



# COMPETITION LAW AND SUSTAINABILITY

**A STUDY OF INDUSTRY ATTITUDES TOWARDS  
MULTI-STAKEHOLDER COLLABORATION IN THE  
UK GROCERY SECTOR**







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# BACKGROUND TO THIS RESEARCH

Since 2014, the Fairtrade Foundation has been working to encourage a more favourable regulatory environment for business sustainability initiatives in the grocery sector. As part of our work in this area, we spoke to industry experts about some of the barriers preventing market actors from achieving progress on key sustainability issues, such as climate change, modern slavery and low incomes. Anecdotally, we understood that competition law was preventing businesses from working together on sustainability initiatives. We therefore partnered with businesses, legal experts and charities to build the evidence base on this subject, with a view to prompting the UK competition watchdog, the Competition and Markets Authority (CMA), to consider its own role in addressing the sustainability of UK food supply.

In November 2017, we published a report that outlined the potential consumer benefits that could be gained from collaboration between businesses for sustainability purposes. The study considered a pre-competitive hypothetical collaborative sustainability initiative in the British retail market for fresh pineapples, and made the case that this initiative had a 'reasonable case' for competition law compliance.<sup>1</sup>

Having outlined the potential consumer benefits that could be gained from multi-stakeholder collaboration for sustainability purposes, we consulted with key stakeholders on what the next phase of our research should be. Following a series of cross-industry roundtables, which included representatives of the CMA and central government, we understood that more evidence was needed on the attitudes of market actors towards competition law's interaction with sustainability responses. We have launched this study in direct response to that consultation.

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# ACKNOWLEDGEMENTS

This report was written by Sophie Long with support from David Taylor and Tim Aldred. Fairtrade would like to thank all interview participants for giving up their time to take part in this research project. The conversations we had with the brands, retailers and industry experts were extremely insightful. We hope the outputs of these interviews will contribute to greater sustainability achievements in both the British and global grocery sector and an improved regulatory environment with regard to the achievement of sustainable supply chains.

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<sup>1</sup> [https://www.fairtrade.org.uk/~/\\_media/FairtradeUK/What%20is%20Fairtrade/Documents/Fairtrade%20and%20sustainability/FTF%20Sustainability%20Collaborations%20Report%20FINAL.pdf](https://www.fairtrade.org.uk/~/_media/FairtradeUK/What%20is%20Fairtrade/Documents/Fairtrade%20and%20sustainability/FTF%20Sustainability%20Collaborations%20Report%20FINAL.pdf)

# EXECUTIVE SUMMARY

This report builds on existing research to explore two themes: i) the necessity of cross-industry collaboration to achieve key sustainability goals and ii) what barriers exist that prevent business collaboration for sustainability purposes? Through a series of interviews with businesses, retailers and industry experts, we have identified that a significant number of market actors in the grocery sector believe that multi-stakeholder collaboration is necessary to achieve key benefits for producers and consumers. We have also collated evidence that validates the theory that a fear of an unfavourable ruling under competition law is a deterrent to a significant number of retailers from collaborating on sustainability issues, particularly on issues of low incomes and wages in the supply chain.

This research was undertaken in the context of a multitude of sustainability risks to modern grocery supply chains. From the prevalence of poverty within supply chains to human rights abuses, we know that bold change is needed in the sector. Our research was particularly concerned with industry-led progress to raising wages and incomes throughout the supply chain. This is because anecdotally we understood this to be the issue where businesses often feel most constrained by competition law, due to the link between wages/incomes and farm-gate prices. We also chose to focus on this subject because we know the gap between what producers earn and what constitutes a living wage remains stark and the problem of producer poverty is becoming increasingly urgent. At the Fairtrade Foundation, we fully believe that all workers and farmers should be paid enough to have a decent standard of living, and we want to ensure that nothing constrains businesses from achieving this. We remain fully committed to helping the UK achieve the United Nations Sustainable Development Goals. However, we fear that without more progress on the issues of low wages, price and incomes, it will be impossible to meet the target of 'end[ing] poverty in all its forms everywhere' by 2030.<sup>2</sup>

The issues are complex and our research suggests that no single actor can solve them alone. Drawing on external literature and interviews with representatives of key market players, our findings suggest that businesses must be able to work together to address low incomes in the supply chain. All interviewees told us that collaboration is necessary to ensure businesses commit to higher incomes/wages. Drawing on existing literature

and the responses of interviewees, it seems that a major reason market actors will not act unilaterally on sustainability issues is due to a fear of competitive disadvantage that could result from an increase to their cost base. While it is true that certain ethically-branded companies have made unilateral steps towards paying a living wage in their supply chains, the mass-market brands without the same ethical unique selling points are unlikely to move first. Given their market share, it is these larger players that need to take action to achieve the systemic change needed. We conclude that a significant number of retailers will need to work together to collectively take action on the issues of low prices, incomes and wages across all grocery supply chains.

Prior to undertaking this research, many leading market actors have already identified the critical need for action in many agricultural supply chains, as well as the need for collective action. This is particularly true in the banana and cocoa sectors, where market players have begun to work together in multiple collaborative forums to tackle sustainability issues. While great progress has been made in some areas, there has been notably less progress on the issues of low wages and incomes.

Our research therefore also wanted to explore what was constraining collaborative market action on sustainability issues. The key finding from this part of our interviews is the near-unanimous message that competition law is a barrier to tackling low farm-gate prices. While our findings do not indicate any regulatory barriers to collaborative discussions between businesses on issues such as child labour, deforestation and low productivity, they do indicate a severe constraint on the issues of low incomes and wages. This is because competition law restricts any collaboration between competitors in relation to prices within a value chain (unless it can be justified essentially on the grounds of consumer benefit). Due to the close relationship between incomes and farm-gate prices, discussions on low farm-gate prices and wages are a highly sensitive issue that leads businesses to often preclude any discussion on the subject whatsoever.

According to our interviewees, the constraints of competition law are real and severe in this area. Our interviewees described situations whereby they have felt obliged to cite strict disclaimers at the beginning of meetings that forbid any

<sup>2</sup> <https://sustainabledevelopment.un.org/?menu=1300>



reference to prices in the supply chain. Some also described situations where other market actors have refused to attend meetings citing competition law risks. Overall, it was felt that there is very limited space to discuss even pre-competitive efforts to address low farm-gate prices. Our findings point to fears of competition law having a ‘chilling effect’ on all collaborative sustainability initiatives aimed at increasing incomes for farmers and workers.

It is imperative that the regulatory environment encourages retailers and supply chain businesses to tackle low prices and incomes. Interviewees made a strong call for clearer guidance on current rules, and a more supportive policy environment, to help unblock the barriers to progress currently experienced. Competition law is rightly designed to protect consumers from price-fixing and other practices that can harm consumers. However, unless farmers and workers receive higher incomes and wages, the medium to long-term supply of commodities such as cocoa and bananas will be put at risk by loss of labour supply and the worsening impacts of climate change. These impacts will ultimately harm UK consumers, raising retail prices and even potentially compromising the nation’s food supply chains. Earlier Fairtrade research suggests that there is likely to be direct, long-term consumer benefit from multi-stakeholder collaboration for sustainability purposes, for example, by reducing the risks of a collapse of production due to extreme weather.<sup>3</sup>

The UK government played a leading role in the creation of the UN Sustainable Development Goals.<sup>4</sup> We are now asking the government to lead the way to reform the regulatory landscape to enable businesses to make further progress to achieving those goals. Only through an alignment of government and industry, will we be able to truly make our supply chains sustainable.

