers/suppliers promise to be more effective than looser kinds of co-operation, giving supply chain partners concrete combined demand volumes they can count on. Bundling demand effectively may require businesses to agree on specifications for crop varieties.

At the same time, complementary foods can and probably should be processed independently, giving competing food companies a means to differentiate their products from each other as much as possible. Collaboration may then come into play again further downstream, notably in the form of joint initiatives to overcome behavioural biases that strengthen initial consumer reluctance to switch to new ingredients and drive consumer acceptance of complementary foods sustainably.

As is true for other types of sustainability collaborations, once an effective supply chain has been established, (peer) collaboration may not be required anymore and can be replaced by entirely individual action where appropriate. To foster healthy nutrition and biodiversity it may even be desirable to terminate joint initiatives once complementary foods have been successfully introduced, helping to avoid the fate of many of today's food staples that have become ubiquitous and effectively impediments to diversity given economies of scale.

It would be valuable to understand how the Commission would apply Art. 101 TFEU

- *To joint offtake agreements for complementary foods, especially if they bundle a large share of demand, come with agreements on where the products are sourced and on the basis of which specifications;*
- *To agreements between competing companies to introduce these products into the market at (a defined minimum) scale, potentially with commitments in terms of marketing investment.*

C. Collective adherence to foreign laws, international standards and policies protecting the environment and human rights

FoodDrinkEurope's members source raw materials from all over the world, including from developing and emerging markets, and among other things, consider ways to: (i) eliminating wide-scale deforestation which can result from the use of certain agricultural commodities (e.g. cocoa, palm oil, soya, vanilla) by ensuring more sustainable farming and sourcing of these products; (ii) ensuring fair purchasing practices; and (iii) respect human rights across the supply chain. However, no individual

²⁰ FAO, 'The State of the World's Biodiversity for Food and Agriculture', FAO Commission on Genetic Resources for Food and Agriculture Assessments. Rome, available at: <http://www.fao.org/3/CA3129EN/CA3129EN.pdf>.

²¹ FAO, 'Sustainable Food Systems: Concept and Framework', available at: <http://www.fao.org/3/ca2079en/CA2079EN.pdf>.

manufacturer has the necessary scale to address endemic business and human rights issues across the supply chain. These aims are also reflected in Commission's Green Deal, which includes amongst its objectives 'to promote imported products and value chains that do not involve deforestation and forest degradation'.

European Commissioner for Justice, Didier Reynders, announced on April 29, 2020 that he will next year introduce legislation on mandatory sustainable due diligence for companies as part of the Commission's 2021 work plan and the European Green Deal.

The legislation, which the Commission will frame as part of its Green New Deal and its plans to achieve carbon neutrality, is set to identify, prevent, mitigate and account for human rights abuses and environmental damage linked to corporate operations, subsidiaries or value chains." In addition, on October 26, 2020 the European Commission launched a public consultation on sustainable corporate governance,²² soliciting responses from stakeholders on a possible EU sustainable corporate governance initiative with the aim of ensuring "that environmental and social interests are embedded in business strategies".

In addition to these regulatory initiatives, collective adherence, not just to local laws, but also to international good practice, is critical to achieving the aims of protecting the environment and human rights. The only way we can eradicate damaging practices (both to the environment and to lives of farmers, their families and workers) is to ensure consistency and robust enforcement of these standards by *all* actors in the supply chain.

To achieve this, we urgently need further guidance from the Commission and NCAs clarifying their stance in relation to collective action to avoid sourcing from businesses who do not adhere to the desired standards, especially in the context of international environmental and human rights requirements. Agreements not to purchase certain products which are produced in a manner that is damaging to the environment or human rights, or which are otherwise not sustainable can be an important tool to promote more sustainable supply chains with a meaningful impact. For example:

