

ENVIRONMENTAL SUSTAINABILITY AND THE COMPETITION AND CONSUMER LAW REGIMES.

CMA CALL FOR INPUTS.

Response from Unilever UK Limited (1 November 2021)

Unilever welcomes this request and opportunity to put its views before CMA for consideration. Unilever has long recognised that the only viable business model is one in which all our stakeholders' benefit – and where the planet and society thrive. Hence, locally and globally we have been vocal in our support for business and government action which have sustainability at their heart. Achieving the Net Zero and sustainability goals will be pivotal for the global economy and for business, creating market opportunities and new jobs. All Unilever targets are detailed in the following publicly available document: <https://www.unilever.com/planet-and-society/>

The increased urgency to act and deliver results has required Unilever to reassess its stance on cooperation with peers and competitors. While in the past it was an easier option to avoid any interaction so as to remove all Competition Law risks, this is no longer a viable option. Unilever believes that sustainability co-operations can be done successfully without breaching Competition Law, however this would be easier if authorities acknowledge the need for such co-operations and provide practical guidance on what is acceptable cooperation.

Below are responses to those questions where Unilever UK Limited has examples to share and requests to make. We are happy to provide further clarification if required. We have included links to submissions and articles that have been made in other jurisdictions where these give more details and context for Unilever UK Limited's stance.

Competition law enforcement

(a) Are you aware of examples where the CA98 regime has constrained or frustrated actual or potential agreements or initiatives that could support the UK's Net Zero and sustainability goals? Please explain the issue faced and any solutions identified.

In Unilever globally and locally in UK, we have and will continue to pursue sustainability goals and projects independently as this enables us to differentiate our products and win competitive advantages.

However, there are limits to what Unilever can achieve alone. Whether this is because:

- (a) the cost of the project is too large;
- (b) the risk of an isolated first mover not being able to recover the additional costs;
- (c) demand Unilever can provide to suppliers is not sufficient to incentivise them to engage and invest; or
- (d) shopper and consumer change can only be achieved if all players in a market drive it jointly.

Joint initiatives of industry peers can fill the gaps that unilateral actions and regulation cannot fill.

Unilever is committed to fully comply with competition laws and, like many large companies, has a robust competition law compliance programme. This has the positive result of helping the business identify what agreements and conducts they can or cannot engage in.

However, the way some competition law rules have been interpreted results in inhibiting the business from exploring sustainability cooperation. A concrete example is (for fear of competition law non-compliance) unilateral efforts to bring compressed deodorants to market in the UK that failed. Unilever developed technology independently that allowed it to store the same amount of deodorant in a smaller aerosol bottle – which saved on packaging and transport emissions. Unilever developed and brought the project to market at a time when sustainability cooperation projects were less prevalent, and the business viewed the risk of authorities suspecting cooperation for collusion was too great. The product was launched and the technology made freely available to all as Unilever knew that consumer perceptions and habits would not be changed by only one player in the market. Unfortunately Unilever’s lead was not followed and the technology has been halted for now.¹ We believe that if the business had cooperated with its peers and competitors prior to launch the project may have succeeded and the sustainability benefits achieved.²

Unilever is focusing on reducing business fear of falling foul of Competition Law as this often resulted in cooperation being avoided. Unilever is not the only ones to notice this fear.³ This type of CFI gives Unilever a voice to show how the CMA can assist business to no longer fear cooperation but to engage with peers and competitors in a legally compliant way.

(b) Are there changes to the CA98 regime that would help to achieve the UK’s Net Zero and sustainability goals? If so, what changes should be made to the regime, and what would they achieve?

To assist these Net Zero and sustainability goals, environmental and social considerations need to be integrated into Chapter I analysis in a way that environmental and social benefits other than price reductions or product functionality improvements can be conceptually embedded in exemptions. For Example the CA98 regime could

- 1) expressly recognize environmental and social benefits as worthy in their own right. This approach can indeed be easily integrated in section 9(1)(a) that looks at whether agreements contribute to “improving the production or distribution of goods or to promoting technical or economic progress”. Qualifying emission reductions as production-

¹ see FoodDrinkEurope, Competition Policy supporting the Green Deal, 20 November 2020, p. 2, fn. 1, www.fooddrinkeurope.eu/publication/green-deal-and-competition-policy.

² See the following to illustrate the environmental benefit that could have been achieved if this project had been successful [Unilever share emissions-saving deos tech with competitors | News | Unilever global company website](#)

³ As highlighted in the World Economic Forum’s feature “How rivals can work together to stop plastic waste” (https://www.weforum.org/agenda/2021/05/how-rivals-can-work-together-to-stop-plastic-waste/?utm_campaign=WEF2021&utm_content=171167607&utm_medium=social&utm_source=linkedin&hss_chan%20nel=lcp-2196): “As antitrust fines can be high, and most executives are not always fluent in the language of antitrust regulation, this level of collaboration is often avoided.”

improving and biodiversity protection or humane working conditions as contributions to economic progress needs no stretching of the letter of the law. Similarly, as many sustainability benefits materialise in the long term, the time horizon for the assessment under section 9 could be adapted. Social benefits shouldn't be treated differently from environmental benefits.