Based on the findings of this research, and other research conducted in this area, we recommend the following:

## RECOMMENDATIONS

- The UK government should consider the long-term environmental and social sustainability of supply chains alongside short-term consumer interest when reviewing how well markets are functioning.
- The UK government should update its Strategic Steer to the Competition and Markets Authority in that it should work to facilitate markets that are sustainable in the long-term.
- The CMA should issue clearer communications to companies and retailers on how businesses can collaborate for sustainability purposes in order to address low farm-gate prices in a manner that would be consistent with competition law. Specifically, this means providing guidance or policies that would clarify the application of the prohibition and the exemption criteria under Chapter 1 of the Competition Act 1998 and Article 101 of the Treaty on Functioning of the European Union.
- We continue to ask that the CMA regularly report on how its assessment of competition law is affecting progress towards the Sustainable Development Goals and UN Guiding Principles on Human Rights.



<sup>3</sup> [https://www.fairtrade.org.uk/~/\\_media/FairtradeUK/What%20is%20Fairtrade/Documents/Fairtrade%20and%20sustainability/FTF%20Sustainability%20Collaborations%20Report%20FINAL.pdf](https://www.fairtrade.org.uk/~/_media/FairtradeUK/What%20is%20Fairtrade/Documents/Fairtrade%20and%20sustainability/FTF%20Sustainability%20Collaborations%20Report%20FINAL.pdf)

<sup>4</sup> <https://sustainabledevelopment.un.org/sdg1>



# INTRODUCTION

This report explores how competition law affects business collaboration for sustainability purposes. Through a series of interviews with brands, retailers and industry experts, the Fairtrade Foundation has identified specific obstacles that businesses believe they face in relation to competition and antitrust law. Building on the findings of our 2017 report, which demonstrated how business collaboration for sustainability purposes can deliver important consumer benefits, this report demonstrates why collaboration is necessary to deliver those benefits.



Our interviewees, predominantly brands, retailers and experts from the cocoa and banana sectors, unanimously agreed that there is a critical need for action to reduce the overly risk-averse application of competition law, real or perceived. Our experts noted that while competition law does not generally create favourable conditions for multi-stakeholder collaboration, this problem becomes particularly acute over issues such as price and paying living wages throughout the supply chain. This is particularly significant, as farm-gate prices and living wages are critical parts of building a sustainable and ethical food supply chain.

Fair prices and living incomes and wages are central to achieve this, which will require alignment between all supply chain actors on a common approach, as global supply chains are complex. Our interviewees expressed that competition law does not allow for any discussions on this urgent issue in collaborative forums, and so believed it very difficult to explore even pre-competitive initiatives to help increase the income of farmers and workers due to concerns that they will breach competition law.

The complex and structural issues facing all commodity markets cannot be solved by one actor alone and require greater collaboration amongst key stakeholders if low incomes are to be addressed. All of our interviewees told us that collaboration across industry is necessary to ensure businesses commit to paying and influencing higher prices to producers; they confirmed that first mover disadvantage is a real issue.

# METHODOLOGY

This research consists of two approaches i) desk research to scope out the sustainability challenges facing key grocery supply chains and the existing landscape of multi-stakeholder collaboration and ii) a series of semi-structured interviews with industry experts to understand how competition law interacts with their sustainability efforts.



For the desk research, an internal researcher used materials publicly available online, as well as consulting with experts on sustainability within the Fairtrade system, to map out existing case studies of how competition law has already impacted on business sustainability efforts. From this research, we identified the cocoa supply chain as a particular area of focus for our research. This was due to the sophisticated debate about low incomes in the cocoa sector. We then contacted cocoa and other commodity experts within and outside of Fairtrade along with the British Retail Consortium to gain advice on appropriate interviewees to contact for the research. These were carefully considered and appetite to be involved in this project was strong.

For the interviews with industry stakeholders, prepared interview questions/scripts were used which we designed with competition law input from legal counsel.

For the purposes of this report and to acknowledge that many of the interviewees represent global supply chains, we will be referring to 'competition law' or 'antitrust law' as covering the applicable competition law, which could be UK/EU or US competition/antitrust law.



# CROSS-CUTTING SUSTAINABILITY ISSUES IN GLOBAL AGRICULTURAL SUPPLY CHAINS

From chocolate to tea, farmers and workers in some of the world's poorest countries provide £34 billion<sup>5</sup> worth of groceries that stock Britain's shelves. Today, those farmers and workers are facing a number of sustainability challenges that threaten the medium to long-term supply of commodities. The impact of a failure to address these challenges on the UK consumer could be severe.



## 1. LOW INCOMES AND EXTREME POVERTY WITHIN SUPPLY CHAINS

**10.7 percent<sup>6</sup> of the world's population still live in extreme poverty according to the World Bank.** One major reason for this is the gap between average incomes in the agricultural sector and living incomes in virtually all countries where extreme poverty is prevalent. With the agricultural sector remaining a major employer in many emerging economies, this gap between average and living incomes is a major contributor to the prevalence of extreme poverty today. For example, the current income of the average cocoa farmer in Côte d'Ivoire is \$0.78 per day.<sup>7</sup> This is below the extreme poverty line, calculated at \$1.90 per day<sup>8</sup> and even further below the living income benchmark of \$2.51 per day.<sup>9</sup> Despite efforts by governments to control this issue (i.e. through a national minimum wage), attempts have so far fallen short. For example, in Malawi the current minimum wage is set at \$1.54<sup>10</sup> per day.<sup>11</sup> This is nowhere near sufficient, as the living wage benchmark is \$3.40<sup>12</sup> per day.

The issue of poverty in the agricultural sector is inextricably linked to the amount that producers are paid for their produce. Typically, price has been a major problem in the banana industry, where farmers continue to be squeezed at the end of the chain, only receiving about 1-3 percent of the total value in their incomes.<sup>13</sup> This has created a situation whereby the price of bananas is still below the cost of production.

**LOW AND DOWNWARD PRESSURE ON PRICES WILL ALWAYS UNDERMINE THE ABILITY OF WORKERS TO EARN A LIVING WAGE.**

*Alistair Smith, Banana Link<sup>14</sup>*

Alistair Smith from Banana Link, a lead coordinator of the Distribution of Value working group of the World Banana Forum, told us that pricing at all stages of the supply chain is a common issue raised at World Banana Forum meetings, but that antitrust and competition law restricts them from discussing pricing solutions for sustainability purposes.