- Deforestation poses a serious threat to ecosystems, yet a hypothetical agreement between competitors to refuse to buy from companies engaging in such practices could likely be construed as a collective boycott under European competition law and past decisional practice.²³ For example, the Indonesian Government has sought to use competition law as a tool to force a number of major palm oil companies to abandon a landmark "zero deforestation" pact alleging it may constitute an anticompetitive cartel.²⁴ Such precedents, including also EU case law on anticompetitive boycott, have negative implications for future progress on these objectives as industry-wide action is deterred due to perceived competition law risk.
- Likewise, it is currently unclear how the Commission would view agreements between competitors to refuse to source from manufacturers or suppliers who do not pay a basic 'living wages' or who refuse to implement systems to prevent and address child labour.
- Another example, which requires further guidance to avoid fear of breaching competition laws, relates to guaranteeing 'responsible recruitment'. Local 'agents' in developing countries sometimes charge local farmers and fishermen significant fees to get to work (which must be paid off first and therefore contribute to keeping local families in poverty). An industry

²² Consultation Document Proposal for an Initiative on Sustainable Corporate Governance, available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation>.

²³ See also statements from the Indonesian government about forcing palm oil companies in the country to abandon their landmark "zero deforestation" pact over cartel allegations. <https://www.straitstimes.com/world/jakarta-wants-oil-majors-to-ditch-zero-deforestation-pact>

²⁴ See e.g. <https://www.straitstimes.com/world/jakarta-wants-oil-majors-to-ditch-zero-deforestation-pact>

collaboration to only work with responsible local recruitment agencies could help improve local communities and break their reliance on unscrupulous actors.

This is an area where international coherence and cross-agency alignment, combined with further guidance on the application of competition law to these scenarios, is key to enable our industry to achieve the outcomes that we – and our consumers – strongly aspire to.

D. Need for clarity and certainty that detailed information exchange may be permissible when required to achieve industry-wide sustainability objectives

Many companies already effectively share certain important information with peers in order to improve the environmental performance of products and production processes. For example, certain production information is shared in the context of developing industry-wide standards in relation to recycling and packaging design. Moreover, we acknowledge that *some* collaboration is possible within the existing enforcement practice and guidance regarding information exchange (e.g. by aggregating or anonymising certain information or implementing information barriers).

However, there remains widespread uncertainty in relation to various important categories of sustainability-related information, which might be deemed to be competitively sensitive under the Commission's (and NCAs') existing approach to enforcement. Companies naturally take a cautious approach in this area. This is particularly true in Europe, where the bar for unlawful information exchange is low.

To ensure the greatest chance of success, access to the same data sources and up-to-date information for all industry participants is key. A clarification by the Commission that certain types of data exchanges – even in granular and non-anonymous form – would not infringe EU competition law would be valuable and materially enhance the industry's ability to drive rapid and effective change. For example:

- Pipeline projects or innovations that could produce potentially significant improvements to sustainability outcomes are inherently forward-looking and related to company strategy. At present, such early stage projects are not explored on an industry-wide basis (pooling the greatest minds and resources) as companies are, understandably, extremely cautious about sharing information which may be deemed to 'reduce strategic uncertainty'. However in the absence of collaboration, many of these early stage projects fail to even reach their initial development stage as a single company may lack the resource, technical expertise and know-how to come up with a successful solution to a novel, complex problem alone. This has a serious chilling effect on sustainability innovation across our industry.²⁵ Indeed, the Green Deal recognises that the EU industry needs "climate and resource frontrunners" to develop the first commercial applications of breakthrough technologies in key industrial sectors by 2030. These frontrunners do not exist in a single company alone. The industry would therefore benefit from guidance on whether the sharing of such information, i.e. where it *does* relate to forward-looking plans and innovations, but does not include sensitive information relating to e.g. pricing or individual customers, would be permissible to achieve successful sustainability outcomes.
- A company commissions a third party to produce detailed report analysing the costs/benefits of different types of sustainable packaging alternatives. The information is granular and provides detailed information on the environmental impact (e.g. likely reduction in emissions) as well as the likely costs associated with switching to each alternative. Such information, which relates to an aspect of the company's cost base, could be considered to be competitively sensitive under

²⁵ Market research conducted by the Fairtrade Foundation highlights that competitors are extremely reluctant to even attend meetings where such topics may be discussed for fear of breaching competition law. Fairtrade Foundation, [Competition Law and Sustainability: A study of industry attitudes towards multi-stakeholder collaboration in the UK grocery sector](#), January 2019.

the existing horizontal guidelines and past enforcement practice. Yet sharing this information with peers to reach an aligned view on the most environmentally friendly alternative would produce substantial benefits to the environment (whereas such benefits would be far more limited if the information was held by a single player) and indeed smaller companies may be deterred from commissioning such studies at all if they cannot share the costs with peers).

