Aalto University
School of Business

IDENTIFYING THE VALUE OF SUSTAINABILITY IN COMPETITION POLICY

an expedition to Article 101(3) TFEU

Master's Thesis
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Abstract

European Union was established to bring about peace into a violent Europe. Currently we are facing a problem, the climate crisis, that has no precedence and demands immediate actions. The European Union has made its stand on the importance of saving the world from a disaster by adopting measures to enable the Green transit. To become the world's first climate-neutral continent by 2050, the EU requires all EU policies to take environmental values into account. One of these policies, that is currently seeking a way to coordinate multiple values is competition policy. This thesis has focused on pinpointing, what is the value of sustainability in the European Union's competition policy. Competition policy aims at maximizing the consumer welfare and the question is, can sustainability constitute an element of that welfare. Co-operation between companies can be fruitful from the point of view of sustainability but at the same time, it can be prohibited. This thesis has focused on finding out, whether companies can co-operate when there are sustainability gains to be achieved and can this co-operation be justified by sustainability gains. At the core of this thesis is finding out what value can sustainability in competition law have and can it be considered under the Article 101(3) TFEU requirement for a "fair share for consumers". This question is up-to-date as the Commission is currently in the process of renewing the horizontal guidelines. This thesis presents current views from stakeholders, which previously have not been analysed as a part of a master's thesis.

The thesis consists of seven chapters. The first chapter contains introduction. The scope, limitations and research questions of the thesis are presented in the second chapter. This is followed by a chapter containing a brief history and introduction to the concept of sustainability. The fourth chapter entails the limitations and demands that competition law sets for taking sustainability into account. The fifth chapter contains a summary and analysis of the Commission's recent call for contribution on the matter and a brief analysis on recently published draft guidelines. This chapter also contains current and future trends on the issue. The sixth chapter contains de lege ferenda - section with writer's view on how the situation should be handled and current tools amended. This thesis concludes with an analysis answering the research questions and summarising the findings, as well as containing suggestions for future actions.

This thesis shows that there is legal support for taking environmental issues into account in every policy, including competition policy. Also, competition law provisions leave room for interpretation and there is no rule against taking sustainability into account. In fact, quite the opposite: primary law presupposes for it to be considered and emphasized when possible as TFEU 191 (2) and supporting case law points out. The CJEU follows its own rules but reflects the society at large. Taking current political climate into account, the CJEU would most likely rule in favour of sustainability where possible.

Legal uncertainty and the chilling effect of certain rules have not made it compelling for undertakings to take action in the field of sustainability. The Commission has pointed out in the Communication for draft guidelines, that sustainability makes an excellent argument in the balancing of benefits under Article 101(3). The next step after the guidelines have been finalised, would be that someone would dare to lead and be brave enough to test the boundaries and current legal environment.

Article 101(3) combined with sustainability should complement other means for striving towards a more sustainable future, not substitute them. The value of sustainability is priceless, and sustainability should be pursued with this in mind.

Keywords Sustainability, competition law, competition policy, Article 101(3) TFEU

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Tiivistelmä

Euroopan unioni perustettiin tuomaan rauhaa väkivaltaiseen Eurooppaan. Edessämme on uusi haaste, ilmastokriisi, jolle ei ole historiallista vastinetta. Tämä kriisi edellyttää välittömiä toimia, joihin Euroopan unioni on ryhtynyt Vihreän siirtymän muodossa. EU edellyttää kaikilta politiikan aloilta ympäristöllisten arvojen huomioon ottamista, jotta EU:ssa voidaan saavuttaa hiilineutraaliuden tavoite. Yksi politiikan aloista, joka parhaillaan pyrkii yhteensovittamaan ympäristöllisiä tavoitteita omaan agendaansa, on kilpailupolitiikka.

Tässä tutkielmassa on ollut tarkoitus hahmottaa, mikä on kestävän kehityksen arvo EU:n kilpailupolitiikassa. Kilpailupolitiikka tähtää kuluttajien hyvinvoinnin maksimointiin, joten kysymys kuuluu, voiko kestävä kehitys olla tämän hyvinvoinnin tekijä. Yritysten välinen yhteistyö kestävän kehityksen alalla voi olla hedelmällistä mutta samaan aikaan myös kiellettyä. Tässä tutkielmassa on keskitytty selvittämään, voivatko yritykset tehdä yhteistyötä perustellen sitä hyödyillä kestävän kehityksen muodossa. Tutkielman ydin on ollut selvittää, mikä arvo kestävälle kehitykselle voidaan antaa kilpailuoikeudessa ja voidaanko se hyväksyä SEUT 101(3) artiklan mukaisena hyötynä. Kysymys ja aihepiiri on ajantasainen, sillä komissio parhaillaan uudistaa horisontaalisia suuntaviivoja. Tässä tutkielmassa on esitetty ajantasaisia intressiryhmien mielipiteitä, joita ei aiemmin ole analysoitu osana maisterintutkielmaa.

Tutkielmassa on seitsemän kappaletta. Ensimmäinen kappale sisältää tutkielman johdannon. Toisessa kappaleessa esitellään tutkielman laajuus, rajaukset sekä tutkimuskysymykset. Kolmas kappale sisältää lyhyen esityksen kestävän kehityksen historiasta sekä kestävän kehityksen määritelmän. Neljännessä kappaleessa esitellään kilpailulainsäädännön rajoitukset ja vaatimukset kestävän kehityksen huomioimiselle. Viidennessä kappaleessa tiivistetään ja analysoidaan komission viimeaikaisia toimia: kiinnostuksenilmaisupyyntö viihreän kehityksen ohjelmaa tukevan kilpailupolitiikan osalta sekä luonnos horisontaalisiksi suuntaviivoiksi. Tässä kappaleessa myös selvitetään mahdollisia tulevaisuuden kehityskulkuja asian osalta. Kuudes kappale sisältää de lege ferenda -osion, jossa esitetään kehitysideoita uusien instrumenttien osalta ja nykyisten tulkinnan osalta. Tutkielman viimeisessä kappaleessa vastataan kootusti tutkimuskysymyksiin ja tiivistetään tutkielmassa esiin nousseet keskeiset havainnot sekä esitetään ehdotuksia tuleviksi toimiksi.

Tutkielmassa esitetään, että ympäristöllisten arvojen huomioon ottamiselle kilpailupolitiikassa on juridinen tuki. Kilpailulainsäädäntö jättää tilaa tulkinnoille ja sellaista säännöstä ei ole, joka kieltäisi kestävän kehityksen huomioinnin kilpailuoikeudessa. EU:n primäärioikeus jopa edellyttää, että ympäristölliset arvot otetaan huomioon siinä määrin kuin mahdollista, kuten SEUT 191 (2) artikla ja oikeuskäytäntö osoittavat. Euroopan unionin tuomioistuin on riippumaton mutta heijastelee yhteiskunnan kehitystä. Ottaen huomioon nykyisen poliittisen ilmaston, Euroopan unionin tuomioistuin todennäköisesti puoltaisi ympäristöllisten arvojen huomioimista, mikäli se yksittäistapauksessa olisi mahdollista.

Oikeudellinen epävarmuus ja tietyt oikeudelliset säännöt ovat saaneet aikaan tilanteen, jossa yritykset eivät kope houkuttelevaksi tehdä yhteistyötä kestävän kehityksen saralla. Komissio on nyt nimenomaisesti ilmoittanut horisontaalisten suuntaviivojen luonnosta koskevassa tiedonannossaan, että kestävä kehitys on erinomainen perustelu etujen punnitsemisessa SEUT 101(3) artiklan valossa. Sen jälkeen, kun suuntaviivat on julkaistu, tulisi kentältä löytyä uskallusta johdattaa ja testata rajoja ja vallitsevaa oikeudellista ympäristöä.

SEUT 101(3) artiklan mahdollistama kestävän kehityksen huomioiminen ei yksinään riitä eikä sen tarkoitus voi olla korvata muita kestävän kehityksen huomioon ottamisen keinoja. Kestävän kehityksen arvo on mittaamaton ja kestävää kehitystä tulisi tavoitella ja edistää pitäen tämä mielessä.

Avainsanat kestävä kehitys, kilpailuoikeus, kilpailupolitiikka, SEUT 101(3) artikla

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1 Introduction

In times of unforeseeable continuous natural disasters worldwide and the Covid-19 pandemic, we are entering a new era. More and more people are starting to shift towards understanding why Greta Thunberg is a pioneer who should be listened to. Climate change is not an opinion. The Intergovernmental Panel on Climate Change (IPCC) published first part[1] of its Sixth Assessment Report in fall 2021, where it stated *it is unequivocal that human influence has warmed the atmosphere, ocean and land.*[2] The IPCC calls for deep reductions in CO2 emissions in order to limit climate change.[3] In the second part of the report the IPCC stated that any further delay in the actions will risk missing the brief *window of opportunity to secure a liveable and sustainable future for all.*[4]

The European Union has made its stand on the importance of saving the world from a disaster by adopting measures to enable the Green transit. This means that the EU *aims to make Europe climate neutral by 2050, boost the economy through green technology, create sustainable industry and transport, and cut pollution. Turning climate and environmental challenges into opportunities will make the transition just and inclusive for all.*[5] To become the world's first climate-neutral continent by 2050, the EU requires all EU policies to take environmental values into account. One of these policies, that is currently seeking a way to coordinate multiple values is competition policy.

It may seem that the target of saving the planet by taking environmental values into account in every policy would be easy to execute. However, looking more closely into European competition policy and legal instruments we find that the task is not that simple. As a matter of fact, the target raises a set of fundamental questions going back to the very fundamental existence of the EU and its foundation. What should the EU aim for and how should contradicting values be reconciled? Can the goals of policies change over time when the world and problems it poses, change?

The goal of European competition law is maximising the consumer welfare.[6] This notion is the essential key to solving competitional questions. In evaluating what the outcome might be, the alternative that maximises consumer welfare is most likely to be the overruling one in judicial

[1] IPCC 2021.
[2] Id., p. 5.
[3] The IPCC states in the report that *Global surface temperature will continue to increase until at least the mid-century under all emissions scenarios considered. Global warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in CO2 and other greenhouse gas emissions occur in the coming decades*. (Id., p. 17) Furthermore, according to the IPCC *from a physical science perspective, limiting human-induced global warming to a specific level requires limiting cumulative CO2 emissions, reaching at least net zero CO2 emissions, along with strong reductions in other greenhouse gas emissions*.(Id., p. 36).
[4] IPCC 2022, p. 37.
[5] EC: Green transition.
[6] EC: Competition policy.

decision making. In this new era we are facing a challenge where it seems that sustainability should be considered in competition law. Hence, the question is, how can consumer welfare and sustainability be combined?

Companies are keen to co-operate in order to achieve sustainable goals but co-operation between competitors can be forbidden from the competition policy view. Co-operation can however be allowed if it sufficiently benefits consumers. This benefit has up till now been mainly measured by economic factors. As Suzanne Kingston puts it, the Commission orthodoxy for almost 20 years has been that *the consumer welfare standard requires a narrow economic efficiency assessment entailing proof of quantified economic benefits for consumers within the relevant market.*[7] There are however some cases in the past, where environmental benefits have been considered in addition to the mere economic benefits in the consumer welfare analysis.

In this thesis I aim to investigate whether companies can co-operate when there are sustainability gains to be achieved and can this co-operation be justified by sustainability gains. At the core of this thesis is finding out what value can sustainability in competition law have and can it be considered under the Article 101(3) TFEU requirement for a “fair share for consumers".

I will first introduce the scope, limitations and research questions of my thesis. This will be followed by a chapter containing a brief history and introduction to the concept of sustainability. In the fourth chapter I will present the limitations and demands that competition law sets for taking sustainability into account. The fifth chapter contains a summary and analysis of the Commission’s recent call for contribution on the matter and a brief analysis on recently published draft guidelines. In this chapter I will also look at the Commission’s current take on the issue and the possible future trends on the issue. In the sixth chapter I present my view on how the situation should be handled and current tools amended. This thesis concludes with analysis answering the research questions and summarising the findings, as well as containing suggestions for future actions.

2 The scope, limitations, and research questions

Our planet is facing tremendous and acute challenges of pandemica and war. In addition to these crises there is also a crisis that is not as immanent and visible in causing direct casualties, but the threat is also a real and an acute one. If the climate crisis is not addressed, it will surprise us and there will be no globe left to have other problems on. The challenge is that the threat is not perceived by the general public as acute and important as many experts do, I also think it should be. Sustainability

[7] Kingston 2021, p. 3.

as a notion encompasses a wide range of different aspects (see for instance United Nations' 17 Sustainable Development Goals (SDGs)[8]). In this thesis, the point of interest is the environment and climate change.

Slowly the wheel is turning, and the EU has awakened and decided to take part in the big bee in the form of Green Transit. It has for instance concluded the Green Deal in its political spearheads. The EU has stated that sustainability is one if its most important and prominent goals and requires all policies to promote sustainability. Sustainability in the EU is an important and timely subject. It presupposes analysis on what is seen to be important and what the question of what the EU stands for.

I have decided to look at this big subject from the point of view of competition law and co-operation between companies. I feel that this is an important subject as traditionally co-operation between rivals has been considered to limit competition and as somewhat dubious. In the present era we however have no time to wait merely for legal amendments to address the crisis and the toolkit should entail initiatives from all the angles of the society. The Commission is also searching for answers to meet the goals of the Green transit and reconciling competition policy and environmental goals. The Commission has stated that it will update the horizontal guidelines so that they would enter into force on 1 January 2023.[9] The Commission published draft guidelines in March 2022. The subject of this thesis is therefore important, up-to-date and in the core of EU (competition) law.

To pinpoint this relationship between competition and sustainability, I have decided to investigate whether the current legal environment supports sustainable co-operation or whether it poses obstacles to it. If it hinders co-operation, the means to abolish these obstacles should be exposed. From this point of view, I have formulated my research questions as follows:

1. Should and could competition law take sustainable goals into account when assessing co-operation between competitors and
2. more specifically, can agreements be exempted under Article 101 (3) TFEU when there are sustainability gains to be achieved

Due to the limited number of pages, I will only look at how sustainability arguments can be used in the co-operational scheme i.e. any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings and any concerted practice or

[8] UN: Sustainable Development Goals.
[9] EC: Antitrust: Commission invites comments on draft revised rules on horizontal cooperation agreements between companies.

category of concerted practices, and will leave out mergers, state aid and abuse of dominance. Also, I will not look at this co-operation in detail by providing concrete examples of co-operational situations, as it is not essential in answering the research questions on sustainability as a defense. I will also only look at the condition of "allowing consumers a fair share of the resulting benefit" of Article 101(3) TFEU and leave out evaluations of the other conditions on indispensability or the possibility of eliminating competition due to limited number of pages of this thesis.