<sup>5</sup> Based on average imports over last 3 years, data taken from Eurostat COMEXT database <http://epp.eurostat.ec.europa.eu/newxtweb/setupdimselection.do>

<sup>6</sup> <http://datatopics.worldbank.org/sdcatlas/SDG-01-no-poverty.html>

<sup>7</sup> [https://www.fairtrade.net/fileadmin/user\\_upload/content/2009/resources/2018-04\\_Report\\_Fairtrade\\_Cocoa\\_Farmer\\_Income.pdf](https://www.fairtrade.net/fileadmin/user_upload/content/2009/resources/2018-04_Report_Fairtrade_Cocoa_Farmer_Income.pdf) (page 26)

<sup>8</sup> <http://www.worldbank.org/en/topic/poverty/brief/global-poverty-line-faq>

<sup>9</sup> [https://www.fairtrade.net/fileadmin/user\\_upload/content/2009/resources/2018-04\\_Report\\_Fairtrade\\_Cocoa\\_Farmer\\_Income.pdf](https://www.fairtrade.net/fileadmin/user_upload/content/2009/resources/2018-04_Report_Fairtrade_Cocoa_Farmer_Income.pdf) (page 29)

<sup>10</sup> MWK 962

<sup>11</sup> <https://wageindicator.org/main/salary/minimum-wage/malawi>

<sup>12</sup> MWK 3051

<sup>13</sup> [https://www.fairtrade.net/index.php?id=single-view&tx\\_ttnews%5Btt\\_news%5D=594&cHash=8ee50cbbf338d58b43ccf75718a1f90c&utm\\_medium=email&utm\\_campaign=Weekly%20Fairtrade%20International%20News&utm\\_content=Weekly%20Fairtrade%20International%20News+CID\\_ee39e83ec52a20a94cb0206ef322f5b1&utm\\_source=&utm\\_term=A%20fairer%20share%20strengthening%20workers%20voices%20through%20Fairtrade%20the%20labour%20movement%20and%20socially%20engaged%20companies](https://www.fairtrade.net/index.php?id=single-view&tx_ttnews%5Btt_news%5D=594&cHash=8ee50cbbf338d58b43ccf75718a1f90c&utm_medium=email&utm_campaign=Weekly%20Fairtrade%20International%20News&utm_content=Weekly%20Fairtrade%20International%20News+CID_ee39e83ec52a20a94cb0206ef322f5b1&utm_source=&utm_term=A%20fairer%20share%20strengthening%20workers%20voices%20through%20Fairtrade%20the%20labour%20movement%20and%20socially%20engaged%20companies)

<sup>14</sup> <http://www.bananalink.org.uk/growing-commitment-change-industry-banana-trade-news-bulletin-april-2018>



## 2. PRICE VOLATILITY AT THE FARM-GATE LEVEL

It is not just the fact that prices are low, but also that they are volatile, which impacts on sustainability. Price volatility is particularly significant in cocoa, banana, cotton and tea sectors. Prices have been known to fluctuate dramatically, usually depending on global crop yields. With many smallholder producers having little visibility over the global market for cocoa, it often leaves producers with very little information to plan for their incomes.

An example of this volatility occurred in April 2017, when the price of cocoa crashed for the first time in several years. The price for a tonne of cocoa decreased from above US\$3,000 to below US\$1,900 in a matter of months,<sup>15</sup> shocking the sector. The market volatility means farmers may receive wildly fluctuating prices for their product, making it impossible for them to plan ahead and reducing confidence to make investment into their production practices. After the price crash, farmer incomes decreased by 30 percent, according to the International Cocoa Organisation.<sup>16</sup>

**WE AFFIRM THAT THE COCOA SECTOR WILL NOT BE SUSTAINABLE IF FARMERS ARE NOT ABLE TO EARN A LIVING INCOME.**

*Berlin Declaration of the Fourth World Cocoa Conference<sup>17</sup>*

## 3. THREATS TO AGRICULTURAL LABOUR SUPPLY

Another key challenge for many agricultural supply chains is to ensure a reliable supply of talented, young workers. Tough physical conditions, combined with volatile and low incomes, make farming a particularly tough livelihood. The challenging conditions on many farms in developing country supply chains risk driving young people out of the sector towards service-sector jobs, primarily in cities. For example, a 2014 study by the Institute for Development Studies exploring attitudes of young people in Africa, Asia and Latin America towards farming, found that many view farming as an undesirable occupation due to perceived low social status and unstable low incomes.<sup>18</sup>

As a result, there is a risk that many countries will struggle to retain young workers in the farming sector as workers move to cities in pursuit of more stable jobs with higher wages. Many developed economies already struggle to attract domestic labour into the agricultural sector, with many farms relying on immigrant labour to fill a lack of domestic labour supply.

<sup>15</sup> [http://www.cocoabarometer.org/Cocoa\\_Barometer/Download\\_files/2018%20Cocoa%20Barometer%20180420.pdf](http://www.cocoabarometer.org/Cocoa_Barometer/Download_files/2018%20Cocoa%20Barometer%20180420.pdf) (page 3)

<sup>16</sup> <https://www.reuters.com/article/us-cocoa-sustainability-wcc/cocoa-industry-pledges-co-ordinated-action-on-poverty-deforestation-idUSKBN1HW2GG>

<sup>17</sup> <https://www.icco.org/about-us/icco-news/387-berlin-declaration-of-the-fourth-world-cocoa-conference.html>

<sup>18</sup> <http://www.fao.org/3/a-i6583e.pdf>

<sup>19</sup> DEFRA statistics

<sup>20</sup> <https://www.gov.uk/government/publications/food-statistics-pocketbook-2017/food-statistics-in-your-pocket-2017-global-and-uk-supply>

<sup>21</sup> <https://www.foodsecurity.ac.uk/.../extreme-weather-resilience-global-food-system.pdf>

<sup>22</sup> <http://www.fao.org/3/a-bt150e.pdf>

<sup>23</sup> <https://www.confectionerynews.com/Article/2018/06/08/Barry-Callebaut-to-build-sustainable-cocoa-farming-model-in-Ghana>

## 4. THREATS TO CLIMATE CHANGE RESILIENCE

Given that the UK imports over half of its food,<sup>19</sup> it is particularly vulnerable to climate disruption in food-exporting nations.<sup>20</sup> The government's own Climate Change Risk Assessment notes that climate change will affect agricultural productivity in regions that are important for food producing nations. While the Assessment states that more research is needed in this area, there is enough evidence to show that increasing the resilience of crop production to climate shocks will be key to ensuring a sustainable supply of food to the UK.

Recent experience shows us the importance of preparing for more frequent climate shocks in the future. In 2017, unseasonable weather in Spain all but wiped out certain crops, such as lettuce and courgettes. This led to empty shelves in supermarkets and higher prices for consumers, as supermarkets turned to more expensive exports from countries like the US. Based on most estimates, it is likely that more extreme future weather conditions could mean such food shortages become more common across the globe, including in the UK.<sup>21</sup>

At the time of writing, there are already a range of tools at the disposal of farmers to make their crops more resilient to the changing effects of the world's climate (such as differing seed varieties, intercropping, mulching and use of botanical pesticides<sup>22</sup>) and more tools will continue to be developed with technological innovation. It is critical that food producers make investment in their agricultural practices and adopt these climate-resilient and sustainable agricultural practices. However, we contend that unless farmers are paid a fair price for their crop, they will not be able to make these vital investments.