- 2) Consumer getting a fair share of the benefits Article 101(3) requires that restrictive agreements allow “consumers a fair share of the resulting benefit.” Unilever believes this should not be read as the users receiving “full compensation” for any restrictive effects following from sustainability co-operations. Rather, the reduction of negative externalities also - and in particular - of non-users should be factored in. I.e. the reduction of waste, emissions etc benefit all rather than just the purchaser of a product which has been made more environmentally friendly.⁴

(c) To the extent not already covered by your responses to the previous questions, are you aware of examples of potential environmental sustainability initiatives which, in your view, would benefit from further CMA guidance or direct engagement with the CMA on the possible application of CA98? If so, please explain what further guidance would be necessary and why.

There are essentially three categories of industry collaboration initiatives that should be addressed as they are most likely to make the most significant contributions Net Zero and sustainability targets, and for which CMA guidance should be provided:

- 1) Mandatory standards: if all stakeholders come together and agree on a mandatory standard, industry self-regulation could realise significant change. E.g. Commitments to phase out non-sustainable products, e.g. non-recyclable polymers in packaging; Agreements on practices more sustainable than required by law e.g. design requirements to improve recyclability, Commitments to adhere to poorly enforced laws outside UK e.g. on human rights or competition laws, Agreement to apply standard sustainability requirements to suppliers.
- 2) Joint off take, joint investment and joint buying, notably in areas where supply volumes for sustainable input products are currently insufficient (e.g. PCR-recycled plastics). Joint action can drive and deliver transformative advances.
- 3) Collective impact balancing. It is unlikely that all negative environmental impact of industry will be removed in the foreseeable future. Responsible companies can seek to balance their footprint and where this is done in collaboration the impact will increase exponentially e.g. joint reforestation, joint collection /sorting/recycling packaging, etc.

The above are examples where competitor and market collaboration can drive change and realise sustainability targets. However, this will be infinitely harder where businesses and their legal advisors are cautious and act from a fear that authorities will assume the worst of collaborations. Comprehensive guidance on activities that are deemed not to breach Competition Law and are in fact encouraged would go a long way to changing overly cautious behaviour. It should be acknowledged that competitor agreements’ restrictive effects may be outweighed by

⁴ Herewith a link to a recent Concurrences article from Unilever competition counsel Dirk Middelschulte elaborates in more detail on the “fair share” criteria in sustainability co-operation cases: [+03.Concurrences 4-2020 On-Topic Sustainability-Middelschulte.pdf](#)

sustainability benefits, to be looked at in their totality, possibly in the long term and beyond the relevant product and geographic market, including beyond borders.

(d) While the CMA is concerned primarily with public enforcement, we would also welcome any comments you may have in relation to private enforcement in this sphere. For instance, if you have suggested changes in response to previous questions, what impact, if any, do you think this could have on private actions?

No comment

Merger control regime

No comment on this section as Unilever does not have any meaningful examples to share.

Consumer protection law

(a) Does the current consumer protection law framework constrain or frustrate initiatives that might support the UK's Net Zero and sustainability goals?

Consumer protection legislation has legitimate aims at their heart but the practical impact of some suggests that more thought and guidance would be productive. For example the current [Price Marking Order \(2004\)](#) which is designed to allow consumer to compare price per unit, requires larger stores and online to declare price of products per 1L/1kg (or 100ml/100g) with only limited exceptions.

This means that concentrated products end up looking much more expensive than dilute, despite offering more applications. This creates significant frustration in the homecare divisions of the Unilever business where costly projects have been undertaken to make our products more concentrated (as this saves packaging and logistics). e.g.:

- more washes from the same size bottle if a detergent dose per wash is 15ml vs 35ml;
- concentrated eco-refill cartridge for spray bottles resulting in spray bottles being re-used.

However, compliance with the law shows these concentrates as costing more per ml than unconcentrated product or new spray bottles. An example taken recently from Tesco.com. The following 2 products all retail at £1.50- £2. But the value on the shelf edge label is portrayed very differently:

Cif Kitchen spray retails at £2.

Cif Ecorefill retails at £1.50 (makes 750ml which is the same as the above).

But the cost / litre of the first is £2.86 and £21.43 of the second. Both represent the same cleaning quantity for the consumer and the second represent more value to the consumer but the Price Marking Order suggest the opposite which is misleading for consumers and does not reflect new innovations that benefit the environment and consumers. Legislation needs to encourage rather than dissuade such advances.

There is need for more measures such as declaration per dose and/or referral to sustainability benefits.

(b) What changes to business-to-business protections are required, to address the current issues of supply chain transparency?

No comment

(c) What other opportunities are there to develop the consumer protection law framework to help to achieve the UK's Net Zero and sustainability goals?

Assessing the practical effect of laws to take into account sustainability advances that have been made is vital. Size is no longer a fair comparator and technological advances need to be encouraged rather than dissuaded. Unilever holds sustainability at the heart of its business plan but it still is in the business of selling products. What message and/or incentive exists if more sustainable products are effectively penalised by legislation that put in place before Net Zero was a must reach target.

(d) To what extent should the consumer protection law framework be prescriptive, for example, by mandating provision of particular forms of information, or by prohibiting particular types of conduct, in order to help to achieve the UK's Net Zero and sustainability goals?

Again, the practical effect will need to be considered carefully and assessed as it is unlikely that there can be a one size fits all framework. Unilever would not want to be obliged to follow a prescriptive framework that due to practical, unforeseen effect actually disincentivises advancement.

(e) How far should the consumer protection law framework go to address: (i) the planned obsolescence of products; and/or (ii) commercial practices which promote over-consumption?

No comment.