Answering these questions prerequisites an expedition to a set of EU rules, jurisprudence and literature. I will investigate the legal grounds for taking sustainability in the first place into account in the EU. More specifically I will detect the competition law norms' take on the issue and are the legal grounds permitting the sustainability to be taken into account in competition law. Moreover, I will look into how the issue has been dealt within jurisprudence and legal literature. This will be followed by an up-to-date analysis on how the issue is seen in academia and by legal practitioners representing actors regulated by the competition law. This analysis draws from the Commission's call for contribution held in 2020/2021. The material is mostly European, as this thesis is limited to the EU and its norms.

This thesis is limited to the European Union context due to the limited number of pages of a master thesis. Investigating the matter merely in a national setting would not be reasonable as according to Article 3 TFEU, the EU has exclusive competence in certain areas, for instance *the establishing of the competition rules necessary for the functioning of the internal market,* i.e., competition policy and law. According to Article 2(1) TFEU, exclusive competence means that the EU is the sole legislator in that area and institute that can adopt legally binding acts, whereas the member states can only do so if authorised by the EU or due to implementing Union acts.

The method of this thesis is legal dogmatics. The aim is to investigate and codify the existing legislation, jurisprudence and other legal sources in order to formulate a view on the current interpretation regarding the research question. In addition to this, the thesis entails de lege ferenda suggestions on whether and how the prevalent norms should be amended in the future in order to enhance the situation.

3 Sustainability – the underdog becomes the topdog

Environmental values seem to have long had an echo of something that should be considered in every sector but at the same time something that hasn't to a great extent been *required* to be taken into account. The times they are a-changin', and it looks like in the future environmental values and sustainability will be ever so important as more and more nations seek to chip into the bee of saving our planet.

The starting point for sustainability can be seen to date back to 1980, when the International Union for Conservation of Nature (IUCN) published the World Conservation Strategy, subtitled "Living Resource Conservation for Sustainable Development". In this document, the IUCN demanded that governments and international organizations better protect the world's natural resources. David Sarokin has borrowed the report quite on point with the following quotation: "we have not inherited the earth from our parents, we have borrowed it from our children". Sarokin points out that the report drew little attention then and the real breakout moment for sustainable development came years later with the publication of Brundtland report. The United Nations' Brundtland committee, led by the former prime minister of Norway Gro Harlem Brundltand, headed up an effort known as the World Commission on Environment and Development. The Committee released its' call for action titled "Our Common Future" in 1987.[10] Sustainability is often defined by the report's notion which goes as follows: *Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*[11] I think that this definition summarises well the responsibility that generations have when the globe is in their hands.

A remarkable next step in the field of sustainability was taken in 2015, when the UN published its 17 Sustainable Development Goals (SDGs), "which are an urgent call for action by all countries in a global partnership".[12] These goals lie at the heart of the 2030 Agenda for Sustainable Development which was adopted by all UN Member States in 2015.

In the EU, sustainability has played a part for a long time. Earlier however it has seemed more like a "nice to have", whereas nowadays it is a compulsory target. The Von der Leyen Commission has underlined green development by putting sustainability at the top of its list, for instance in the form

[10] Sarokin 2021, p. 5.
[11] Brundtland report, p. 41.
[12] UN: Sustainable Development Goals.

of the Green Deal.[13] I think that sustainability is itself an important goal, but it also supports other EU goals, for instance promoting peace.

Sustainability has become the topdog and lies at the heart of world politics. I believe that even though the EU currently faces severe challenges in the form of war, the importance of sustainability will remain a focal point in the EU.

[13] On the history of sustainability in the EU, see https://ec.europa.eu/competition-policy/green-gazette/green-deal_en. (EC: Green gazette)

4 EU calls for sustainable actions, but can competition law rise to the challenge?

Companies have been called to participate into the effort to meet the goals of the Green Deal.[14] Companies are most likely willing to contribute but achieving sustainability gains will often require co-operation. Co-operation between rivals might be subject to Article 101 of TFEU and hence prohibited from the competition law point of view.

Also, the EU mandates that all policies take sustainability into account but can for instance competition policy include it in its remit? Some researchers argue that taking sustainability into account raises no problems from the competition law point of view and that the current legal framework works well in enabling sustainability to be taken into account. For instance, according to Peeperkorn, there is no need to change the existing rules as competition law can contribute to meeting the goals of the Green Deal by focusing on its core function of promoting effective competition which in turn promotes efficiency and innovation.[15] However, I think that if the situation were clear and the current competition law did allow co-operation and meeting the Green Deal's goals, the whole conversation would be quieter, and the European Commission probably would not ask for opinions from stakeholders. As it stands, the conversation is ongoing and legal experts disagree on many fundamental questions, let alone details. When assessing how sustainability should be considered in competition policy, and whether it should be considered at all, the assessment should be based on regulation and also on what is stated in competition policy and its goals.

Looking at the big picture it seems evident that the public authorities are willing to promote sustainability and to seek to find ways to ease stakeholders' task of taking sustainability steps. In the interpretation of goals and what can and should be done, the base must be built on existing norms and jurisprudence. I consider there to be a need to assess a question which is two-fold:

1) whether competition law should take part into the battle towards cleaner future in the first place, and so
2) how could sustainability goals be combined into the competition law framework i.e., how could competition law contribute to promoting sustainable co-operation

After this, it is possible to answer more specifically, whether agreements can be exempt under Article 101 (3) TFEU when there are sustainability gains to be achieved.

[14] See Margrethe Vestager's speech in September 2020. (EC: Vestager's speech)
[15] Rousseva 2020, p. 7.

4.1 What is competition law meant for ("the should")

4.1.1 EU's objectives

The assessment of whether competition law should take sustainability into account is quite a philosophical question. The answer lies in what one thinks the objectives of competition law are and what one thinks they should be.

The main objective of EU competition rules is to ensure proper functioning of the EU's internal market in order to maximize the welfare of different stakeholders: citizens, companies and society.[16] At the core of this objective is therefore *welfare.* According to the Oxford dictionary, welfare is *the general health, happiness and safety of a person, an animal or a group.*[17]

In the context of the EU competition law, the concept of welfare might seem to have been converted into a synonym for money.[18]

Needless to say, these two are nevertheless not synonyms. Obviously assessing whether welfare is maximized is easier when it is effortlessly converted into monetary units. Even if something is easier, it does not mean that it is the only possible option to be considered. Kingston also points out that assuming *that environmental benefits cannot constitute economic efficiencies or be measured* ignores *the very significant developments in quantifying environmental goods in the discipline of environmental economics over the past 20 years*. She also refers to Dijk and Mark Carney in that consumers are finding sustainability important, and what is held important morally, in essence turns into market sentiments.[19] I understand this to mean that normally harm, and benefit, has been measured with monetary units, for example, increasing or decreasing electricity bills. What Kingston, Dijk and Carney seem to suggest is that environmental benefits and consumers' interest in sustainability also constitute a unit that can also be translated into the language of economics and euros. This would mean, that sustainability is not just intangible and subjective but something that can be translated into mathematically comparable units. How this could be measured is another question that I do not have a possibility to go into in the limits of this thesis.

Could sustainability contribute for enhancing welfare, and can it hence be taken account in competitional analysis? I will next examine whether there are legal grounds for taking sustainability into account in general in the EU's policies.

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[16] EC: Competition policy.
[17] Oxford Dictionary.
[18] Holmes for instance states that: one often gets the impression that either only short-term price effects have been taken into account or that they are the only factors to which any weight has been given. Holmes 2020a, p. 8.
[19] Kingston 2021, p. 5.

4.1.1.1 Legal provisions and sources

Looking at the values of the EU there is no doubt that sustainability is a value that could be taken into account. The goals of the EU include the following: *promote peace, its values and the well-being of its citizens* and *sustainable development based on balanced economic growth and price stability, a highly competitive market economy with full employment and social progress, and environmental protection.*[20] Looking at these objectives it seems evident that sustainability should fit into competition law's set of goals and should be considered.

Also, the necessity of the environment and the obligation to take such issues into account has been enshrined in EU primary law in TFEU Article 11 (ex Article 6 TEC) according to which:

> *Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.*

Nowag points out that, TFEU 11 Article does not make sustainability or environment a goal of the competition law, but simply requires respect or comity relating to such matters.[21] Even though the Article would not constitute a goal for competition law, I think it still should work to support interpretation of competition law situations. Just as fundamental rights might not be a goal for certain provisions or situations, the aim of protecting fundamental rights is taken into account as far as possible. For instance, in the event where a Court can choose between different alternatives, it would choose the one that best advances fundamental rights. In the same way, regarding competition law and sustainability, the Court could perhaps try to find a way to include sustainability as far as legally possible in its evaluation and hence choose the most pro-environmental road. This way interpretation of regulation might be seen to be supported by the following provision of the Article 191 (2) TFEU:

> *Union policy on the environment shall…be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.*

This principle has been stipulated in the CJEU jurisprudence as follows:

> *It follows that the precautionary principle can be defined as a general principle of Community law requiring the competent authorities to take appropriate measures to* ***prevent*** *specific* ***potential risks*** *to public health, safety and the* ***environment****,* ***by giving***

[20] EU: Aims and values.
[21] Nowag 2019, p. 9-10.

> ***precedence to the requirements related to the protection of those interests over economic interests***. *Since the Community institutions are responsible, in all their spheres of activity, for the protection of public health, safety and the environment,* ***the precautionary principle*** *can be regarded as* ***an autonomous principle stemming from the abovementioned Treaty provisions***.[22] (emphasis added)

In addition to these sources, Article 37 of the EU Charter of Fundamental Rights underlines the importance of the environment in EU policies as follows:

> *A high level of environmental protection and the improvement of the quality of the environment* ***must be integrated*** *into the policies of the Union and ensured in accordance with the principle of sustainable development.*[23] (emphasis added)

Holmes states in relation to this charter, that *the EU could be in breach of its international obligations if it did not integrate climate change and environmental protection into competition policy*.[24]

In addition to all the reasons mentioned above, there is also the fact that environment is a current spearhead. The European Commission has set[25] six goals for the period 2019-24. One of these goals is the Green Deal[26] which stipulates the EU will become the first carbon neutral continent by 2050.[27] The Green Deal states the need for a holistic approach whereby all EU policies take part into reaching the Green Deal's goals.[28] In the Green Deal's annex, that contains key actions, one of the objectives is explicitly stated as *Mainstreaming sustainability in all EU policies.*[29]

Therefore, there are legal grounds for taking sustainability into account in the field of competition. Another question is, is it considered legitimate. I will next examine this by presenting legal experts' views on the issue.

4.1.1.2 Legal experts

Legal experts differ in their views on the goals of competition. According to some, competition law should focus on its traditional task and not meddle with other goals such as sustainability. Other experts on the other hand find that competition law should find ways to promote sustainability. In this

[22] Artegodan and others, paragraph 184.
[23] Charter of Fundamental Rights of the European Union, paragraph 37.
[24] Holmes 2021, p. 6.
[25] More on how the priorities are set, please refer to https://ec.europa.eu/info/strategy/priorities-and-goals/how-priorities-are-set_en. (EC: How priorities are set)
[26] EC: The European Commission's priorities.
[27] EC: 2050 long-term strategy 08/21 and EC: A European Green Deal.
[28] European Council: European Green Deal.
[29] EC: The European Green Deal Annex, p. 2.

chapter I will present some views pro and contra widening the goals of competition law from the traditional view of maximizing consumer welfare in the economic sense.

Some argue that there are plenty of public policy objectives so how could one goal be more important than another. Peeperkorn for instance states that there have been calls to make sustainability an explicit goal of EU competition law and to take sustainability into account when dealing with individual competition law cases. He claims that the "around twenty goals" set in the EU Treaties have no hierarchy[30] and *it would not be possible to single out (arbitrarily) one goal to be balanced against consumer welfare, while ignoring other goals* nor would it be possible to balance it against all goals.*[31]* He justifies this in part by Jan Tinberger's view that there should be at least as many policy instruments as there are goals, and one goal should be allocated to each instrument. According to Peeperkorn trying to achieve different goals with each policy instrument leads to *slow, costly and unpredictable outcomes for every policy instrument.*[32] This idea can be valid in a normal situation where concentrating in specialties is better than the situation where all are generalists. But this is not the case. We are not in a normal situation but in an urgent situation where every reduction in emissions counts. Therefore, instead of finding out excuses and playing with semantics, we should all concentrate on finding the best ways to contribute.

Peeperkorn also states that taking positive effects contributing to other goals into account presupposes that these benefit consumers. In addition, he states that the consumer welfare goal should not be replaced with a total welfare goal nor can consumer welfare, defined in the traditional sense of economic benefit, be balanced against other policy goals.[33] He concludes that climate policies on e.g., greenhouse gas emissions and competition policy are complementary, and they should each pursue their own goal.[34] He therefore suggests that other goals could not be pursued if they would not fit into the normal scenario of aiming to enhance consumer welfare. In this way, the guidelines Peeperkorn refers to would have power over the TFEU to dictate what kind of goals could be pursued. I find this controversial as the guidelines in hierarchy are under the TFEU as primary EU law and hence if it is stated in TFEU that certain goals must be considered in all policy areas, the guidelines should not be able to state otherwise.

[30] Peeperkorn 2020, p. 22.
[31] Id., p. 21.
[32] Ibid.
[33] Id., p. 17-19.
[34] Id., p. 26.

Schinkel and Treuren state that the green antitrust movement, as they call it, risks doing damage to both competition and sustainability.[35] They argue that companies would promote sustainability more in a competitive situation than when they are exempted from settled competition law enforcement criteria because of possible sustainability gains. They firmly believe that if the competitors are allowed to set minimum sustainability standards in co-operative self-regulation, they have an incentive to set the bar lower and slower than in a competitive setting.[36] Likewise, Schinkel and Spiegel state that *sustainability coordination induces the lowest levels of investment in sustainability and makes consumers worse off than they are absent collusion*[37]. They point out that their view on the issue is at stark contrast to the emerging policies in that they find coordinating investment levels undesirable but promote the possibility of firms to coordinate their output levels or prices.[38] It might be true that when firms can co-operate with the sustainability ticket, the end result can be worse than in a situation where they compete with sustainability. I think however, that the infrastructure needs to be in place before demand can exist. In that way, it could be better that companies can co-operate in order to create sustainability gains and after the development has started, then the consumers could make their choices from existing products. It demands quite a lot from an individual to be able to choose the most sustainable product. When there is a wider selection of sustainable products and through this also consumer awareness, then the demand side might be able to drive sustainable outcomes in a competitive setting.