*Christiaan Prins, Head of External Affairs at Barry Callebaut, told Confectionery News*

**WHEN WE TALK ABOUT DEFORESTATION... WE ALSO NEED TO TALK ABOUT HOW TO INCREASE COCOA FARMERS' INCOME... WE KNOW LOW INCOME HAS A DIRECT IMPACT ON COCOA FARMERS BECAUSE IT MAKES THEM LOOK FOR NEW LANDS [FOR COCOA]**



# WHY DO RETAILERS AND TRADERS NEED TO ACT?

Modern agricultural supply chains face a variety of sustainability risks. The key question is what action is required and by whom? There is a range of players that need to come together to tackle these challenges, including policymakers and regulators, civil society and market actors. In this chapter we focus primarily on what role market actors, particularly major retailers and traders, can play, and why their role is so important.

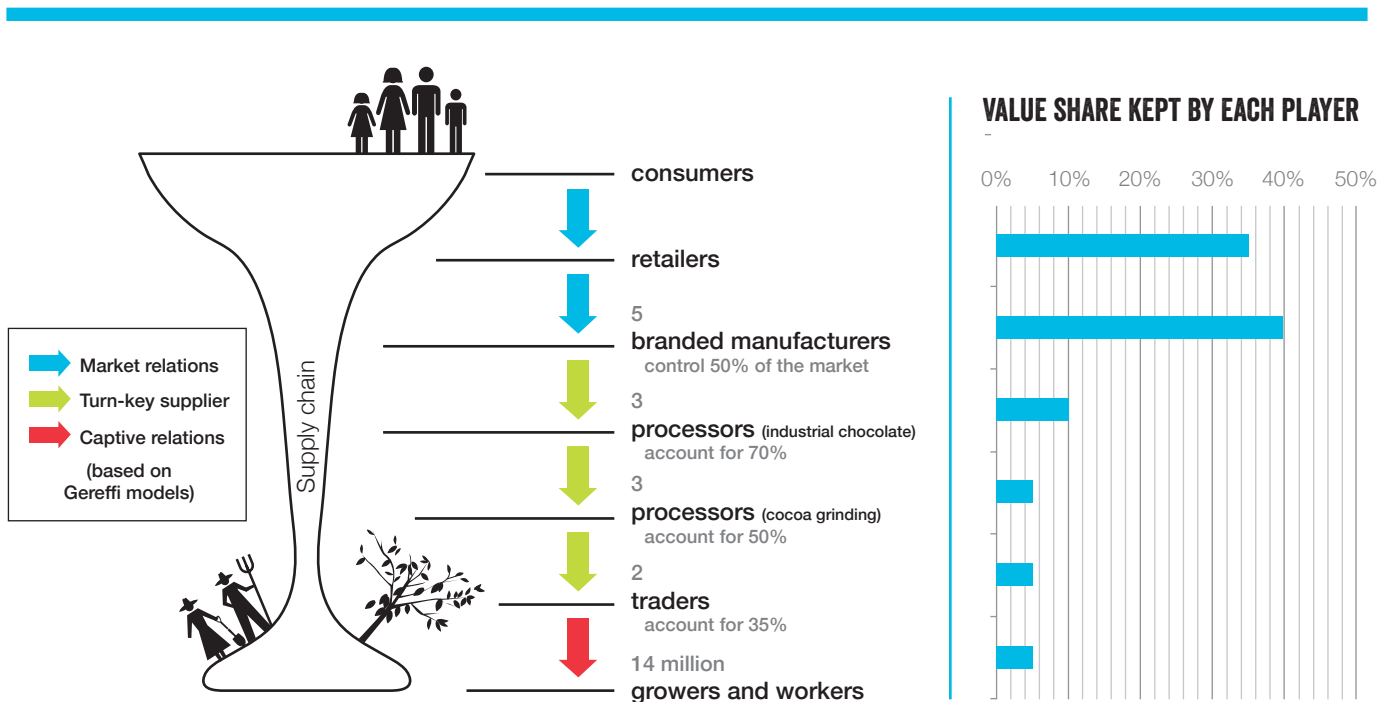
Put simply, retailers and traders need to act because they hold most of the power to deliver meaningful change – or not to do so. Most grocery supply chains are characterised by an asymmetric power structure. On the one hand, retailers and traders hold a high degree of buying power and visibility over the market for agricultural goods. On the other, a large number of producers in developing countries continue to operate in a smallholder context, with little to no power in their negotiations with buyers. Modern retailers are

highly sophisticated businesses that can find suppliers more easily than suppliers can find customers.

The dynamic is described in depth<sup>24</sup> in research by the Fair Trade Advocacy Office. Some of the underlying factors within the power asymmetry include vertical integration of many retailers with the creation of ‘own brand’ products, and the consolidation of major traders and retailers into a small number of large corporations. This asymmetry, in turn, leads to sustained downward pressure on farm-gate prices, as well as creating pressure to use a range of unfair trading practices. The buying power of retailers and traders puts farmers under a great deal of pressure to sell at low prices. This power imbalance can be exacerbated by a lack of pricing data, which affects the ability of producers to plan and demand a fairer price for what they grow.

Below is a visual example<sup>25</sup> of how this power dynamic manifests itself in the cocoa supply chain, where the concentration of power is distributed among just a few traders, manufacturers and retailers who dominate the market.<sup>26</sup> This power allows for huge influence over how prices are set, and favours low prices for consumers.

Buyer power of this kind increases the chances of sustainability issues occurring. Oxfam has recently argued that this buying power puts farmers under great pressure to farm in unsustainable ways, such as using child labour or the overuse of pesticides and fertilisers.<sup>27</sup>



Source: Fair Trade Advocacy Office

<sup>24</sup> ‘Who’s got the power?’, Fair Trade Advocacy Office  
<sup>25</sup> [http://www.fairtrade-advocacy.org/images/Whos\\_got\\_the\\_power-abstract.pdf](http://www.fairtrade-advocacy.org/images/Whos_got_the_power-abstract.pdf)  
<sup>26</sup> The global cocoa market is dominated by three traders: Barry Callebaut, Cargill and Olam who make up approximately 60% of the world’s cocoa processing, according to the Financial Times  
<sup>27</sup> <https://policy-practice.oxfam.org.uk/publications/ripe-for-change-ending-human-suffering-in-supermarket-supply-chains-620418#comment-3954011877>

**IN SOME COUNTRIES, 90 PERCENT OF PROFITS ALONG THE [BANANA] SUPPLY CHAIN ARE IN THE HANDS OF RETAILERS.**

Interview with Alistair Smith, Banana Link



# WHY DO RETAILERS AND BRANDS NEED TO ACT IN A COLLABORATIVE WAY?

In the previous chapter, we described the challenges facing the UK's supply of key grocery products. We have also made the case for why retailers and traders play a vital part in addressing these challenges. Why do retailers and brands not take sufficient unilateral action on the issues of low farm-gate prices and depressed wages? Unilateral action certainly seems possible considered that recent research<sup>28</sup> from Oxfam also suggests consumer prices would typically only require an increase of 1-3 percent to achieve living incomes and wages across a range of commodities.