- Joint tracking of certain sustainability topics like e.g. “responsible recruitment”, deforestation etc. to sanction/exclude non-compliant suppliers of certain agricultural commodities, as well as carrying out joint anti-bribery and human rights due diligence / audits of suppliers. In these scenarios, aggregated and anonymised data sets are not sufficient to achieve the desired collective outcomes (i.e. ensuring no purchasing at all from any non-compliant supplier).

We would welcome more detailed guidance and examples clarifying scenarios where detailed information exchange and/or exchanges of information on sustainability or human rights-related strategies would be permissible, if necessary, to achieve industry-wide sustainability objectives.

III. FURTHER GUIDANCE AND CLARIFICATION

FoodDrinkEurope considers that it would be particularly valuable

- To receive from the Commission written guidance that addresses substantive competition law issues specific to sustainability collaborations (see below), ideally defining safe harbours and offering assurances similar to those provided by the Netherlands Authority for Consumers and Markets (ACM) in that it would not intend to pursue fines in bona fide cases where business have sought to follow the guidance and/or had consulted early on with the Commission;
- If the Commission would indeed, as indicated in previous statements by Commissioner Margrethe Vestager²⁶ and Director General Guersent²⁷, practice an “open door” policy with the opportunity to consult with the Commission on specific proposals – ideally already at an early stage in order for companies to understand which joint initiatives merit further exploration and which don’t;
- If the Commission would make use of guidance letters, as provided for in regulation 1/2003, to give companies a higher level of legal comfort than in an entirely informal consultation.

More specifically, we would particularly welcome the Commission’s guidance in relation to the following questions:

1. How does the Commission assess mandatory standardisation agreements between competing firms if such binding commitments promise to be more effective to achieve sustainability objectives than voluntary standardisation agreements (for example, by ensuring the necessary scale required for systemic change to effectively take place and overcome the first mover disadvantages mentioned above), and provided mandatory standards would be under fair, reasonable and non-discriminatory (FRAND) terms?
2. Would the Commission be ready to grant more leeway to procurement alliances / joint offtake agreements than outlined in the existing horizontal guidelines if the competing companies strive to establish a supply chain for more (environmentally) sustainable products?
3. In which circumstances and within which limits would short to mid-term cost increases, even if they likely lead to appreciable price increases downstream, be acceptable if they are required to achieve penetration of more environmentally sustainable technologies, with the perspective

²⁶ See at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/keeping-eu-competitive-green-and-digital-world_en.

²⁷ See at: <https://www.lexology.com/library/detail.aspx?g=e163dce4-db30-4ffa-bd92-175d4154cbd1>.

of significant mid to long-term cost reductions (and reduction in negative externalities, see under 5.)?