Holmes states that the discussion about the goals of competition law is an 'endless debate'. He then points out *that consumer welfare, in the narrow sense of consumer surplus, appears nowhere in the treaties and at most should only be part of a much wider set of goals focusing on both the competitive process and the core goals of the treaty set out above, including for present purposes, sustainability.*[39] He also states that, *climate change is an existential threat and of a different order of concern to all the other issues (important as they may be). There is a moral and economic imperative to mobilise all policy tools to combat this*.[40] Holmes strongly supports sustainability aims and it seems he would change the setting so that other goals are subordinate to sustainability. The question therefore would not be whether other policies should take sustainability into account but how can they fit into the targets of sustainability.

[35] Schinkel & Treuren 2020, p. 20.
[36] Id., p. 18-19.
[37] Schinkel & Spiegel 2017, p. 374.
[38] Id., p. 392.
[39] Holmes 2021, p. 9.
[40] Holmes 2021, p. 5.

Dolmans finds several reasons for why sustainability is a superior goal to the other goals and should be promoted.[41] He concludes with stating that *taking environmental goals into account in competitive analysis is proportionate, necessary, and legal under the EU treaties. Given the unique, urgent, and existential importance of the climate emergency, an assessment of sustainability does not necessarily create a precedent for other policy goals. Other, less urgent objectives should be assessed on their own merits.*[42] I think Dolmans has got this right: we are facing a new situation which has no precedent. The threat is of a different kind than the ones EU has had to face earlier. Taking sustainability into account is unique and does not constitute a slippery slope with regard to other goals now and in the future.

Suzanne Kingston states it is "severely outdated" to suggest that the competition authorities and courts should disregard environmental factors in their actions. She backs this view up with three key points. Firstly, it would be inconsistent that the EU demands businesses to take pro-environmental initiatives while being discouraged *by the chilling effect or potential competition enforcement*. Therefore, competition policy must act in conformity with other Green Deal policy initiatives and in addition desirably play its part. Secondly, Article 11 TFEU explicitly demands integratating environmental protection into all other EU policy areas. According to the rule of law, the Commission must act in accordance with the Treaties. Hence there is no constitutional legitimacy to adopt an "isolationist approach". Lastly, she refers to the point that environmental economics is a discipline that has for over 20 years investigated how environmental goods could be quantified. As more and more people see climate change as a serious problem and promote environmental protection, the morals transform into market sentiments.[43] This means that sustainability could be quantified and when people find sustainability an important value, they are willing to pay for it and hence it becomes something that the market can solve.

Clifford Chance state in their contribution paper for the Commission, that in the long run the environmental crisis will affect all other policy issues, if preventative steps are not taken. This is not the case vice versa since for instance higher unemployment does not directly impact climate change. *An increasing number of droughts, wildfires, storms and floods, exhausted resources, reduced food production, will result in social unrest, considerable employment issues and reduced welfare on a*

[41] Dolmans 2020, p. 10-11.
[42] Id., p. 11.
[43] Kingston 2021, p. 4-5.

general basis.[44] I find this a very important argument. Taking sustainability into account will enable taking better care of the globe which in turn promotes peace.

Coates and Middelschulte also note that competition rules themselves are not the goal and they should be interpreted in the context of the EU treaties' fundamental principles.[45] I find this a key factor: understanding competition policy as a means to what the EU strives for at any given time is essential. What is the legitimacy of competition if not promoting EU's values more broadly?

The majority of legal experts find it legitimate to take sustainability into account in the field of competition law and seek ways to support it with legal sources and arguments. In addition to legal provisions and the opinions of legal experts there is also one more issue that supports the connection of sustainability and competition: market failures.

4.1.2 Market failures

Even more grounds for competition law taking part in the big bee can be found from looking at the concept of market failures. When the market doesn't fix problem this is because of market failures: In a perfect world, there would be no need for laws and government. I believe that in this world the globe would not be in the verge perishing because of people seeking their own interest at the cost of the environment. The fact is, that we have central administrations and laws to keep things in place. It seems evident that laissez-faire does not work when looking at the environmental state of the globe. Dolmans points out three reasons, i.e. market failures, why the market cannot be left to handle the climate. Firstly, due to negative externalities, the price of the product is not the true price but a portion of it. In this situation, production costs are not paid by the producer or buyer but borne by society as a whole. The protection of consumers prerequisites that this market failure is not ignored. Dolmans also sees that coordination problems result in a poor situation climate-wise. Individuals tend to make choices in order to maximize their well-being in short run instead of in the interest in the common good, since they do not coordinate their actions, e.g. why pay for green products when others won't do the same. Thirdly, due to the eco-paradox, choices made can be bad from the climate point of view. People will claim that they care for the environment but still make bad choices and sacrifice the environment for small benefits. Much of it has to do with information asymmetries: people do not know what will happen, think that their actions don't make a difference or that the future costs are smaller than they will end up being.[46]

[44] Clifford Chance 2021, p. 10-11.
[45] Coates & Middelschulte 2019, p. 323.
[46] Dolman 2020, p. 5-7.

In the ICC's paper, the problem is explained in a clear way. The ICC paints a picture of a market where consumers perceive sustainability worth paying extra for and companies can compete based on innovation, quality and a sustainable reputation. In reality, however this is not the case because of market failures taking place both on the demand and supply sides of the market. Consumers are not willing to pay extra, or enough extra for sustainable products and companies are afraid of taking the first steps alone and suffering from a first-mover disadvantage.[47]

When everyone has access to, but no one owns a certain resource, an individual may act in favor of its individual interest. This tragedy of commons takes place in the environmental sphere where overuse of resources degrades the environment.[48]

I think that people are prone to think that their actions do not matter in the bigger picture. The threat might not be easy to detect in everyday life and choices might be poor for several reasons. Nudging people in the right direction should be part of the toolkit for improving the sustainability state of affairs. I think that these market failures explain well why sustainability should be promoted at every turn. The invisible hand is not here to help, but competition law just might be.

4.1.2.1 Summa summarum

Based on the preceding sources it seems evident that competition law should very much take sustainability into account and participate in achieving a cleaner and more sustainable future. Sustainability is not a desirable goal to be considered but a mandatory part of the equation. In addition, based on many legal experts' views, this form of action is considered legitimate.

Following recent events and especially the EU Green Deal, the goal of a more sustainable future is even more clear. In this era, every reduction in emissions counts and it is vital that sustainable goals are sought from many angles. Needless to say, competition law was primarily created to protect competition rather than promote sustainability. Holmes states, that *competition is not an end itself but a means to an end, a means to achieve other goals.*[49] He argues that *just because competition law cannot do everything, it does not mean that it cannot do anything.*[50] Like Dolmans states, *competition policy can be part of the solution rather than part of the problem, as one tool in a range including regulation, carbon taxation, emission trading systems, and innovation*.[51] Some might argue that the cobbler should stick to his last. I disagree. If the situation could have been cleared by everyone

[47] ICC 2020, p. 2–3.
[48] Id., p. 3.
[49] Holmes 2020a, p. 36.
[50] Id., p. 2.
[51] Dolmans 2020, p. 4.

sticking to their lots, we would not be in this situation where experts stress that, we are facing the last opportunities to secure a "liveable future".[52] Competition policy and law are there to help other goals to be achieved. Currently, sustainability is a goal that needs all policy areas and all instruments to contribute.

Even though there might be pressure to interpret rules in favor of sustainable practices, this shouldn't be done contra the existing legal framework. Vice versa, promoting sustainable goals in the field of competition law shouldn't be hindered if there are no explicit rules against doing so. The next question is, can sustainability be found in the existing provisions of competition law or should competition law be amended to allow room for the sustainable interpretation and to execute the task of taking sustainability into account as all policies have been required to do?

4.2 Competition law – a knight in a shining armor? (the "could")

4.2.1 Is the shield mightier than the sword?

In executing its task of taking sustainability into account, various possibilities for action in competition law can be distinguished. This culminates in two categories: competition law can work as a sword or as a shield. The former entails assessing how competition law can be interpreted in order to prevent or prohibit undesirable outcomes from a sustainability point of view, whereas the latter entails assessment of how competition law can be interpreted in order to support sustainability by allowing certain actions that foster sustainability.[53]

Could competition law work as a knight in a shining armour by protecting and supporting sustainability? Nowag argues that the cases for the use of sword are few and suggests that it should stay so. He seems to think the Commission should focus on working within the boundaries set by the relevant legislator. The use of shield however comes handier.[54] Iacovides and Vrettos on the other hand are of the opinion that the discussion has been too focused on the ways competition law can facilitate otherwise anticompetitive actions by providing sustainability initiatives in exchange for less competition.[55]

[52] *The cumulative scientific evidence is unequivocal: Climate change is a threat to human well-being and planetary health. Any further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all.* IPCC 2022, p. 37.
[53] Nowag 2021, p. 12.
[54] Nowag 2019, p. 9.
[55] Iacovides & Vrettos, p. 93.

The framework of this thesis is investigating whether co-operation between companies could be allowed when there are sustainability gains to be achieved. Therefore, I will not examine further the use of the sword as a possibility for competition law to enhance a sustainable state of affairs. The subject of this thesis however presupposes an excursion into how competition law can work as a shield for sustainability. In the next chapter I will look at what are the legal boundaries to companies' co-operation in the field of sustainability.

4.2.2 Sustainability co-operation – walking on thin ice?

4.2.2.1 The basic framework and the easy way out

Companies have obligations regarding sustainability goals as the continent is striving towards the goal of climate-neutrality, that is net-zero greenhouse gas emissions, by 2050.[56] In addition to this, many companies might value sustainability as such and strive towards innovating sustainable solutions be it for benevolent or, business purposes, or both.

Coates and Middelschulte point out key reasons why achieving sustainability goals effectively requires co-operation among industry peers. Firstly, unilateral actions might lead to *a "first-mover disadvantage" unless consumers are willing to pay a "sustainability mark-up".*[57] This means in essence that the first company to move towards a more sustainable and costly direction might suffer when its rivals keep cheaper prices and consumers are not willing to pay a higher price. Secondly, they state that *most sustainability initiatives only get traction if driven by broader industry coalitions, e.g. reflected in common branding.* They provide an example of this in package sizing where consumers normally tend to buy larger packages notwithstanding the fact that different size packages would contain the exact same amount of product.[58] This seems logical as consumers are not rational and hence the choices made by individual might focus on maximizing the amount of the product while minimizing the amount of monetary loss.

In addition to that, I believe, that co-operation between competitors can enhance the possibility of coming up with creative sustainable solutions that enable the path towards a more sustainable future. There are however pitfalls, that should be avoided, and a company should be aware of the boundaries set for alll co-operation between competitors even in the context of sustainability goals. Co-operation can be implemented by joint actions and contracts between rivals, which might make them anticompetitively doubtful. As Huimala et al. point out, this co-operation can make the cartel ban

[56] EC: 2050 long-term strategy 12/21.
[57] Coates & Middelschulte 2019, p. 325.
[58] Ibid.

applicable.[59] To meet sustainability needs, co-operation is desirable. The assessment of the boundaries, possibilities and requirements for co-operation should start from evaluating existing norms keeping in mind their order of hierarchy. In the European Union the rules for co-operation from the competition law point of view are set as follows.

The treaties of the EU form the basis for the whole EU law paradigm. These treaties form the framework within which all other legal instruments must fit.[60]

The Treaty on the Functioning of the European Union (TFEU) 101 Article prohibits *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.* The exception to this rule is set in the Article 101 (3) which states as follows:

> *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.*

Nowag distinguishes two ways of supportive integration of sustainability (shield) i.e. *interpretation of the competition provision in order to allow sustainability measures.* The first is scope.[61] Needless to say, it is not relevant to investigate any issue further if the situation itself does not fall within the scope of the competition law. I call this the easy way out.

There are several ways in which sustainability co-operation can escape being prohibited as an anti-competitive agreement. The conversation on balancing sustainability and competition should start

[59] Huimala et al. 2020, p. 507.
[60] On EU law and its levels, please see for instance: https://ec.europa.eu/info/law/law-making-process/types-eu-law_en. EC: Types of EU law.
[61] Nowag 2019, p.5.

from enlisting the simpler ways and only then proceed towards the more controversial ones. The options can be categorized as follows.

1. Is the company an undertaking at all – if not, Article 101 TFEU does not apply to its agreements
2. State action defence – when a state forces by regulation or "irresistible pressure" the stakeholders to act in a certain manner
3. De minimis – when the contracting parties have market shares that stay under certain limits

As Nowag and Teorell point out, these options provide little room for manoeuvre for companies and are only available if a company already is in such situation.[62]

Nowag and Teorell also present various measures[63] which companies can take in order to escape the application of Article 101 TFEU and therefore the balancing assessment of sustainability and competition. The parties can for instance scale down or reduce the effects of the agreements. In addition, companies can arrange an agreement so that it is "not likely to restrict competition", as in this case the agreement would fall outside the scope. One of these categories is standardization agreements.[64] In this thesis it is however not possible to look more in detail into these options as they fall beyond the scope of this thesis.

Nowag and Teorell also consider briefly the possibility of concluding sustainability agreements through a platform that connects buyers and sellers. They find it to have a lot of potential and unlikely to be targeted without other platforms such as Über first being targeted.[65] There is therefore plenty of options for how to escape the cartel clause without having to lean on the exception in Article 101(3). As Nowag puts it, *it is only where it has been established that a measure by one or more undertakings is adopted voluntarily and restricts competition by object or effect, that it needs to be asked whether the benefits outweigh the harm.*[66] This is the second form of balancing when it comes to supportive integration of sustainability (shield).

The essence of this thesis is to find out the answer to whether companies can co-operate when there are sustainability gains to be achieved. This boils down to the question of whether sustainability can play a role in the assessment of benefits ("allowing consumers a fair share of the resulting benefit")

[62] Nowag & Teorell 2020, p. 11-12.
[63] See also Middelschulte 2020, p. 45.
[64] Nowag & Teorell 2020, p. 12.
[65] Id., p. 12-13.
[66] Nowag 2019, p. 8.

and how could it be done in practice. This in turns demands breaking down into elements and defining what constitutes a benefit and who is the consumer concerned in the analysis.

In the next chapter I will first systematize the relevant legal provisions related to the question of fair share of benefits to consumers. I will then look into jurisprudence concerning the key elements of this concept and its preliminary question concerning consumer welfare. After this I will look at what are the legal experts' views on the issue.