While unilateral action on farm-gate prices is indeed possible, it is important to understand the very high competitiveness

and low margins of the groceries retail sector. A marginal increase in consumer prices could have a significant impact on a retailer's ability to compete.

For example, the problem of 'first mover disadvantage' is recognised by the Netherlands competition authority, who describe how a 'coordination problem may arise if a sustainable product brings with it higher production costs, and as a result thereof, higher prices. Undertakings would be confronted with a 'first mover disadvantage' if too many customers wished to switch to non-sustainable products'.<sup>29</sup>

The results from our interviews show that first mover disadvantage is very real in the minds of market actors in the UK grocery sector. All 18 interviewees believed that first mover disadvantage was an obstacle to successful unilateral initiatives on pricing. Retailers and brands interviewed all cited the fierce competition between retailers for market share, and the perceived need by retailers to cut their costs to retain their position in the market. This competition means brands and retailers may be reluctant to pay higher prices and to make courageous sustainability commitments, even where they see a compelling sustainability case.

Below, we have outlined some of our interview responses on first mover disadvantage.<sup>30</sup>

▶ **Sophi Tranchell, CEO of Divine Chocolate** said, 'Most people in the cocoa industry, recognise that we need collaboration to achieve meaningful progress on key sustainability goals. There has been tremendous effort by many players to work together to achieve the sort of progress we need such as the International Cocoa Initiative and World Cocoa Foundation. However, the lack of clarity around competition law continues to prevent any meaningful progress on the issue of low farm-gate prices, which is a major issue in our sector and beyond. This really restricts further progress being made on other issues such as living incomes and wages'.

▶ **Rick Scobey, President of the World Cocoa Foundation**, said that several small bean-to-bar companies are willing to pay higher farm-gate prices because they are able to charge a higher sales price for their premium product in their niche market, but that larger market actors would find it difficult to pay farm-gate prices above prevailing global market prices in view of consumer market constraints.

▶ **Arjen Boekhold, Chain Director at Tony's Chocolonely**, told us that many major chocolate retailers and brands seem interested in their progressive pricing (Tony's Chocolonely pay an additional premium<sup>31</sup>). However, it appears that these major players do not feel they can take risks with their pricing, likely because they are both restricted by their competitors' pricing and are accountable to risk averse shareholders.

▶ **A senior sustainability manager at a major UK-based retailer** said that 'the worrying thing about price is that it is not in anyone's interest to lobby for relaxing the law because they are competitors. This means it is impossible to address problems without businesses working together.' 'No one wants to go first', the interviewee said. The interviewee also said that it is hard for retailers to pay higher prices due to how competitive pricing is in the retail sector. This means, in order to deal with low farm-gate prices, supermarkets would have to collaborate, but finding a solution compliant with competition law would be difficult.

▶ **A global chocolate company** said that collaboration is necessary, but coordinated action would be more effective. 'The key element for me is coordinated action. We need to sit round the table and align on what the biggest battles are and align strategically on what needs to happen on a bigger level and then individually each of us can take a piece of the puzzle each'.

▶ **A major UK-based retailer** said there is definitely a need to work collaboratively. Especially where companies source from the same farms and supply chains. 'From raw materials, to ethical sourcing, to packaging, retailers are under increasing pressure from officially recognised bodies to work collaboratively'.

▶ **Mars** spoke to *Confectionery News* about their sustainability plans and their commitments: 'It is hard to get stuff done on your own. We are great believers in this idea of un-common collaboration, building partnerships up and down our value chains but also with our competitors, pre-competitive action.'<sup>32</sup>

<sup>28</sup> <https://policy-practice.oxfam.org.uk/publications/ripe-for-change-ending-human-suffering-in-supermarket-supply-chains-620418#comment-3954011877>

<sup>29</sup> Autoriteit Consument & Markt 'Vision Document: Competition & Sustainability' (2014)

<sup>30</sup> Quotes have been anonymised where requested

<sup>31</sup> <https://tonyschocolonely.com/us/en/our-story/tonys-impact>

<sup>32</sup> <https://www.confectionerynews.com/Article/2018/06/06/Why-Mars-thinks-the-commodities-era-is-over>

# WHAT PROGRESS HAS ALREADY BEEN MADE?

Despite the worries of first mover disadvantage, the picture is not universally bleak! Our interviews also indicate that multi-stakeholder collaboration between market actors is a preferred means to achieve progress on key sustainability issues. Many businesses already engage with the multitude of collaborative forums that have been established in recent years to enable collaboration on some of the issues cited in this report. At the time of writing, some of the major collaborative forums in products where Fairtrade has a particular interest include: Cocoa Action, Tea 2030, Cotton 2040, Malawi 2020 and the World Banana Forum.

These voluntary forums have made great strides in bringing an unprecedented diversity and volume of market actors together to discuss sustainability issues, including the problems associated with low wages and incomes in supply chains. Many major retailers and brands have invested significant resource into collaboration for sustainability purposes, with an estimated industry-wide total investment of \$1 billion in sustainability programmes in the cocoa sector alone.<sup>33</sup> Earlier in 2018 the cocoa sector signed a declaration committing themselves to develop and implement policies that enable cocoa farmers to make a living income,<sup>34</sup> while members of the Global Living Wage Coalition, including Fairtrade, have committed themselves to greater coordination in implementing living wages.<sup>35</sup>

Some of our interviewees spoke about the various multi-stakeholder forums that have been established in recent years. Two initiatives were cited by a number of respondents as examples of particularly sophisticated forms of multi stakeholder collaboration: the Malawi 2020 scorecard and the various living income/wage benchmarks in development.

These initiatives are welcome developments with high potential, so it is important to assess why interviewees also expressed concerns that the issue of competition law will restrict the level of progress they are able to deliver.

## MALAWI 2020 SCORECARD<sup>36</sup>

Many interviewees cited one voluntary initiative, Malawi 2020, as a positive example of market actors collaborating on key issues, such as low incomes in their supply chains. Malawi 2020, which is convened by the Ethical Tea Partnership, is developing a tool that enables its commercial members to assess their progress towards paying living wages throughout their supply chains. This data is not published or shared with other competitors but is a self-assessment tool. This has the potential to result in increased commitments to living wages and incomes from Malawi 2020 members.

Despite the promising start to this initiative, Oxfam have raised concerns about how this collaborative initiative to raise wages will be impacted by competition law once it moves beyond the self-assessment stage; given the competition in the sector, it would be helpful for companies to be able to commit to paying living wages as a collective, not just unilaterally.

Rachel Wilshaw, Ethical Trade Manager at Oxfam GB, said that Malawi Tea 2020's aim of facilitating business-led collaboration to raise the wages of Malawian tea workers is vital to address adverse human rights impacts under the UN Guiding Principles on Business and Human Rights (extreme in-work poverty). However, Rachel also described that members of the coalition face a range of barriers to achieve a living wage, and cited competition law as one of these. For instance, discussion between competitors on the benefit of a buyer price premium to be distributed to workers was shut down by participants due to concerns about possible high penalties associated with breaching competition law. It has taken a lot of effort and ingenuity to manage processes and create tools that allow dialogue to happen in ways that give participants confidence they are not breaching competition law.