4. Under which conditions can companies agree to exclude – abstractly defined groups of – suppliers that do not comply with human rights, (other) labour law or environmental standards to the extent that these standards (a) have been legally defined or (b) in the absence of local legal standards, agreed upon by the companies?
5. How does the Commission consider reductions of negative externalities – also known as “true costs” or “shadow prices” – within the benefits analysis of Art. 101 (3) TFEU, taking into account notably that such effects (a) may not (only) benefit the individual consumers of the relevant products but also other members of society, (b) materialize not immediately or not (only) in the EU/the consumer’s immediate geography?
6. Would sustainability benefits in the form of negative externalities have to be quantified and if yes, what would be the relevant substantive criteria?
7. How would the Commission view “altruistic collaborations”, i.e. where a company would make intellectual property or other technological advances available free of charge or for a below-market price to competitors under the condition that they commit to adopt the novel technology in order for its sustainability benefits not to be limited to a single company?
8. Would sharing of information that relates to forward-looking plans and innovations (and does not include sensitive information relating to e.g. pricing or individual customers) be permissible if it is necessary to achieve successful sustainability outcomes?
9. What is the Commission’s view on competitors sharing information with peers to reach e.g. an aligned view on the most environmentally friendly alternative that would produce substantial benefits to the environment, knowing that this would be considered to be competitively sensitive under the existing horizontal guidelines and past enforcement practice?
10. What is if aggregated and anonymised data sets are not sufficient to achieve the desired collective outcomes, how much details and up-to-date numbers are competitors allowed to share?
11. What approach would the Commission take to different categories of sustainability initiatives (e.g. environmental/ climate change initiatives vs. other sustainability goals such as fair living wages and human rights) and would the Commission anticipate that specific criteria would have to be met respectively?;
12. How would the Commission assess sustainability agreements affecting - and benefiting - non-European supply chains, e.g. aiming to tackle deforestation or achieve living wages for farmers?
13. In which circumstances would the Commission assume that sustainability collaborations pursue legitimate public policy objectives in the sense of the case law of the European courts in e.g. *Meca-Medina*, *Wouters* or *Albany*?
14. In which instances, other than outright price-fixing behaviour, certain aspects of cooperation may be at higher risk of being regarded as ‘greenwashing’? For example, what about competitors agreeing on supply/output limitations, or coordinated phasing-out of products or technology in the context of sustainability projects?
15. From an antitrust perspective, pursuing sustainability objectives may raise both horizontal and vertical issues. In its recent Inception Impact Assessment in respect of the revision of the VBER, the Commission points out that the European Green Deal may impact the assessment of vertical agreements. We would like to ask the Commission to clarify this point further. Vertical restraints might come into play in the context of the so-called first mover disadvantage. As pointed out above, sustainability projects very often require heavy investments by the companies. The

legitimate investor's interest is to know how to recoup the investment. Companies could be incentivized to invest more in sustainability projects if EU competition law was applied in a way as to allow overcome the problem of the first mover disadvantage. In the context of vertical restraints, a more lenient approach towards RPM by acknowledging "sustainability efficiencies" might be one of the potential solutions to this.

Several NCAs have recently published draft guidelines or working papers that outline their positions on how sustainability co-operations should be evaluated within Art. 101 TFEU and the equivalent national provisions, and there is probably more to come. To ensure coherence and legal certainty within all member states, FoodDrinkEurope would find a coordinated approach across the EU highly desirable. The Commission's leadership is therefore needed to avoid inconsistent enforcement practice and conflicting policy messaging which alone would have a chilling effect on collective action.

As the world's most influential antitrust enforcer, the Commission's leading role extends beyond Europe. Setting the tone in the global policy debate is pivotal in order to encourage also other agencies to be part of the solution and not the problem when it comes to climate change and other imminent sustainability challenges. Clear guidance from the European Commission will strengthen agencies' stance notably in developing and emerging economies when confronting politicized requests to intervene against legitimate sustainability initiatives – a vital concern especially in the agricultural supply chain as examples from Brazil (soy) and Indonesia (palm oil) demonstrate.²⁸

FoodDrinkEurope and its members would welcome the opportunity to engage further with the Commission as it develops its guidance and practice in this important area. We are happily available to discuss the examples and questions put forward in this contribution.

²⁸ In 2016, the Indonesian competition authority KPPU threatened to fine palm-oil traders who had decided not to buy palm oil from farmers that engaged in illegal deforestation, giving in to political pressure after initially endorsing the initiative (see at <https://www.straitstimes.com/world/jakarta-wants-oil-majors-to-ditch-zero-deforestation-pact>). In Brazil, the competition authority has been urged to investigate a soy-bean moratorium barring grain traders from buying oilseed from deforested areas in the Amazon (see at <https://www.reuters.com/article/us-brazil-soybeans-environment/europe-says-brazils-move-to-end-soy-moratorium-threatens-5-billion-market-idUSKBN1XZ1CV>).