4.2.2.2 Benefits outweighing the harm: defining the fair share of benefits for the consumers

4.2.2.2.1 Legal documents forming the base interpretation

The primary law, that is the EU Treaties, sets the framework for all other legal provisions in the EU. As a ground rule, co-operation is prohibited if it might restrict competition. Co-operation can however be allowed, if certain other (enlisted in chapter 4.2.2.1) requirements are fulfilled and consumers are allowed a fair share of the resulting benefit. The TFEU does not entail further guidance on *how* the fair share of the benefits for consumers should be defined.

As the Treaties do not provide answers, the solution should be searched from sources of secondary law that consists of regulations, directives, decisions, recommendations and opinions. Some of these sources are binding and some merely provide guidance. These sources of secondary law can be found from the TFEU 288 in the following form:

> *To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.*
>
> *A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*
>
> *A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*
>
> *A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.*
>
> *Recommendations and opinions shall have no binding force.*

I will next examine, in this order, what has been said about the fair share of benefits for consumers in these acts.

The regulation that contains rules for the implementation of Article 101 TFEU is Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. As a ground rule, the burden of proof according to the Article 2, is on the party or the authority alleging the infringement of Article 81(1) or of Article 82. However, in claiming the benefit of Article 81(3) of the Treaty, the undertaking or association bears the burden of proof on that the conditions of that paragraph are fulfilled.[67] This means that the companies claiming that consumers have received a fair share of benefits must prove this is the case. Proving it means providing evidence and concrete information on e.g. what is the benefit and how has it been accrued by consumers. The regulation leaves open the concrete advice on how this should be executed.

Prior to the regulation, the system leaned on asking the Commission for a decision that the criteria for exemption were met for a particular agreement. However, with the current regulation, the system leans on companies' self-assessment of agreements' likeliness to fall under the exemption. Tyagi states that *following the modernization of the EU competition law, the possibility of individual assessment has been done away with, and for competitors that wish to co-operate, they currently need to self-assess the compatibility of their practice, and decide whether it is in breach of competition laws*.[68]

In the old system, the Commission held the power of assessing agreements and defining the boundaries. In this new decentralized enforcement era, as Or Brook calls it, the power has been distributed so that the national competition authorities ("NCAs") and national courts apply Article 101(3) in parallel with the Commission. The NCAs have to apply EU competition law provisions where an agreement affects trade between Member States, and EU competition law enjoys supremacy over conflicting national competition laws in such an event. Or Brook states that the Commission has been from the start, *concerned that the decentralized enforcement would result in the incorporation of national interests in the application of Article 101(3)*. To tackle this, the Commission reframed Article 101(3) in the Modernization White Paper[69] as follows:

to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations.[70]

[67] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 2. Note that the Article 81(1) is equivalent to existing Article 101(1) TFEU and Article 81(3) is equivalent to existing Article 101(3) TFEU.
[68] Tyagi 2020, s. 4.
[69] Brook 2019, p. 135-136.
[70] EC: White Paper, paragraph 57.

The Commission therefore stated that the assessment is economic and ruled out the possibility for "political consideration". As I understand this, what the Commission precisely intended to do, was to limit the evaluation to mere price effects and rule out the possibility to take other public policy objectives, e.g. environmental effects, into account.

In 2004, the regulation was followed by the Commission's guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), i. e. the application of Article 101 (3) of the Treaty. The purpose of these guidelines was to clarify the Commission's view on how the Article 101 (3) should be applied, which by no means restricts the way the Court of Justice or the General Court interpret the Article.[71]

In these so-called general guidelines, the relevant provisions regarding fair share for consumers, can be found in sections 83-104. The concept of consumer is stated in paragraph 84 as follows:

> *The concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles.*

This view on consumer is wide and considers buyers as well as final consumers.

According to these guidelines paragraph 85:

> *The concept of "fair share" implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1). In line with the overall objective of Article 81 to prevent anti-competitive agreements, the net effect of the agreement* ***must at least be neutral from the point of view of those consumers directly or likely affected by the agreement****. If such consumers are worse off following the agreement, the second*

[71] According to the section 7 of the guidelines: *With regard to a number of issues, the present guidelines outline the current state of the case law of the Court of Justice. However, the Commission also intends to explain its policy with regard to issues that have not been dealt with in the case law, or that are subject to interpretation. The Commission's position, however, is without prejudice to the case law of the Court of Justice and the Court of First Instance concerning the interpretation of Article 81(1) and (3), and to the interpretation that the Community Courts may give to those provisions in the future.*

> *condition of Article 81(3) is not fulfilled. The positive effects of an agreement must be balanced against and compensate for its negative effects on consumers. When that is the case consumers are not harmed by the agreement. Moreover, society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources.* (emphasis added)

This view suggests that fair share in essence is an amount of total but not total itself. I think this is in line with the wording "fair" share – it is not "total" share.

The guidelines also contain a chapter concerning general principles. In this chapter paragraph 43 states that: *The assessment under Article 81(3) of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates.*[72] Peeperkorn argues that based on this paragraph, the relevant market for evaluation of positive and negative effects for consumers should take place in the same market and not across different groups of consumers in different markets. He states that this view has not "really" been questioned by case law and is also explicitly stated in the general guidelines paragraph 43.[73] I would however emphasize the wording "in principle". This in essence means, that there is room for interpretation. I would claim that if the room for interpretation was intended to be extremely narrow, the wording would also have been more along the lines of "the assessment could only in very exceptional situations be made in other ways than by within the confines of each relevant market to which the agreement relates". I would also stress that the guidelines are almost twenty years old, and the world has changed from those days quite a bit. In addition, the guidelines cover all sorts of activities and work as guidelines so they need to generalize and simplify situations. Hence when other evidence points towards considering benefits in different markets, I would not refer to this paragraph as grounds for objection.

In addition to these guidelines, the Commission has also published guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01). These so called horizontal guidelines are intended to assist businesses in their assessment of the compatibility of an individual co-operation agreement with Article 101. The guidelines are in essence guidelines and the Commission points out; they do not conclude a mechanically applicable checklist suitable for all purposes.[74] The Commission underlines, that the

[72] General guidelines, paragraph 43.
[73] Peeperkorn 2020, p. 19.
[74] See horizontal guidelines paragraph 7.

Court of Justice of the European Union is by no means bound by the guidelines.[75] The guidelines should be read in conjunction with the general guidelines referred to above.[76] In paragraph 49, the following is stated:

> *consumers must receive a fair share of the resulting benefits, that is to say, the efficiency gains, including qualitative efficiency gains, attained by the indispensable restrictions must be sufficiently passed on to consumers so that they are at least compensated for the restrictive effects of the agreement; hence, efficiencies only accruing to the parties to the agreement will not suffice; for the purposes of these guidelines, the concept of 'consumers' encompasses the customers, potential and/or actual, of the parties to the agreement.*

This wording (together with general guidelines paragraph 85 referred to previously in this chapter) points to the direction that the compensation for the harmed consumer doesn't necessarily have to make up for the harm done, as long as there is sufficient passing of benefits to that consumer. It is clearly stated that mere efficiencies for contracting parties will not suffice but the consumer must also benefit from the agreement. It does, however not, define more clearly the amount to make up sufficiency and does not stipulate the form of the benefit.

Looking merely at Article TFEU 288 it seems that the role of guidelines is that of only guidance as they are not binding. Case law and reality has however pointed out that this is not the case and the guidelines actually have significant relevance in defining the boundaries for co-operation among competitors.

In the case Archer Daniels Midland Co I[77] , the Court stated that

> *It should be noted in that regard that, whilst rules of conduct designed to produce external effects, as is the case of the Guidelines, which are aimed at traders, may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (see, to that effect, Dansk Rørindustri and Others v Commission, paragraphs 209 and 210).*[78]

[75] See horizontal guidelines paragraph 17.
[76] See horizontal guidelines paragraph 19.
[77] Archer Daniels Midland Co. and Archer Daniels Midland Ingredients Ltd v Commission of the European Communities.
[78] Id., paragraph 91.

In Archer Daniels Midland Co II[79], the Court stated that

> *First, the Guidelines are capable of producing legal effects. Those effects stem not from any attribute of the Guidelines as rules of law in themselves, but from their adoption and publication by the Commission. By adopting and publishing the Guidelines, the Commission imposes a limit on its own discretion; it cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations and legal certainty (see, to that effect, Dansk Rørindustri and Others v Commission, paragraph 41 above, paragraphs 209 to 212).*[80] In Grimaldi[81], the Court stated that *The reply to the question asked by the tribunal du travail, Brussels, must therefore be that in the light of the fifth paragraph of Article 189 of the EEC Treaty, the Commission Recommendation of 23 July 1962 concerning the adoption of a European schedule of occupational diseases and Commission Recommendation 66/462 of 20 July 1966 on the conditions for granting compensation to persons suffering from occupational diseases cannot in themselves confer rights on individuals upon which the latter may rely before national courts . However, national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law.*[82]

Guidelines hence have a remarkable impact on how the agreements are assessed not only by companies, but by all other stakeholders excluding the Court. The Court might however also interpret provisions in the light of these guidelines, but it is not bound by them or required to do so.

Companies most likely use the guidelines to assess their situation. If the companies find the guidelines point to the direction that the benefits are hard to prove, they would probably refrain from co-operation. Kingston states that the limits of this Article *are widely considered to be unclear…the fact that the Commission's 2004 Article 101(3) Guidelines are at times difficult to reconcile with the approach of the EU courts, and with the Commission's own past practice, illustrates the confusion in this area well, and adds to this confusion.*[83] The guidelines and the situation hence do not encourage

[79] Archer Daniels Midland Co. v Commission of the European Communities.
[80] Id., paragraph 43.
[81] Salvatore Grimaldi v Fonds des maladies professionnelles.
[82] Id., paragraph 19.
[83] Kingston 2012, p. 261.

co-operation when there is even a slight chance of a unclear situation, which is the case with sustainability benefits.

In addition to these guidelines, there are no other relevant guidelines or notices that would touch upon sustainability or consumer welfare. While the guidelines fall under the category of recommendations and opinions in Article 288 TFEU and therefore have legally merely role of guidance, the Commission however is bound to its guidelines and notices[84] and these documents provide the answers to how the Commission interprets legal sources. The guidelines probably also limit case law in that the national courts already have binding guidance on how to assess situations and hence they have no reason to seek preliminary rulings on issues covered by the guidelines. This leads to a situation where the Court has no possibility to steer the case law as no cases are brought to it for consideration. Therefore, the guidelines actually form the de facto rules for the interpretation and work as a gatekeeper and hence most likely are considered as a powerful legal norm when companies consider what co-operational agreements they can enter.

The Commission has published a group of block exemption regulations whereby certain activities are directly allowed if they fall under the exceptions laid down in these instruments. The block exemption regulations relevant to this thesis are the R&D and specialisation block exemption regulations (together 'Horizontal Block Exemption Regulations' or 'HBERs'). The purpose of these regulations is to *exempt from the prohibition of Article 101(1) of the Treaty those R&D and specialisation agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.*[85] The idea is that, if a company can fit its activity under the block exemption, it no longer has to evaluate whether all the Article 101(3) requirements are met spesifically but is directly allowed to enter into co-operation with its rival. These block exemptions contain no references to sustainability or the environment. Therefore, they will not be investigated more into detail in this thesis. Also, there is no directive covering the fair share of benefits for consumers.

It can be concluded that even though the foundation is set in legal documents, these provisions leave a lot of room for interpretation. Hence, I will next look at how this issue has been dealt with in the case-law, followed with a summary of legal experts' thoughts on the issue.

[84] Brook states, that although they are an important source of influence over the interpretation of EU competition law, they are self-binding on the Commission alone. Brook 2019, p. 123.
[85] EC: Horizontal agreements between companies – revision of EU competition rules.

4.2.2.2.2 Case law on fair share of benefits for consumers

Companies no longer have the possibility to notify their agreements prior to entering into them to be sure they will be acceptable. Instead, companies are required to self-assess their agreements based on the rules provided by the EU. As explained before in this chapter, the relevant sections are somewhat vague and leave room for interpretation. When looking at how the law should be interpreted, case law is essential. In this chapter I will look at the cases which are relevant for the research question of this thesis to pinpoint how the provisions should be interpreted.

To understand whether co-operation can be defended with sustainability arguments, each component of fair share of benefits for consumers must be evaluated carefully. I think that this question boils down to defining who the consumer is and what is the content of welfare and more specifically benefit. In this way we can ask the following questions:

a) should **the consumer** receiving the welfare benefit be the same one that is suffering from the restriction of competition and
b) can **benefit** mean something which is not measurable in monetary units

There are only a few cases concerning environmental or sustainability directly benefits. There are however cases concerning the consumer welfare standard in general and more specifically, what has been held to constitute a benefit that would allow the exemption in Article 101 (3) to apply. Next, I will summarize the relevant case law after which I will present legal experts' opinions on the issue.

4.2.2.2.2.1 Consumer welfare

As stated previously in this thesis, the main objective of the EU competition rules is to ensure the proper functioning of the EU's internal market and to maximize the welfare of different stakeholders.[86] As competition law strives towards enhancing welfare, sets defining consumer welfare the base for defining the more detailed question of what constitutes the fair share of benefits for consumers. I think it is logical to say that for an element to constitute a consumer benefit, it would need to augment consumer welfare. If welfare it not augmented, the element would not benefit the consumer. It is hence an important preliminary question to ask, what constitutes consumer welfare.