## LIVING WAGE/INCOME BENCHMARKS:

There are also an increasing number of regional living wage and living income benchmarks developed using the Anker methodology,<sup>37</sup> as the sector recognises the importance of living incomes and wages to ensure sustainable livelihoods for farmers. The Global Living Wage Coalition and The Global Living Income Community of Practice are two initiatives that have a similar approach to living wage and income using the Anker methodology.

The Global Living Income Community of Practice<sup>38</sup> is a multi-stakeholder group of over 200 who work together to report on progress against living income benchmarks, understanding the gap between actual and living incomes and solutions to help actors close these gaps.

The Global Living Wage Coalition is an 'unprecedented' collaboration of seven standards systems to take a common approach to measuring living wages<sup>39</sup> led by ISEAL.

In summary, there are moves towards the sort of multi-stakeholder collaboration on farm-gate price that Fairtrade has been calling for since 2014. However, there are concerns by interviewees that legal barriers could restrict further progress. We will explore these barriers further in the next chapter.

<sup>33</sup> [http://www.seo.nl/uploads/media/2016-79\\_Market\\_Concentration\\_and\\_Price\\_Formation\\_in\\_the\\_Global\\_Cocoa\\_Value\\_Chain.pdf](http://www.seo.nl/uploads/media/2016-79_Market_Concentration_and_Price_Formation_in_the_Global_Cocoa_Value_Chain.pdf)

<sup>34</sup> <https://www.icco.org/about-us/icco-news/387-berlin-declaration-of-the-fourth-world-cocoa-conference.html>

<sup>35</sup> <https://www.isealliance.org/about-iseal/our-work/global-living-wage-coalition>

<sup>36</sup> <http://www.ethicalteapartnership.org/wp-content/uploads/Malawi-2017-Progress-Report.pdf>

<sup>37</sup> <https://www.globallivingwage.org/about/anker-methodology/>

<sup>38</sup> <https://www.isealliance.org/about-iseal/our-work/living-income-community-practice>

<sup>39</sup> <https://www.isealliance.org/about-iseal/our-work/global-living-wage-coalition>



# DID INTERVIEWEES SEE COMPETITION LAW AS A BARRIER TO COLLABORATIVE EFFORTS?

Prior to conducting this research, we were also aware of reports that an unclear legal landscape may also be restricting collaboration among market actors for sustainability purposes. This was something that was referenced by interviewees during the discussions we had on existing multi-stakeholder collaboration initiatives. We therefore wanted to better understand how the existing legal landscape interacts with efforts to collaborate on key sustainability issues.

**All our interviewees said that competition law limited their ability to work collaboratively to address certain sustainability issues.** In particular, competition law constraints were felt most acutely in the context of low farm-gate prices.

Helpfully, our interviewees did not feel competition law particularly restricted discussions about supply chain issues such as child labour, deforestation, and low productivity, but they did feel that an unclear legal landscape around potential collaboration in relation to low farm-gate prices restricted progress towards working collaboratively to secure living wages and incomes across supply chains.

EU and UK competition law prevents collaboration between market actors on pricing in order to protect consumers. Nonetheless, EU and UK competition law permits collaboration between market actors essentially that promotes 'technical' and 'economic' progress that results in an evident consumer benefit. **However, for our interviewees, it is not obvious when this exemption might apply. All of our interviewees said that further clarity from competition authorities on how a pre-competitive collaboration on the issue of low farm-gate prices would be assessed under competition law would greatly aid progress.**

**PRICE IS THE BIG ELEPHANT IN THE ROOM NO ONE DARES TO TALK ABOUT**

*Arjen Boekhold, Tony's Chocolonely*

**I DON'T THINK RETAILERS ARE USING COMPETITION LAW AS AN EXCUSE. NO ONE IS ABLE TO TALK ABOUT TAKING ACTION ON PRICE**

*A senior sustainability manager at a major UK-based retailer*

Competition authorities can, and regularly do, provide guidance to market actors and legal experts on how to conform to competition rules when collaborating. In Annex 3, we have included a list of examples of such guidance. Despite this, nothing the CMA or European Commission has produced provides a clear answer to the specific question of how market actors could collaborate on issues related to farm-gate prices, incomes and wages for sustainability purposes.

Below, we have included excerpts from our interviewees which describe some of the practical barriers UK competition law poses to collaboration in the field of price.<sup>40</sup>

Interviewee	Example of where competition/antitrust law has been an obstacle
<b>Brands</b>	
<p><b>A global chocolate company</b></p>	<p>The interviewee recounted an example where a competing business was sourcing from and working with the same co-operative as the interviewee's company. Their company wanted to discuss how the two businesses could coordinate activities to increase efficiency for the producer. However, legal counsel advised against engaging in any level of conversation.</p> <p>They said, 'It is difficult for me to say whether the co-operative would be in a better position, but it probably would have been a more effective way to achieve more things, yes. Did we miss an opportunity to be more effective? Maybe.'</p> <p>About two years ago, they also tried to talk to other businesses and regulatory bodies about how they could discuss low prices in the cocoa sector more creatively, but she was prevented from doing so by legal advice.</p> <p>They also described direct experience of competition law restricting discussion about price in a collaborative forum. She said '[the collaborative forum] was <b>very difficult</b>. As soon as you talk about a premium, as soon as there is any talk of payments, then the discussion becomes commercial and is stopped. <b>Price is a piece of the sustainability puzzle but it is very simple: we cannot talk about it. Is there anything we can do?</b>'</p>
<p><b>Director of independent chocolate brand</b></p>	<p>This independent chocolate brand recounted a situation where they are currently working in an area of East Africa where another Fairtrade certified buyer operates. The independent brand suggested streamlining both of their reporting processes to try and reduce the amount of paperwork the co-operatives needed to complete.</p> <p>However, the Fairtrade certified buyer thought the discussion would breach competition law, even though our interviewee felt it was clear that this was not the case. This means there is double the amount of paperwork for the producers to complete and ways of working are inefficient in the region.</p>
<b>Retailers</b>	
<p><b>A senior sustainability manager at a major UK-based retailer</b></p>	<p>One interviewee, who is a senior sustainability manager at a major UK-based retailer, said 'The worrying thing about price is that it is not in anyone's interest to lobby for relaxing the law because they are competitors. This means it is impossible to address problems without businesses working together.' 'No one wants to go first,' the interviewee said. The interviewee also said that it is hard for retailers to pay higher prices due to how competitive pricing is in the retail sector. This means, in order to deal with low farm-gate prices, supermarkets would have to collaborate, but finding a solution compliant with competition law would be difficult.</p> <p>They also expressed that retailers would not enter into conversations when they know those discussions might have a competition risk. 'If we knew how to talk about issues that impact competition, then this would be very helpful'. The interviewee has also experienced situations where suppliers have actually refused to attend certain meetings if they suspect there might be a conversation about farm-gate prices. The interviewee said that 'this really doesn't help'.</p> <p>'I don't think retailers are using competition law as an excuse. No one is able to talk about taking action on price', they said.</p>
<p><b>A major UK-based retailer</b></p>	<p>'We want clear one or two-page guidance from CMA with some case studies so it is clear what we can and can't do. Formal clarity from the CMA is needed'.</p>

<sup>40</sup> Quotes have been anonymised where requested



## Industry bodies

### Rick Scobey, President of the World Cocoa Foundation

The industry body has a detailed Antitrust Compliance Policy to ensure that there is no discussion or exchange of information related to any topic with competitive significance, such as any elements of price or pricing policies during their group meetings with companies. They are able to talk about general industry trends, government policies with regard to farm-gate pricing, and research coming out of the sector, but would not be able to discuss any company-level recommendations or solutions related to pricing.

Mr Scobey also said, 'Long term sustainability of cocoa depends on a proper set of incentives that embody the real social and environmental costs of production. We need to be able to structure discussions with all stakeholders in the supply chain to see how we can achieve sustainable livelihoods and a living income for farmers.'

He also described how antitrust law limits companies' ability to co-ordinate sustainability activities with one another on the ground in cocoa-growing areas, as this could be construed as anticompetitive behaviour to divide up markets or suppliers. This constraint on coordination may sometimes lead to duplication of effort and other inefficiencies.

### An industry membership- based commodity sustainability initiative

The sustainability initiative has spoken with its industry members and origin stakeholders about the problem of extreme price volatility in vanilla. Members (including major multinational brands and traders) want to understand the pros and cons of different strategies to improve market stability, including understanding the possible roles of mechanisms such as a minimum price.

They spoke to lawyers, who have clearly said that it would violate competition law for an industry group to discuss specific prices. However, an industry group can review and discuss general third party research on this issue as long as no collective agreements or actions are developed. The sustainability initiative is currently engaged with independent NGOs to develop a research based 'living income reference price' for vanilla. However, at the moment, it is not clear how they can leverage something like a reference price effectively without collaborative action.

### Bart Vollaard, Organic Cotton Accelerator (OCA)

In one of the OCA's brand-drive and sourcing programmes, they are gathering the prices and premium received by the farmers for their raw cotton. This is to help understand more about the impact of premium payments on the overall farm economics of cotton farmers in India. This has been challenging, particularly where publishing or sharing results are concerned.

He mentioned that data gathering is often questioned by lawyers. For example, he asked legal counsel if he can share the overall averages of the premium received by farmers, but they always tell him to keep it to himself. He expressed that is very unhelpful when the goal is to share and promote sustainable practices.

He also expressed that, for not-for-profit, the cost of legal advice is extremely expensive so guidance would be useful so he could understand the law better and be able to self-assess.

**'We are not doing this to price fix. We are exploring how the premium payments impact the lives of cotton farmers in India.'**

OCA does not engage in commercial transactions, which are done between brand and supplier. Through its interventions, OCA aims to better understand incentivisation structures that lead to sustainable outcomes.

## Industry bodies

**Alistair Smith,  
International  
Coordinator, Banana  
Link**

As explained in the first section of this report, the Distribution of Value working group in the World Banana Forum is the first multi-stakeholder and multi-retailer initiative in the banana sector that aims to talk about cost and pricing issues in the supply chain. A new sub-group is being formed following calls to action from all stakeholders in the banana sector but Alistair commented that competition law has posed a real challenge to any engagement on the issue of low farm-gate prices.

**Antonie Fountain,  
Managing Director of  
the VOICE Network  
and co-author of the  
Cocoa Barometer  
Report**

The NGO is a strong advocate for robust antitrust and competition laws and acknowledges that low farm-gate prices are a systemic problem. Mr Fountain explained that he has been speaking to the major chocolate companies individually for a number of years who say, **'We want to talk about price but we can't'**. Specifically, he mentioned that the major chocolate companies admit that they are afraid of antitrust and that not talking about price is hurting their sustainability initiatives.

He also mentioned that at an International Cocoa Organisation meeting in July 2017, convened in response to the cocoa price crash in March 2017, any attempts to speak about the price crash were stopped by an industry lawyer. This meeting was also attended by the Vice President of a multinational chocolate brand, among many other industry experts, companies, NGOs and governments who all needed to engage in conversation about how to respond to the price crash but they were unable to do so.









# CONCLUSION

Interviewees support the claim that multi-stakeholder collaboration is necessary to achieve sustainability goals, as well as demonstrating that competition law is viewed by businesses as a barrier to achieving these sustainability goals.

Interviewees consistently highlighted the challenge of competitive disadvantage if they were to take action on low farm-gate prices and incomes unilaterally. In common with many collective action problems, our interviewees expressed fears of losing competitive advantage in a fiercely competitive market. In order for farmers to receive prices which deliver environmental sustainability and poverty reduction, there is a need for alignment between multiple supply chain actors on a common approach.

The key point for policymakers to note from this research is that the current understanding of competition law by a considerable number of experts and businesses is that it does restrict business collaboration on farm-gate prices and incomes for sustainability purposes. It was felt to be difficult, if not impossible, for industry actors to explore pre-competitive initiatives aimed at increasing the income of farmers and workers, due to concerns of breaching competition law. This constrains poverty eradication efforts, and progress against the United Nations Sustainable Development Goals.

Interviewees wanted competition regulators to provide more straightforward guidance on how they would view multi-stakeholder collaboration for sustainability purposes, and for policy makers to unblock this barrier to progress on poverty level incomes.

This report does not in any way oppose the principle of competition law protecting consumers. Rather, it asks that policymakers consider how to enable multi-stakeholder action which benefits both suppliers and consumers, especially with regard to poverty-level incomes. Unless farmers and workers receive higher incomes and wages, we argue that the medium to long-term supply of commodities such as cocoa and bananas will be at risk, ultimately harming the consumer.

Competition regulators already have a range of tools at their disposal to facilitate these conversations, without compromising consumer protection. They could issue formal guidance, develop a clear policy on competition law and sustainability (following the Dutch example) or facilitate competition law-compliant discussions between market actors.

However, a simple recognition by the government and competition authorities that they have a role to play in building sustainable markets (or at least ensuring no harm) would be helpful. We encourage the government and the CMA to reflect on the role of competition law in building markets that promote sustainable development (either as a barrier or an enabler) and consider what more it could do to contribute to further progress.

While not the focus of this report, government may have other policy options to incentivise the payment of living incomes and wages in the UK's international supply chains, which would be useful to explore further.

The UK government played a leading role in the creation of the UN Sustainable Development Goals. Many government departments are working actively working towards these goals. There is a need for competition regulation to demonstrate coherence with these stated government policy objectives.

## RECOMMENDATIONS



- The UK government should consider the long-term sustainability of supply chains alongside short-term consumer interest when reviewing how well markets are functioning.
- The UK government should update its Strategic Steer to the Competition and Markets Authority in that it should work to facilitate markets that are sustainable in the long-term.
- The Competition and Markets Authority (CMA) should issue clearer communications to companies and retailers on how businesses can collaborate for sustainability purposes in order to address low farm-gate prices in a manner that would be consistent with competition law. Specifically, this means providing guidance or policies that would clarify the application of the prohibition and the exemption criteria under Chapter 1 of the Competition Act 1998 and Article 101 of the Treaty on Functioning of the European Union.
- We continue to ask that the CMA regularly report on how its assessment of competition law is affecting progress towards the Sustainable Development Goals and UN Guiding Principles on Human Rights.