The concept of consumer welfare was first presented in antitrust law in the United States in the 1960's by scholar Robert Bork. In the United States, the concept remains disputed and there is no clear definition on how it should be seen in the US antitrust. The concept of consumer welfare was first

[86] See chapter "should".

introduced to European competition law in the 1997 Green Paper on Vertical Restraints.[87] In this green paper, it was stated as follows:

> *To further the interest of the consumer is at the heart of competition policy. Effective competition is the best guarantee for consumers to be able to buy good quality products at the lowest possible prices. Whenever in this green paper the introduction or protection of effective competition is mentioned, the protection of the consumer's interest by ensuring low prices is implied.*[88]

The concept was further developed and the term itself mentioned in connection with the modernization package[89] in 2004.[90]

The concept was meant to clarify and bring uniformity. Nevertheless, the meaning of consumer welfare remains disputed, and unclear and instead of clarity, has brought confusion.[91] The definition of consumer welfare cannot be found in any binding legal instrument, and the Commission and the Court of Justice of the European Union have differing views on the status and content of consumer welfare.[92]

Daskalova points out that even though consumer welfare is stated to entail more attributes than merely price, the Commission uses price effects as "shorthand" for the other parameters.[93] Daskalova argues that there has been a change in the language[94] of the Commission relating to consumer welfare. It seems that the Commission is moving away from emphasizing price and consumer welfare as the ultimate goal[95] of the EU competition law. Daskalova points out that the consumer welfare standard has not disappeared but that it is moving towards being of "price, quality and choice".[96] There are other goals and recently consumer welfare has been established as one of the goals of the EU competition policy instead of being the ultimate goal of it. Commission has moved away from understanding consumer welfare as a narrow consumer surplus standard. According to Daskalova,

[87] Daskalova 2015, p. 140–143.
[88] EC Green Paper, p. 32 paragraph 54.
[89] Consumer welfare can be found from 2004 Notice on the application of the former Article 81(3), the Guidelines on the Application of the former Article 81 EC to technology transfer agreements (2004), the Merger Guidelines (2004).
[90] Daskalova 2015, p. 140–143.
[91] Id., p. 131 and 142.
[92] Id., p. 132–133.
[93] Id., p. 145–146.
[94] For instance, the 2010 Block Exemption Regulation on Vertical Restraints and the related guidelines as well as the 2011 Guidelines on the applicability of article 101 of the TFEU to horizontal agreements are missing a proper reference to consumer welfare.
[95] Daskalova writes *recently, we see fewer statements from the Commission claiming that consumer welfare is the (ultimate) goal of (EU) competition law.* Daskalova 2015, p. 146.
[96] Id., p. 146.

competition policy is not be seen as an independent legal discipline but *a strategic tool, influenced by the broader objectives of the Union – and […] it has a regulatory agenda*[97]. I think that this means that competition policy should be interpreted in a way that supports other EU goals, such as sustainability. Hence, instead of being the end itself it would constitute a means to an end, which can for instance be sustainability. Based on this change, the Commission could have seen to have diverted from a narrow isolistic view of promoting consumer welfare and sees that competition policy can be part of a wider set of EU goals.

Daskalova points out a few examples where concerns about choice and innovation have weighted more than price. Even though these cases are not related to Article 101 TFEU, I believe they provide analogy to how benefit could be perceived and argumented under Article 101(3). Daskalova argues that the Commission's 2004 Microsoft decision[98] in essence was about competitors' possibility to sell an alternative product rather than protecting consumers from price hikes. She also is of the opinion that the later Microsoft decision[99] was about preserving choice and innovation, i.e., foreclosing, rather than protecting consumers. In this Commission decision against Microsoft from 2009, the essence was preserving choice and innovation. Many consumers were happy with the situation and Internet Explorer and no monetary harm was established. The Commission still found that the situation was undesirable. [100] I think that the point in all this is to ensure that competition remains on the market instead of mono-, duo- or oligopoly. I think this is the same idea as in predatory pricing where the consumers benefit in the short term but might suffer in the long term. This idea of protecting consumers from future developments is something that could perhaps be aligned to the arguments for taking sustainability into account: it also protects future developments. Like in the Microsoft cases, consumers were harmed in a short-term way, they were protected for the future. In sustainability cases, this could also be the pattern: first consumers might suffer a bit in the form of a price increase but in the long term they would be protected as the globe would be in better shape. The Microsoft case would then be of protecting consumer welfare in the long run instead of short run. It could perhaps be seen as an investment to future consumer welfare as the price hike now could result as better prices in the future.

[97] Daskalova 2015, p. 147.
[98] COMMISSION DECISION of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft)
[99] COMMISSION DECISION of 16.12.2009 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/C-3/39.530 – Microsoft (tying)).
[100] Daskalova 2015, p. 147–148.

An interesting question is what the view of the Court of Justice of the European Union is on consumer welfare. In the Österreichische Postsparkasse -case the General Court held that *the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers.*[101] According to Daskalova, the reference to "well-being of consumers" might have well been intended as a reference to consumer welfare, which has been lost in the translation of the judgment. Even if the Court meant to refer to consumer welfare, it didn't add anything to the definition but simply referred to Article 101(3) TFEU.[102] I think that it is not in the Court's authority to define the notion when the question does not touch this issue precisely. It can merely consider details of the case and consider what is what in casu. If it would give an opinion outside the scope of the case by setting out what a certain definition means, it would be a political body rather than independent judiciary.

In the GlaxoSmithKline -case from year 2006, the Court of First Instance held that the goal of the Article 101(1) is to prevent undertakings restricting competition and reducing consumer welfare of the final consumer of the products in question.[103] The CFI also stated that mere knowledge that the intention of an agreement is infringement of Article 101 is not sufficient. The CFI required *an analysis designed to determine whether it has as its object or effect the prevention, restriction or distortion of competition on the relevant market, to the detriment of the final consumer.*[104] The CFI held that, in relation to Article 81(3), *the advantages may arise not only on the relevant market but also on other markets and that they are not required to be a direct consequence of the agreement.* [105] I think this case has relevance also for the evaluation fair share as this can be seen to point out that the consumer accruing the benefit might be another than the one suffering from it. This might open the door for evaluating for instance reduced pollution as an advantage. In these kinds of cases, it might, however , be that the analysis required by the CFI in the first place would not lead to constituting an infringement under Article 81(1).

The Court of Justice however noted in the GlaxoSmithKline case in year 2009 that *by requiring proof that the agreement entails disadvantages for final consumers as a prerequisite for a finding of anti-competitive object and by not finding that that agreement had such an object, the Court of First*

[101] Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission of the European Communities, paragraph 115.
[102] Daskalova 2015, p. 149–150.
[103] GlaxoSmithKline Services Unlimited v Commission of the European Communities, paragraph 10.
[104] Ibid.
[105] Id, paragraph 15.

Instance committed an error of law.[106] The Court of Justice pointed out that this interpretation is supported neither by the wording of Article 81(1) EC nor the case-law.[107] The Court of Justice also noted that protecting the interests of competitors or of consumers is not the only goal competition rules. These rules also aim to protect *the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price.* [108]

Daskalova states that the Court did not define what consumer welfare is, but it indicated what it would not accept: *primacy of the consumer welfare and consumer welfare in the sense of consumer surplus*.[109] This, I think, would mean that other values than merely the price, would also matter in estimating the consumer welfare. I find this to support analogically the view that the benefit in Article 101(3) would not require benefit to be economically quantifiable with ease.

Bhatt summarizes that the *decision of the CFI promotes consumer welfare as an ultimate goal and the decision of ECJ aims to cover a broader perspective of competition policy to weigh a balance between structure of the market as well as interest of consumers by giving both of it equal importance in the role play of Competition Policy.*[110] Hence, the ECJ took a step towards a broader perspective which enables wider set of factors to be considered.

The question of whether consumer welfare can include sustainability contains elements of what should be the goal of competition law. If competition law is seen merely as a field of law that maximises monetary welfare, the answer seems quite clear. Looking at the case law previously in this chapter, it seems that the consumer welfare is not a synonym for maximizing monetary welfare but can contain other elements as well. Daskalova points out that the consumer welfare notion is both in US antitrust and European competition policy a notion that remains disputed and creates uncertainty.[111] I believe that this is a good thing as this means that there is room for interpretation and the courts can shape the course of future events and possibilities for tackling the environmental issues.

Based on the previous examples it seems clear that the consumer welfare is at least one goal of competition rules. There is no consensus for the definition of consumer welfare. The Court has however quite clearly stated in the GSK-case in 2009 that in addition to supply or price there can also

[106] GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc v Commission of the European Communities, paragraph 64.
[107] Id, paragraph 62.
[108] Id, paragraph 63.
[109] Daskalova 2015, p. 152.
[110] Bhatt 2020, p. 92.
[111] Daskalova 2015, p. 142.

be other elements in evaluating whether the competition has been harmed. Daskalova states that in the GSK-case from 2009 the Court referred to the CFI's decision in a manner that suggests that the Court has rejected a narrow view of consumer interest where only price counts.[112]

Based on the case law presented above, consumer welfare could mean more than mere economic attributes. I find this very important as welfare indeed can mean much more than money.

4.2.2.2.2.2 The benefit

It has been stated in the previous chapter that consumer welfare can consist other elements than just mere economic elements. Next, I will look at relevant case law in defining the benefit and examine what elements is benefit made of

The Court first opened the door to considering other than direct economic benefits as benefits with the case Metro I in 1977. In this case, the Court stated that *according to the contested decision the conditions of supply for wholesalers under the cooperation agreement are such as to provide direct benefit for consumers in that they ensure continued supplies and the provision of a wider range of goods by retailers for private customers. Furthermore, the lively competition existing on the market in electronic equipment for leisure purposes exercises sufficient pressure to induce saba and the wholesalers to pass on to consumers the benefits arising from the rationalization of production and the distribution system based on the cooperation agreement. 48 in the circumstances of the present case regular supplies represent a sufficient advantage to consumers for them to be considered to constitute a fair share of the benefit resulting from the improvement brought about by the restriction on competition permitted by the commission.*[113]

Brook states following Metro I, that the Commission accepted broad types of benefit as a justification for exemptions including direct and indirect economic benefits as well as *exemptions on the basis of non-economic benefits, such as environmental benefits, development of sports, and allocation and supply of scarce national resources among States.*[114] There are some examples of environmental benefits as follows.

In Assurpol[115] the Commission exempted the Assurpol's agreement with the Article 85 (3) clause. In this decision the Commission stated in conjunction with the fair share for consumer -analysis, that *the prevention measures with which the issue of the policy is associated also contribute to technical*

[112] Daskalova 2015, p. 151–152.
[113] Metro v Commission, paragraphs 47-48.
[114] Brook 2019, p. 133.
[115] Assurpol.

and economic progress and to the protection of the environment.[116] In the decision Assurpol*, the Commission exempted an agreement to set up an economic interest grouping for the co-reinsurance of environmental damage risks. In doing so the Commission considered that the cooperation enabled better assessment of the environmental risks and thus the development of industrial processes that are less hazardous for the environment.*[117]

In Ford/Volkswagen[118], the Commission evaluated the exemption and stated in conjunction with this evaluation that, *it will also be considerably improved with respect to environmental requirements, for example, potentially hazardous materials (e.g. CFCs, PVC) in the final product will be either drastically reduced or totally eliminated. Furthermore, the extent of recyclability will be significantly increased and the MPV is also envisaged to lead the segment with regard to low emissions and fuel consumption.*[119]

In Exxon/Shell the Commission stated when evaluating consumer benefits, that *It should also be noted that the reduction in the use of raw materials and of plastic waste and the avoidance of environmental risks involved in the transport of ethylene will be perceived as beneficial by many consumers at a time when the limitation of natural resources and threats to the environment are of increasing public concern*.[120] In Philips/Osram, the Commission stated in conjunction with the evaluation of consumers that *The use of cleaner facilities will result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities. This positive effect will be substantially reinforced when R& D in the field produces lead-free materials. In addition, the cost advantages resulting from the improvements mentioned above will be passed on to consumers in the form of downward pressure on lamp prices, which have been falling steadily due, in particular, to the development of new types of more modern lamps and to competition from the central and eastern European countries.*[121]

This new path can be seen from the most prominent example combining environmental concerns with competition law, the so called CECED-decision.[122] In this case the Commission granted an individual exception for washing machine producers that wanted to agree upon more energy efficient washing machine models. The Commission allowed this under the exemption of Article 101(3) TFEU (then

[116] Assurpol, paragraph 39.
[117] Vedder 2003, p. 163.
[118] Ford Volkswagen.
[119] Id., paragraph 26.
[120] Exxon/Shell, paragraph 71.
[121] Philips-Osram, paragraph 27.
[122] CECED.

Article 81(3)), and held that this agreement resulted in various ways of benefits for consumers: lower energy costs and lower CO2 emissions. The Court stated as follows:

> *Community pursues the objective of a rational utilisation of natural resources, taking into account the potential benefits and costs of action. Agreements […] must yield economic benefits outweighing their costs and be compatible with competition rules. […] the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines.* ***Such environmental results for society would adequately allow consumers a fair share of the benefits even if no [economic] benefits accrued to individual purchasers of machines****.*[123] (emphasis added)

Proponents of taking non-economic factors into account in the welfare analysis would point out the emphasized part of the decision. I think that such statement could easily be interpreted as a guideline to allow non-economic benefits in the evaluation of the exemption of Article 101(3) TFEU at least in the case benefits in the form of less pollution.

According to Townley, *environmental protection was the Commission's inspiration in CECED*. He however states that it is debatable whether environmental criteria outweighed the economic efficiency in the balance. [124] Peeperkorn goes even further arguing that, the direct benefits for buyers of washing machines were sufficiently compensated in the form of lower electricity bills and water consumption. He states that *the collective environmental benefits resulting from less pollution were neither decisive nor necessary for the positive decision under Article 101*.[125]

The Commission referred to the traditional ways of recouping the losses in stating that the consumers benefitted from the lower electricity bills.[126] I claim that it stated clearly that for instance benefits in the form of less pollution should be taken into account and also meant, that this could be done independently without other benefits. In this situation there were other benefits which mix up the situation. The Commission had to refer to them as well but in the limits it has, I think it did the best it could to point out the relevance of other than mere economic benefits. The explicit statement in paragraph 56 would have meant a beginning of a new era where environmental benefits alone could be sufficient for the exemption of Article 101(3) TFEU to apply.

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[123] CECED, paragraphs 55-56.
[124] Townley 2009, p. 152.
[125] Peeperkorn 2020, p. 20.
[126] CECED, paragraph 52: *Savings on electricity bills allow recouping of increased costs of upgraded, more expensive machines within nine to 40 months, depending mainly on frequency of use and electricity prices.*

These case law examples date back to the era of the Commission's individual assessment of agreements and granting exemptions. Or Brook like many others talk about two eras in the case-law: the pre and the post self-assessing eras. According to Brook: *In conclusion, the empirical findings show that the Commission did not limit the types of benefit that could be examined under Article 101(3) during the era of centralized enforcement. Rather, it embraced the leeway afforded by the wording of the Treaties to consider generously economic and non-economic benefits within the enforcement of EU competition law.*[127] The Court also seems to have had a wide approach to allowing other than mere economic benefits in the analysis.

According to the Commission's and Court's precedence it seems possible to take other than purely economic benefits into account in the evaluation of Article 101(3) TFEU. Another question is, who should this benefit be accrued by, that is what constitutes a consumer. The case law has however not evolved lately due to several factors, of which most important I think, is the uncertainty on how certain agreements will be evaluated. It is a real catch-22 where openings are much-needed. In the following chapter I will look into how the consumer has been defined in the existing case law.

4.2.2.2.2.3 The consumer

In order to investigate what constitutes elements of fair share of benefits for consumers it is evident, that the case law regarding the concept of consumer should also be looked at. This case law also contains elements of defining the relevant market and timespan.

In 2002, the Court of First Instance issued its often-referred judgment on Compagnie Générale Maritime[128]. In this case the CFI stated that

> *For the purposes of examining the merits of the Commission's findings as to the various requirements of Article 85(3) of the Treaty and Article 5 of Regulation No 1017/68, regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market, namely that for inland transport services provided as part of intermodal transport, but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement. Both Article 5 of Regulation No 1017/68 and Article 85(3) of the Treaty envisage exemption in favour of, amongst others,*

[127] Brook 2019, p. 135.
[128] Compagnie Générale Maritime and Others V. Commission.

> *agreements which contribute to promoting technical or economic progress, without requiring a specific link with the relevant market.*[129] The CFI therefore noted that the consumer accruing the benefit does not necessarily have to be the same than the one suffering from the lessened competition. For instance, Provost refers to this as the case for *a broad view in which all gains can be captured, including non-market gains - then burdens the burden of establishing that a "fair" share accrues to consumers harmed by the restriction.*[130]

At the other end of this spectrum are the general guidelines with their narrow view in which full compensation of consumers in the market is required.

In the GlaxoSmithKline case, the CFI cited the case Compagnie Générale Maritime and Others V. Commission and stated that

> *It is therefore for the Commission… to examine whether the factual arguments and the evidence submitted to it show, in a convincing manner, that the agreement in question must enable appreciable objective advantages to be …, it being understood that these advantages may arise not only on the relevant market but also on other markets (Case T-86/95 Compagnie générale maritime and Others v Commission [2002] ECR II-1011, paragraph 343).*[131]

In this case, the CFI held that benefits could rise in different markets and be still held as benefitting the customer: *In the present case, GSK claimed that Clause 4 of the General Sales Conditions would make it possible to secure advantages both upstream of the relevant market, by encouraging innovation, and on the market itself, by optimising the distribution of medicines. As those markets correspond to different stages of the value chain, the final consumer likely to benefit from those advantages is the same.*[132] This still means though that the CFI allowed the procedure, because the consumer benefitting is essentially the same as the one harmed by infringement.

In the case Asnef-Equifax, the Court stated that *Under Article 81(3) EC, it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers.*[133] In the paragraph 72, the Court held that *In the event*

[129] Compagnie Générale Maritime and Others V. Commission, paragraph 343.
[130] Gürkaynak et al. 2021, paragraph 32.
[131] GlaxoSmithKline Services Unlimited v Commission of the European Communities, paragraph 248.
[132] GlaxoSmithKline Services Unlimited v Commission of the European Communities, paragraph 351.
[133] Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administación del Estado Asociación de Usuarios de Servicios Bancarios (Ausbanc), paragraph 70.

that a system for the exchange of information on credit, such as that register, restricts competition within the meaning of Article 81(1) EC, the applicability of the exemption provided for in Article 81(3) EC is subject to the four cumulative conditions laid down in that provision. It is for the national court to determine whether those conditions are satisfied. In order for the condition that consumers be allowed a fair share of the benefit to be satisfied, it is not necessary, in principle, for each consumer individually to derive a benefit from an agreement, a decision or a concerted practice. However, the overall effect on consumers in the relevant markets must be favourable.

These cases allow for the benefit to arise in a different market than the one where the harm has been done. It is not required that the individual consumer is compensated fully for the harm. It is not stipulated in these cases what is the amount of fair share in that how much does the consumer at hand suffering has to accrue to be fairly compensated. I think that these cases would allow for instance clean air as a benefit to be allowed as there is no clear demand on the amount of benefit for that harmed consumer that should be accrued if there is benefit that he/she accrues.

The atmosphere however changed with the judgment of MasterCard, where the Court assessed for instance anti-competitive effects on a two-sided market.[134] In this case, the Court stated that,

> *the General Court was, in principle, required, when examining the first condition laid down in Article 81(3) EC, to* ***take into account all the objective advantages flowing from the MIF, not only on the relevant market, namely the acquiring market, but also on the separate but connected issuing market.***[135] (emphasis added)

This would still be consistent with what was stated in this chapter previously: the benefits could occur in different market than the one where the harm was done. However, the Court went on to state also the following:

> *where, as in the present case,* ***restrictive effects have been found on only one market*** *of a two-sided system,* ***the advantages*** *flowing from the restrictive measure* ***on a separate but connected market*** *also associated with that system* ***cannot, in themselves****, be of such a character* ***as to compensate for the disadvantages*** *resulting from that measure* ***in the absence of*** *any proof of the existence of appreciable objective* ***advantages*** *attributable to that measure* ***in the relevant market****, in particular, as is*

[134] MasterCard and Others v Commission.
[135] Ibid., paragraph 242.

> *apparent from paragraphs 21 and 168 to 180 of the judgment under appeal, where the consumers on those markets are not substantially the same.* (emphasis added)

This would mean that benefits would have to take place on the same market, where the harm is done. The Court also stated though that the benefit analysis should take place in both sides of the two-sided market. Peeperkorn emphasizes that even though the Court in this case "as a general position" held that the harms and benefits in two-sided markets might in limited circumstances be weighed up across the markets, *in the specific case, it did not rule in favour of such cross-market balancing. It is highly artificial and not credible to read into this specific judgment a general requirement under Article 101(3) to balance effects across markets or within society at large.*[136] I believe that the judgments contain nothing that would not have relevance. It is not credible that the Court would state something explicitly without meaning it to have a more general guiding element. If the Court considered that certain guidance only links to that case or only very limited number of cases, I think it would underline this. The Court understands that everything it states is held as a rule from that point onwards. Any limitations to that rule would hence be made explicitly and clearly when intended there to be such limits.

4.2.2.2.2.4 Other relevant cases for source of inspiration

In addition to the above-mentioned cases, inspiration on what can be held to constitute a "fair share of benefits for consumers" can be found in the following cases from national competition authorities.

Often referred to cases in the field of fair share for consumers and sustainability are the Dutch cases concerning closing down five coal power plants (The Energy accord) and concerning more sustainable production of chicken (The Chicken of tomorrow). In the Energy accord -case the agreement among five competitors to close the coal power plants was in essence part of a larger sustainability project in the Netherlands where different stakeholders were brought together to roundtable negotiations to plan a more sustainable future. In this case the national authority ACM held that the agreement violated Article 101 (1) TFEU and it could not be exempted under Article 101(3) TFEU. The ACM argued the latter with an extensive cost-benefit analysis, where the value of the agreement's benefits was determined based on avoided costs. The ACM held that the estimated price increase of electricity was higher than the benefit in the form of avoided costs. The result of calculation was this in part because of the EU Emission Trading System (ETS).[137] The EU ETS system works in a way where companies receive or buy emission allowances, which they can trade

[136] Peeperkorn 2020, p. 20
[137] Monti & Mulder 2017, p. 638.

as well. The amount of received allowances depends on company's emission history and the amount of allowances is reduced every year ensuring that emissions drop.[138] The argument of the ACM here was that the companies still had received the allowances which they could use for other purposes or trade, i.e. benefit from them which in turn limited the net environmental benefits.[139] Monti and Mulder criticize this decision for various reasons such as the ACM's emphasize on the so-called waterbed effect of the EU's ETS, the failure to take dynamic effects into account[140], the cost-savings were calculated based on decreased chance of dying prematurely and the failure of seeing the agreement as a part of a wider climate agreement.[141] I think that this case points out the problem of seeing the wood for the trees. Looking strictly at numbers and the mere wording leads to a situation where the old polluting technology was retained with the cost of the current state of this globe.

In the Chicken of Tomorrow case companies at different levels of the chain of chicken production came together to plan more sustainable production of chicken meat. The purpose was to present a minimum standard of sustainable production and reach a situation where only sustainably produced meat would be sold in 2020. The ACM decided to evaluate the case in order to be able to point out its view on private sustainability initiatives. The ACM held that the agreement violated Article 101(1) TFEU since the choice for consumers was limited because after the agreement "regularly" produced meat would no longer be sold. The ACM analysed the first condition in Article 101(3) regarding higher consumer surplus based on an analysis of willingness to pay. Simply put the ACM asked the consumers how much they were willing to pay for more sustainably produced meat. The ACM concluded that the amount was not enough to justify the price increase. The ACM held that sustainability should instead of a minimum standard, be pursued through informing consumers about animal welfare on the basis of labels. Monti and Mulder are not convinced that the eco-labels would secure sustainability goals. They also criticize the willingness to pay analysis for instance because consumers who do not buy chicken are not considered in the analysis.[142]

Looking at whether environmental factors can constitute benefits, a EU case worth mentioning is the Concordia case from the field of public procurement. The possibility of taking environmental values into account in other policy areas was debated in this case, where a public procurement contract had

[138] EC: Emissions cap and allowances.
[139] Monti & Mulder 2017, p. 638-639.
[140] *The potential incentive effects that the closing down of the coal power plants would have on the development of alternative forms of green energy.* Monti & Mulder 2017, p. 639.
[141] This means that the ACM held that the emissions would not decrease but just change place. Monti and Mulder view this differently and point out that in addition to EU ETS's decreasing trend of allowances, *at present the vast majority of the emissions reductions from additional actions will be permanently retained.* Monti & Mulder 2017, p. 639.
[142] Monti & Mulder 2017, p. 640-641.

been awarded by using criteria consisting of price and quality (as opposed to mere price). The contracting entity evaluated quality by taking into consideration such environmental components as the low level of nitrogen oxide emissions and the noise level of the buses. The Court stated that:

> *Second, Article 36(1)(a) cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature.* ***It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority.*** *That conclusion is also supported by the wording of the provision, which expressly refers to the criterion of the aesthetic characteristics of a tender.*[143] (emphasis added)

The Court held that the contracting entity could take ecological criteria into account as long as the evaluation is done in a manner that respects the rules for public procurement processes and complies with *all the fundamental principles of Community law, in particular the principle of non-discrimination.*[144]

Albeit this case was about public procurement, I think it tells a bigger story about how different aspects should be evaluated. The Court held that even though something does not have a mathematical value, it does not mean that it does not have any value. Sustainability contains elements that are not necessarily directly measurable, but they do have a value. It is hard for instance to put a price on the biodiversity, but it is certain that it is something valuable. I think that this case also tells a story of enabling wider considerations to greater cause if they comply with the EU rules.

I believe that this judgment highlights the obvious point that even though certain policy does not per se have the objective of promoting environmental values, it has the possibility of taking them into account without exact wordings in Articles. Also, even though the Court did not refer to it, it did not expressly oppose the fact that Article 6 of TEC demands other policies to take environmental values into account either.

4.2.2.2.2.5 Lessons from case law on fair share for consumers

In the beginning of this chapter, I posed two questions, which I stated that have relevance in the evaluation of fair share for consumers. I will now answer these questions based on the summarized case law.

[143] Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne, paragraph 55.
[144] Id., paragraph 69.

I think that based on the case law, **the consumer** receiving the welfare benefit does not necessarily have to be the same one that is suffering from the restricted competition at least so that he/she would be fully compensated. However there are no situations where the consumer harmed would not accrue any benefit. I claim that the anchor therefore is that the consumer experiencing the harm must, accrue some benefit.

I also claim that based on the case law, **benefit** can mean something which is not measurable in monetary units. The Court has stated explicitly that the benefit does not have to be of economic nature. As Suzanne Kingston puts it: *the argument should no longer be about whether such benefits can be considered, but **how** they should be considered.*[145]

Recent case law contains only few cases containing references to fair share for consumers. According to Huimala, Wasastjerna and Heurlin this can be explained by the new implementing regulation[146] which entered into force in 2004.[147] According to the regulation, companies are required to assess the benefits and drawbacks of the agreements themselves. Huimala, Wasastjerna and Heurlin believe that the cartel bans' harsh consequences combined with the uncertainty relating to the application of the efficiency rules can lead into a situation where companies are afraid of co-operating.[148]

The evolution of the case law has understandably followed the development of the process in that there are fewer cases from recent years when the companies have had to self-assess, and presumably agreements that are on the borderline have been abandoned. As stated previously in this thesis, this means, that case law does not evolve as there are no cases on which the Courts could opine. There are no cases, as there is no case law to search recent guidance from.

In addition, guidance for analysing the provision can also be found in legal literature. Next, I will summarize the legal experts' views on the fair share for consumers.

4.2.2.2.3 Legal experts' take on fair share for consumers

The legal experts' conversation regarding the consumer welfare seems somewhat divided between the proponents of a narrow consumer welfare standard and a broader consumer welfare standard. In the former one, a restriction on competition increases prices and is therefore seen to lead to a lower consumer welfare. In this narrow standard no counterbalancing factors are taken into consideration and hence competition is seen to be restricted. In the broader consumer welfare standard, other

[145] Kingston 2021, p. 5.
[146] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
[147] Huimala et el. 2020, p. 515.
[148] Ibid.

quantifiable counterbalancing elements than price can take into consideration. These benefits are required to go to the same consumers although the benefit does not need to occur in the same market. For instance, the ACM applied this broad consumer welfare standard in its case regarding energy agreement on coal-fired power plants. In this case the Dutch authority weighed avoided healthcare costs against the increase of the prices. In this particular case though the ACM held that the benefits deriving from avoided healthcare costs are less than the increase of the prices and therefore constituted the agreement to be in breach of competition law. This view allows to take into consideration non-economic goals, which nevertheless need to be quantifiable. As Claassen and Gerbrandy point out, there however is *a difference in valuing health in itself, as a capability…and valuing the avoidance of (quantified) healthcare costs*.[149] This, I think, is the essence of the problem. If consumer welfare needs to be measured in a consistent and predictable manner, it would need to have rules that are somehow mathematical and not relying on ad hoc overall evaluation executed by for instance a court. An interesting question is, is the court an expert than can evaluate consumer welfare at any given time and case?

The narrow view has long been the prevailing orthodox of defining the fair share for consumers. The voices are however turning towards the broader view.