# ANNEX 1: FURTHER AREAS OF RESEARCH IN PRICE TRANSPARENCY AND TRACEABILITY

Throughout this research, it became clear that there were additional avenues for further research for those interested in the field of collaboration for sustainability purposes. A theme that cropped up repeatedly was improving the transparency and traceability of supply chains. As these topics did not fall within the scope of this research, we did not include them within the main findings. However, we have summarised our findings below, which were based on our interviews with market actors. We hope this acts as a helpful starting point for further research by others in the sector.

Our research identified that there is a need for enhanced data availability to better understand the specifics of who needs to take what action on key sustainability issues. This is particularly relevant to the issue of low farm-gate prices and wages. Improved price transparency and traceability in supply chains would enable industry, governments and civil society to develop and enhance their understanding of who exactly is responsible for low prices and many other issues in the value chain. This could help focus collaborative initiatives in this area, as well as encouraging companies to take greater action to address sustainability issues.

Enhanced traceability could also enable competition authorities to evaluate how healthy competition could be achieved. Public transparency in relation to supply chains is achievable under competition law and it is in the consumer interest to understand who is being paid what in supply chains. As previous Fairtrade research has shown, consumers are developing an increased appetite for improved transparency in their food supply chains, possibly due to a large number of public-interest incidents in the industry, not the least the 2013 horsemeat scandal.

In addition, improved price transparency and traceability in supply chains would help consumers and civil society hold companies to account for the price they pay to farmers and workers. It is in the reputational interest of governments and businesses to be fully transparent so that consumers and civil society can be confident the produce they buy is sustainably sourced and can hold them to account when they fall short. Many of our interviewees believed that regulated transparency and traceability measures are a key part of the solution to low prices, as it is not in the business interest to disclose unfair prices paid.

There are already many traceability and transparency tools operating or in development such as FLOCERT's FairTrace tool<sup>41</sup> and others using blockchain technology<sup>42</sup>. Independent reports and analysis such as Oxfam's Behind the Brands<sup>43</sup> and Behind the Barcodes assessments, and Business & Human Rights Resource Centre's Modern Slavery Report<sup>44</sup> help to assess the extent of transparency and traceability for particular businesses.

There could also be a role for government to play in creating favourable conditions for enhanced transparency and traceability of our food. While voluntary initiatives are a way for businesses to communicate their sustainability efforts, and many are making good progress on this, there are no requirements at present for businesses to invest in enhancing the traceability of their products. Further research is required in this area to ascertain both how greater price transparency and traceability in the supply chain could be achieved and the benefits this could bring.

*Mars's CEO told Confectionery News:*

**[TRACEABILITY] IS HAPPENING AND HAPPENING QUICKLY, IT WILL BE LESS THAN 10 YEARS BEFORE YOU KNOW EXACTLY WHERE YOUR MATERIALS COME FROM. THIS IS A TRANSFORMATIONAL SHIFT.**<sup>45</sup>

**I'D LOVE TO SEE A WORLD WHERE THE CONSUMER AND THE SECTOR COULD KNOW WHAT ORGANISATIONS ARE REALLY DOING SO THAT WE COULD HAVE REAL TRANSPARENCY ON PRICING AND THE VALUE OF THE FARM-GATE PRICE, EVEN IF IT'S TWO BUSINESSES LEADING THE WAY.**

*John Steel, CaféDirect*

<sup>41</sup> <https://www.flocert.net/fairtrace-online-platform-empowers-producers-nurtures-business-trust/>

<sup>42</sup> <https://www.blockchain.com/>

<sup>43</sup> <https://www.behindthebrands.org/>

<sup>44</sup> <https://www.business-humanrights.org/en/first-year-of-ftse-100-reports-under-the-uk-modern-slavery-act-towards-elimination>

<sup>45</sup> <https://www.confectionerynews.com/Article/2018/06/06/Why-Mars-thinks-the-commodities-era-is-over>

# ANNEX 2: UK AND EU COMPETITION LAW

## Article 101 Treaty on the Functioning of European Union

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which
  - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
  - (b) limit or control production, markets, technical development, or investment;
  - (c) share markets or sources of supply;
  - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
  - any agreement or category of agreements between undertakings,
  - any decision or category of decisions by associations of undertakings,
  - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
    - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
    - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

## Chapter 1 of the UK Competition Act (1998) excerpts

### 2. Agreements etc. preventing, restricting or distorting competition.

- (1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—
  - (a) may affect trade within the United Kingdom, and
  - (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited unless they are exempt in accordance with the provisions of this Part.

- (2) Subsection (1) applies, in particular, to agreements, decisions or practices which—
  - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
  - (b) limit or control production, markets, technical development or investment;
  - (c) share markets or sources of supply;
  - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- (3) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.
- (4) Any agreement or decision which is prohibited by subsection (1) is void.
- (5) A provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).
- (6) Subsection (5) does not apply where the context otherwise requires.
- (7) In this section “the United Kingdom” means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.
- (8) The prohibition imposed by subsection (1) is referred to in this Act as “the Chapter 1 prohibition”

### 9. [Exempt agreements]

[(1)] [An agreement is exempt from the Chapter 1 prohibition if it]—

- (a) contributes to—
  - (i) improving production or distribution, or
  - (ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; but
- (b) does not—
  - (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
  - (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question

[(2) In any proceedings in which it is alleged that the Chapter 1 prohibition is being or has been infringed by an agreement, any undertaking or association of undertakings claiming the benefit of subsection (1) shall bear the burden of proving that the conditions of that subsection are satisfied.]



# ANNEX 3: CMA AND EUROPEAN COMMISSION GUIDANCE ON CO-OPERATION BETWEEN COMPETITORS

**See the CMA's guidance on the Competition Act 1998 and cartels on the CMA's website and in particular the following:**

- OFT Guidelines, '*Agreements and Concerted Practices*', 2004 (the OFT was the CMA's predecessor and the OFT guidance continues to apply)
- OFT Guidance, '*Trade associations, professions and self-regulating bodies*', 2004
- OFT Guidance, '*Cartels and the Competition Act 1998*', March 2005
- OFT Guidance, '*How competition law applies to cooperation between farming businesses*', November 2011
- CMA, '*Competition Law Risk: A short Guide*', 2014
- CMA, '*Quick Guide to Complying with Competition Law*', April 2014
- CMA, '*Do's and Don'ts for trade associations*', September 2014
- CMA Guidance, '*Local Authority Initiatives and Competition Law*', December 2014
- CMA, '*Joint Ventures and Competition Law: Do's and Don'ts*', April 2018

**In terms of European Commission guidance:**

- Commission Communication, '*Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*', 2011
- Commission Communication, '*Guidelines on the application of Article 81(3) of the Treaty*', 2004





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