Dolmans points out the importance of the question of what constitutes a fair share to consumers. He states that this question *appears to have been the main stumbling block for a more lenient application of competition law to environmental agreements.* Some argue that the wording of guidelines regarding Article 101 (3) constitutes that in order for the environmental efficiencies to be valid, the effects should arise in the same market where the harm is felt. Dolmans points out that the guidelines presume the assessment to be made in this way *in principle*. According to Dolmans, this leaves room for interpretation and interpreting it in a narrow way would be shortsighted.[150] I could not agree more. I think that this relates directly into the idea written previously in chapter 4.1.2.1. Taking pro-sustainable actions should not be done if they are contra existing legal framework. At the same time, when there is no explicit rule against doing so, promoting sustainability in every turn is necessary. Dolmans also points out that there actually is no legal justification for this limitation. The guidelines have no binding force and the wording of the Article 101(3) TFEU does not demand the balancing test to be made in the same market where the harm is restrictions are felt. Dolmans states that instead of concentrating on guidelines' wording on markets, the focus should be on the "fair share for consumers". This fair share, according to Dolmans, can flow to the same consumers although the

[149] Claassen & Gerbrandy 2016, p. 10-11.
[150] Dolmans 2020, p. 21.

market would be different. Dolmans provides an example of this as follows: *an agreement to reduce pollution may increase prices, but reduce the same consumers' healthcare costs and increase their life expectancy and quality of life by more than the extra amount they pay for the cleaner products.*[151] Dolmans' reasoning seems very valid. I also feel that people might be willing to pay more for certain things (such as clean air) even though this would mean that for instance electricity would be more costly. I believe, that the euros of the increase in the price might not all be the same amount than the one an individual would be willing to pay. It is also an interesting question that who should determine what is an increase that is intolerable. Individuals might differ a lot on what and for what they are willing to pay. If someone would not be willing to take any price increase and another one would be willing to take a price increase of 25 % and the increase would be 10 %, what would the going rate be? Is it a system where consensus is required and hence even one individual can sabotage it for the rest?

Dolmans points out that in the traditional approach the fair share is calculated by looking at the costs and benefits for the actual and potential customers of the parties to the agreement. The agreement has been approved only if the benefits exceed the costs for those specific customers in monetary terms. Dolmans argues that when it comes to benefits that accrue the society as a whole, we could still claim that it allows consumers a fair share of the resulting benefit, at least when it comes to agreements that concern greenhouse gas emissions and serious pollution with worldwide effect.[152] Dolmans justifies this view with three key points as follows. Firstly, the share can be fair since when there are potentially large consequences, even a small reduction of risk could improve the customer's life and home in a way that outweighs the economic cost of a price increase. Secondly, the wording of Article 101 (3) does not contain a reference to certain customers but just "customers". Dolmans argues that a collective benefit should meet the requirement and hence make a sustainability agreement reducing serious pollution and greenhouse gas emissions allowed. In this context Dolmans also points to the CECED-case where according the Court, the benefits to society of the agreement appeared to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. The Court held that the requirement for fair share for consumers was fulfilled here even though the individual purchasers of machines received no economic benefits. Lastly, Dolmans states that assessing what is fair under Article 101 (3) should actually be turned around into analysing unfairness of the situation. When it comes to pollution and emissions, the buyer gets the benefit while others bear the costs and have no say in that decision. This unfair externality alone according to

[151] Dolmans 2020, p. 21.
[152] Dolmans 2020, p. 21.

Dolmans constitutes reason enough to hold the environmental benefits to society as a whole acceptable under Article 101(3) TFEU.[153] I concur with Dolmans in each of the three points. First of all, every reduction in emissions counts since we are in the verge of a disaster. Little strokes fell great oaks and the tipping point can be around the corner. Secondly, the wording indeed does not refer to "the customers" or any other certain group of customers. If it would be intended to be for instance the customers feeling the harm, then the wording probably would be at least "the customers". This notion has been nowhere in the official documents clearly defined and hence there should remain room for interpretation. It cannot be assumed that a clearer notion is not there by accident since the wording has passed through many tables and instead of one individual officer's view, they are the result of a consensus. Presumably, the wording has been intentionally left open and therefore able to include more than certain customers of the narrow approach. Thirdly, it is very much hypocritical to invoke fairness under Article 101(3) when at the same time cherry picking so that someone else bears the costs. All in all, at least in the situation of severe pollution and greenhouse gas emissions Dolmans' views and arguments seem solid. The benefit will most likely be a cleaner environment either directly or for instance via more energy-efficient products that require less energy production and hence contribute into making the world a bit cleaner. Therefore, I find the arguments solid for even less severe cases. Obviously, all cases should be analysed in casu and greenwashing should be strictly monitored.

Coates and Middelschulte are also of the opinion, that the view on interpreting Article 101 (3) should be broader than the prevalent narrow one. They state that *international co-operation among industry peers can not only significantly contribute to, but may be an absolutely fundamental precondition for, the attainment of the United Nations Sustainable Development Goals ("SDGs").*[154] When it comes to measuring long-term benefits, the authors put it in a nutshell as follows: *The question will be how to address and measure them – not if.* They acknowledge that counter-weighing efficiencies should be measurable for instance in order to avoid arbitrary application of efficiency rules and exploiting them.[155]

Dolmans points out that the "consumer welfare standard" should include in addition to lower prices, better quality, useful innovation and consumer choice, also "environmental impact". He argues that it actually already does so by its nature, since *the costs to society from pollution and carbon emission are effectively a price increase, for all consumers*[156]. Dolmans finds that the references to "public

[153] Dolmans 2020, p. 21-23.
[154] Coates & Middelschulte 2019. p. 318.
[155] Id., p. 321.
[156] Dolmans 2020, p. 9.

interest" and "well-being" mean that competition policy should *serve to maximise the value to consumers, of which price and quality are but two elements.*[157] This would mean that the benefit could be interpreted to be a vast group of elements.

Or Brook states that the wording of Article 101 (3) points in the direction that cost-efficiencies related to production and distribution chains, development of new technologies and products as well as economic growth are acceptable forms of benefits. He argues that it is not clear whether other less quantifiable benefits such as industrial or public policies might also constitute a relevant benefit.[158]

Brook also points out that the provision does not define whether the indirect consumers could also be considered in the evaluation and what sort of a timespan is required in the realization of benefits.[159]

Luc Peeperkorn is an advocate of the narrow consumer welfare standard. Peeperkorn states that the negative and positive effects of the agreement allowed under Article 101 (3) should take place in the same market. This means that the consumer suffering from an agreement which leads to higher prices should be the same one that receives the fair share of the benefits. Peeperkorn justifies this view by referring to case-law and to the Commission's policy of which the guidelines' paragraph 43 he sees as evidence. This paragraph and counter arguments for this justification have already been processed in this thesis on page 23. [160] Peeperkorn also brings up the argument of claiming damages: he finds it important that an individual can claim for damages caused by anti-competitive effects of an agreement that are not properly compensated for that customer. He finds that if the evaluation is broadened, the whole logic of the system would be undermined. He provides considering positive external effects benefitting society as a whole as an example of this. In this situation the harmed consumers in the relevant market would no longer be fully compensated for the harm they have suffered. Peeperkorn sees that broadening evaluation would make the assessment at least ineffective if not destroyed. [161] I think that this admittedly practical way of arguing represents an outdated view on how things should be evaluated. Obviously, it is hard for individuals to claim for damages if there is no clear economic measure for that damage. I would argue that the number of cases for this are not that many that this would constitute a reason for keeping the analysis narrow. I claim that people value wider set of components than mere money. If competition law is seen to have a broader purpose

[157] Dolmans 2020, p. 9.
[158] Brook 2019, p. 128-129.
[159] Brook 2019, p. 129.
[160] Peeperkorn 2020, p. 19.
[161] Peeperkorn 2020, p. 20.

of enhancing consumers' welfare (i.e. benefitting people) that is not mere augmentation of monetary wealth, Peeperkorn's view can be held invalid.

Peeperkorn is firmly against broadening the evaluation into the direction of total welfare test which *would change competition policy into a policy that maximises total welfare, incorporating an undefined constraint that consumers in the relevant market should receive at least some share of the resulting benefits, even if the agreement or conduct leaves them overall worse off*.[162] Peeperkorn finds this kind of test illogical and unworkable. The former follows from the idea that if total welfare is the desired goal, there would be no need to preserve the consumer welfare constraint. The latter relates to the idea that there are many possible types of positive and negative external effects that should then possibly be considered.[163] Peeperkorn has a point in that broadening the analysis makes evaluation harder and more unprecise. I would argue that this is the price we would have to pay to meet the needs of the globe. Though, broadening the analysis does not necessarily mean that it would become free of any constraints.

As Hans Vedder, Arletta Gorecka and Fabian Richter put it in their contribution paper, *there is no requirement in EU competition law to (fully) compensate the consumers affected by an agreement. There is only a requirement to ensure a 'fair share' for 'consumers'. In this regard it is clear that the very concept of a fair share by no means implies (full) compensation. It is similarly clear that the consumers mentioned in Article 101(3) are not specified to mean just those consumers who also face a price increase. The purpose of the fair share-condition in the application is to ensure that advantages that solely accrue to the parties are insufficient to warrant an exemption. It is thus fulfilled when an agreement contributes to a greater good than just the interests of the parties to the agreement.*[164] I concur with this statement. I think that the reference to fair share for consumers means that the companies must demonstrate the benefit flowing to the consumer. It is an anchor, but it does not mean a zero sum game where the consumer has to be fully compensated. Sometimes there are greater causes for why the harm for consumers has to be tolerated.

4.2.2.2.3.1 Summary on the legal experts' views

The legal experts' views on the issue differ and there are voices pro and contra taking wider view on what constitutes consumer welfare and benefits. I think that whether a person is pro or contra widening the view depends upon what that person thinks is goal of competition policy and law. If the goal is seen as a narrow one, then that person most likely is an antagonist of widening the analysis.

[162] Peeperkorn 2020, p. 20.
[163] Peeperkorn 2020, p. 20-21.
[164] Vedder et al. 2020, p. 11.

However, if the expert sees competition policy and law as a means and not an end itself, then the view tends to be wider.

4.2.2.2.4 Summary on the fair share for consumers analysis

Based on the analysis above, the only thing that seems clear is that the situation is unclear. There are cases suggesting that the fair share for consumers could be constitute of sustainability gains. The cases are only a few and businesses seem to be very careful in stepping into co-operation in the field of sustainability.

The experts' views vary on the issue but most of them seem to think that the view on welfare and benefits could be wider than just taking economic welfare and benefit into account.

Albeit there are some limitations and situation remains unclear, based on current wordings of provisions, legal literature and jurisprudence, sustainability agreements could be to some extend be exempted under Article 101(3) TFEU.

The message from the point of view of the environment is clear: we are in a hurry and need immediate actions. In the next chapter I will look at how the Commission is handling the reconciliation of competition law and sustainability aims and what is the up-to-date situation of the harmonisation.

5 The Commission steps out: Stakeholders' hearing, draft guidelines and future development

6.1 The call for contributions

Environmental policy as such is not a novelty in the European Union. However, the European Commission has decided to set it as a priority and published 2019 the new strategy for defeating the climate and environmental-related challenges that the Commission in the Green Deal states to be "this generation's defining task".[165]

The Green Deal entails goals that the public sector alone cannot achieve. In the field of competition law and policy, the Executive Vice-President Margrethe Vestager stated in her speech in September 2020 that in order to succeed (in meeting the goals of the Green Deal) *everyone in Europe will have to play their part – every individual, every business, every public authority. And that includes competition enforcers.* In this same speech she also stated that the time had come *to launch a European debate on how EU competition policy can best support the Green Deal*.[166]

On October 2020 the Commission published a call for contributions on how competition policy could work better with environmental and climate policies. The Commission received almost 200 responses to this call for contributions.[167] In the call for contributions, the Commission asked the stakeholders to share their views on the fields of anti-trust, merger control and state aid control. More than a half[168] of the responses[169] answered the questions related to anti-trust related matters.

The Commission asked three questions related to anti-trust which were formulated as follows. First of all, the Commission wished to receive actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks. Secondly, the Commission asked whether further clarifications and comfort should be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition, and if so, in which form should such clarifications be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities etc.). Lastly, the Commission asked whether there exist circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice.

[165] COM(2019) 640 final. The European Green Deal. p. 2.
[166] EC: Vestager's speech.
[167] EC: Competition Policy Contributing to the European Green Deal.
[168] This amount was 116.
[169] All responses are available at https://ec.europa.eu/competition-policy/policy/green-gazette/conference-2021_en.

The Commission divided the contributions into groups as follows: academia, associations/industry, law practitioners, public authorities, and others. I will next present some contributions from academia and law practitioners.

6.1.1 The opinions of academia

Bruzzone and Capozzi call for individual guidance. They feel that the companies need to discuss the compatibility of their agreements with Article 101 ex ante with the Commission or national competition authorities. This would enable legal certainty and rapid adjustment of such an agreement if the authorities found it incompatible. They point out that the Covid-19 pandemich has brought about a situation where the concerns of co-operation regarding a shortage of supplies of essential products or services have been addressed. In the same way, agreements pursuing key objectives such as sustainability could be addressed for instance via opinions, comfort letters or, for the Commission, positive decisions pursuant to Article 10 of Regulation 1/2003.[170]

In addition, Bruzzone and Capozzi call for uniform guidance at the EU level on the application of Article 101 to sustainability agreements.[171]

Edith Loozen is of the opinion that pursuing the Green Deal objectives should not justify restrictive agreements beyond the current enforcement practice and goes as far as suggesting that the current enforcement practice should as a matter of fact be tightened.[172] Loozen states that *the case for special, green antitrust is largely overstated.* She thinks that the competition norms pursue the goals of the Green Deal by enforcing *competition in a manner that pushes market actors to promote green products*. She writes that this slims the debate down to the *industry-wide agreements that address situations where manufacturers of more sustainable products suffer from a so-called 'first mover disadvantage' insofar as consumers can opt for cheaper, less-sustainable products.*[173] She then argues that the competition agencies should stick to implementing rules and not formulating them. These actors have no legitimacy to recalibrate between market competition and state regulation to promote sustainability. Instead, the single best course of action, according to Loozen, is state regulation.[174]

Francisco Costa-Cabral thinks quite the opposite to Loozen. According to him, *the competition law should at some point drop the economic measures of consumer welfare in order to enable the*

[170] Bruzzone & Capozzi 2020, p. 7-8.
[171] Id., p. 8-9.
[172] Loozen 2020, p.1.
[173] Id., p. 2.
[174] Ibid.

cooperation necessary for the Green Deal. He points out that greenwashing is not a big threat and there is only occasional evidence on cartels disguised as sustainability initiatives. He thinks that there are several grounds for allowing co-operation for sustainability purposes and there should also be several ways to support this. He points out that in the revision of the horizontal guidelines and horizontal block exemption regulations, the sustainability issues should be addressed. In order to provide legal certainty and encourage development, he calls out for a block exemption which would be specifically dedicated to sustainability. In addition to these, he points out that reference should be sought from the Wouters case law.[175] The evaluation of a competition restriction should be based on the necessity of the restriction for the pursuit of a legitimate (public interest) objective.

Giorgio Monti provides several clear suggestions on how the Green Deal objectives could be pursued under competition policy. He calls out for clear guidance on how to design agreements that do not infringe competition law and what kind of evidence should be provided to justify the application of Article 101(3) in the agreement in question.[176] In addition he states that an effective governance regime entails the following elements. Firstly, Monti states that the guidelines should entail practical (hypothetical) examples on when competition concerns are perceived and when not, and in the former case, how can they be exempted.[177] In addition, he promotes review by the Commission of sustainability agreements as part of its enforcement strategy and issuing non-infringement/infringement decision. This would enable the Commission to apply the legal framework in practice and in turn clarify for the undertakings how the agreements are reviewed. The possibility to appeal would be welcome due to the underdeveloped state of case law.[178] Thirdly, he calls out for informal advice in the form of a revised comfort letter seeking reference from the US practice of business review letters. In addition, he also sees commitment letters as one way of enhancing the situation. He also suggests that when agreements have tried but failed to secure the sustainability objectives, they should not be fined. However, the fines posed for undertakings taking advantage of a sustainability initiative in order to harm competition should be raised.[179] Monti concludes this with the view that the design of a sustainability initiative should be *the result of a process of co-creation, involving parties who are likely to be affected as well as the national competition authority and any other relevant regulator.* [180] Monti contest the concern that reading a wide number of policy objectives into Article 101(3) harms the role of competition law, changes the standard to a total welfare standard,

[175] Costa-Cabral 2020, p. 6-7.
[176] Monti 2020, p. 1.
[177] Id., p. 4.
[178] Id., p. 4-5.
[179] Id., p. 5.
[180] Monti 2020, p. 6.

or makes the application of the law unwieldy. He justifies this with three arguments. Firstly, until the Court rules otherwise, Article 101(3) includes a range of non-competition goals. Secondly, the undertaking bears the burden of proof on how the agreement provides a given benefit. Lastly, the final condition of Article 101(3) requires that the competition is retained.[181] Monti points out in the end of his contribution paper, that *the ECJ has considered that innovation is a benefit that counts, and here the consumer benefits are likely to be for future, not present buyers*. He states that this would mean that the Court's interpretation of the fair share requirement is not very strict. This in turn would mean that the Commission could depart from the current soft law document and move towards a looser interpretation of fair share requirement.[182]

Hans Vedder, Arletta Gorecka and Fabian Richter call for *a layered structure that relies on case by case assessments (landmark cases) and substantive guidelines (i.e. not enforcement priorities).*[183]

Julian Nowag suggests for guidance in the form of guidelines. Firstly, he calls for bringing back guidance on agreements unlikely to restrict competition accompanied with case law/decisional practice examples. Secondly, he suggest additional guidance on standardisation agreements to be provided. Thirdly, he calls out for guidance on whether the following agreements are within the scope of Article 101 (1) TFEU: *agreements to comply with the legal requirements in other countries (where problems with compliance and enforcement of laws exist).* Nowag also thinks that the fines could be adjusted according to certain elements that point out the good intention to pursue sustainability goals. For instance, assurances could be provided on undertakings not to be fined if they *have faithfully followed the guidance by the authority to achieve sustainability, the anti-competitive effects were not intended/ directly foreseeable and the companies involved abandon the anticompetitive behaviour once asked by the authority.*[184]

Kalpana Tyagi summarizes his key message as follows: *Within the current setting, it may be highly insightful if there is a return to the practice of case-by-case assessment by the Commission, and once sufficient experience has been accumulated, an incorporation of the same in the form of best practices.*[185]

[181] Ibid.
[182] Id., p. 8.
[183] Vedder et al. 2020, p. 11.
[184] Nowag 2020, p. 2.
[185] Tyagi 2020, p. 6.

Marten Schinkel states in this contribution that competition is a better way to achieve sustainability goals than collusion.[186]

Sandra Marco Colino and Emanuela Lecchi[187] have stated that the most obvious way of giving further clarifications and comfort on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition, is revising the guidelines. However, these are not binding and analysis based on them can be very complex. The authors therefore also suggest an adoption of block exemption regulation for agreements with environmental protection purposes. This would provide legal certainty, however due to the market share threshold this would probably not work in the context of environmental agreements.[188] Colino and Lecchi point out that there exists an instrument in the EU law that has not been used but that could be worth to consider for these purposes. They suggest that the Commission could issue authorizations in individual cases under Article 10 of Regulation 1/2003.[189] This opportunity should be explored by the Commission.

Simon Holmes promotes strongly competition law taking part in climate action.[190] He states that there is a need for clarification regarding what sort of agreements the competition authorities are not likely to challenge (as a matter of enforcement priorities). In addition, more clarity should be provided on what sort of agreements are likely to escape the Article 101(1) prohibition completely or if caught, exempted due to Article 101(3). Lastly he thinks that the circumstances in which the authorities will not impose fines, should be clarified. Holmes sees that the best way to implement this task is in form of guidance on enforcement priorities. In addition to this, he suggest that the Commission should give regular statements on real-life cases it has processed. Holmes however is not in favor of block exemption regulation regarding the issue. He seems to think that this would be a compromise which would not reach the essential core of the issue.[191] Holmes points out that in order to take the Green Deal Objectives into account in the field of competition law, there is no need to amend the law. The legislation should however be interpreted in the light of the actual wording of the sections. As Holmes states, *in most cases it is simply a question of applying the law as set out in the treaties as interpreted by the CJEU.* He makes one exception to this, which is the notion of consumer. He is of the opinion, that the consumer should be interpreted in a broader way than just referring to the immediate

[186] Schinkel 2020.
[187] In addition, a list of people called "collaborators" have been enumerated in the paper.
[188] Marco Colino & Lecchi 2020, p. 5-6.
[189] Id., p. 6-7.
[190] Holmes 2020b, p. 1.
[191] Id., p. 4-5.

purchasers of a widget. He states that *it is essential that we give proper weight to what really matters*.[192]

6.1.2 The opinions of law practitioners

The law practitioners assist companies in their legal problems ranging from small companies to large ones and with different industries. The opinions of this group hence provide an insight on what the business perceives challenging in the big question of contributing to striving towards a greener planet. In this chapter I will present some opinions submitted for the Commission.

Baker McKenzie find that the problem is not reaching a conclusion that cooperation is illegal, but the unawareness on how the rules apply, and the lack of certainty about how the rules would be applied at EU level and beyond.[193] Baker McKenzie calls out for explicit references to sustainability objectives in the Commission's guidelines and other documents. Baker McKenzie seems to miss a clear stance from the Commission, that these objectives are being pursued and that the Commission regards them important.[194] According to Baker McKenzie, there is a need for clear wording in a revised version of the Article 101(3) Exemption Guidelines stating that there *is no legal requirement for a mathematical weighing up of pro and anticompetitive effects to show a net benefit to consumers in a single market.* There is also a need for guidance on when the criteria of this Article are met concerning sustainability co-operation. This guidance should entail sections concerning qualitative benefits, shadow pricing related to quantifying negative externalities, a wider notion of consumer, a longer timeline for consumers' willing-to-pay and on indispensability of restrictions.[195] Baker McKenzie suggests that the Commission finds a way to spread knowledge[196] on their views on how competition law and sustainability co-operation work together. Baker McKenzie points out that the Commission should take this opportunity to shape the field before there are conflicting approaches across the EU and other jurisdictions.[197] Baker McKenzie stresses the need to provide guidance on the applicability of the Article 101(3) on sustainability agreements. Firstly, there is no need to narrow the interpretation into economic factors and mathematical weighing.[198] Also, the Commission should provide more guidance on when due to sustainability efforts, qualitative efficiencies may arise. In addition, the Commission should ditch the analysis on consumer willingness to pay for several

[192] Holmes 2020b, p. 6-7.
[193] Baker McKenzie 2020, p. 10.
[194] Id., p. 2–3.
[195] Id., p. 3–4.
[196] Baker McKenzie also points out that the Commission could benefit e.g. from the tool found in Article 10 of Reg 1/2003.
[197] Baker McKenzie 2020, p. 12.
[198] Id., p. 14.

reasons. Instead of looking at the stated preferences of current consumers, the reference point should be more on a long-term. Moreover, the uncertainty on relevant markets should be clarified and a wider view of relevant consumers/benefits accepting also benefiting society as a whole, should be adopted. Baker McKenzie justifies this with several arguments stemming from the case law[199] and also by pointing out that the first condition of the Article 101(3) would not fit into a narrow view of consumers/markets: in addition to improvements in the production or distribution of goods, it relates to *technical or economic progress where there may be no easily identifiable group of purchasers.*[200] Furthermore, Baker McKenzie argument this view through CECED-case and the wording of the Commission's 2004 Exemption Guidelines paragraph 85. Baker McKenzie however finds out that the line should be drawn so that some degree of overlap would suffice.[201] Lastly, Baker McKenzie call out for guidance *when and how benefits of environmental agreements can be expressed in monetary terms* in the analysis and how the information on them should be presented to justify actions. In this connection, Baker McKenzie points out that when counting for future benefits, future costs which may be increasing, should also be considered. [202]

Castren & Snellman also call out for guidance and the need for "green update" to the Commission's current guidelines, as they phrase it accompanied with concrete examples. This could be accompanied with a possibility of granting negative clearances and/or individual exemptions, at least temporarily. Castren & Snellman would also welcome guidance for instance in the form of guidance letters or similar instruments.[203] Updating the guidelines on the applicability of the Article 101(3) TFEU is needed also *in order for the guidelines to reflect positively towards desirable bona fide cooperation between firms pursuing Green Deal objectives*.[204] Castren & Snellman state that the traditional consumer welfare standard does not fit into a situation where green objectives are pursued. Instead, it should be replaced with a standard of consumer well-being or a broader general welfare standard. In this standard the overall benefits for society at whole would weigh more than the harm caused for a a certain group of customers. Castren & Snellman point out that in the pursuit of Green Deal objectives, there will be benefits that are not easily quantifiable.[205] Castren & Snellman also point out that the relevant market should be wider than traditionally held as relevant and the future consumers should be considered. Castren & Snellman also wish for it be explicitly stated that also progress in

[199] Compagnie Générale Maritime, Mastercard and Groupement Cartes Bancaires -cases.
[200] Baker McKenzie 2020, p. 15–16.
[201] Id., p. 16–17.
[202] Id., p. 17.
[203] Castren & Snellman 2020, p. 4.
[204] Id., p. 5.
[205] Id., p. 6.

terms of sustainability meets the requirement of Article 101(3) TFEU first condition even if this does not have an impact on the actual quality of the product in question. This last point refers to e.g. circular economy as normally the use of recycled materials is more expensive than the use of new ones. [206]

In order to enhance legal certainty, Clifford Chance suggest the following actions to be taken. Relating to TFEU 101 (3), the first requirement should be broader than just economic efficiency on the basis of price and profit. It should entail qualitative efficiencies and reduction of negative externalities which might not always be explicitly quantifiable in all instances. The authorities could seek assistance in the interpretation by holding consultations and obtaining submissions from the relevant agencies or associations. Fair share for consumers has normally required the benefit to accrue for the same consumers in the same markets. Clifford Chance is of the opinion that in sustainable actions, a broader view allowing benefits to flow to society as a whole, including benefits to other markets, should be allowed. They find the revision of guidelines would be needed in order to allow this kind of interpretation. This kind of revision would however not suit the EU court jurisprudence which requires that efficiencies must entirely compensate consumers within the relevant market. Clifford Chance hence suggest enacting *appropriate legislative measures which confirm that Article 101(3) is to be interpreted in this way.*[207] Clifford Chance find that the Commission should hold consultations and obtain submissions from the relevant agencies or associations to assess the indispensability in a situation. They think that *once a product or business has gained a foothold, the cooperation could and should be dissolved*. Clifford Chance refer to actions taken by the Commission during the COVID-pandemic and wish for the same kind of quick response and adaptation in this situation. [208]

CMS suggest two tools for the Commission in order to enhance promotion of sustainability goals in the competition law. First, the revised horizontal guidelines should contain a specific section on sustainability agreements. In this section it would for instance be clearly stated that with the CO2-reduction, benefits accruing to all consumers should prevail instead of requiring the benefits to flow to the direct and/or indirect consumer affected by the agreement.[209] The other suggested tool is informal guidance via comfort letters during a transitionary phrase. The Commission could, similarly as during the Covid-crisis, provide companies with informal guidance to promote sustainability co-

[206] Castren & Snellman 2020, p. 7.
[207] Clifford Chance 2020, p. 9-10.
[208] Id., p. 10.
[209] CMS 2020, p. 6-7.

operation. CMS suggest that these letters should be published in order to guarantee transparency and equal treatment but also to enhance legal certainty and support quicker adaption in the business.[210]

CMS calls out for clarifying several factors related to TFEU 101(3). Firstly, the improvement in sustainability should be held an economic gain and hence meet first the requirement of the paragraph. Secondly, a more sustainable economy should constitute "a resulting benefit" as much as reduced price or increased quality or choice. CMS states in this connection also that, *it should be recognised that the "resulting benefit" for consumers may be a larger benefit to society and that consumers may have to pay a higher price for a more sustainable product.* Thirdly, CMS states that the condition of absence of elimination of competition should be interpreted in keeping in mind that the achievement of Green Deal objectives is likely to require pan-industry cooperation. This should not constitute a problem when the companies continue to *compete on more traditional competitive factors such as price or quality.*[211]

Comfort letters should be published to ensure transparency and equal treatment, to foster legal certainty and to support quicker implementation into legal practice.

CMS states very on point: *Competition law promotes the efficient use of resources in general; sustainability objectives merely extend the scope of resources to be assessed and demands the inclusion of externalities into the competitive assessment.*[212]

6.1.3 Summary on the contributions

For majority, academia and legal experts both root for changes to enable taking sustainability into account in the competition analysis. In addition to renewal of legal provisions, the stakeholders ask for more guidance and clarity. In the next chapter I will first summarize the Commission's key findings from these contributions and after that, I will present the Commissions answer it has provided in the form of communication for draft guidelines.

6.2 The course of the ship

6.2.1 Call for contributions

Combining different goals can be tricky and crowdsourcing can be very fruitful. From the answers received by the Commission it seems clear that change is needed and that certain issues worry stakeholders.

[210] CMS 2020, p. 7.
[211] Id., p. 9.
[212] Id., p. 10.

The call for contributions was followed by a conference held in February 2021 where it was discussed how the sustainability goals and competition policy can be combined. After this on September 10th 2021, DG Competition published a Competition Policy Brief. This Brief contains key findings from the debate launched on September 2020 and additionally provides *examples of concrete policy reform across the competition instruments of State aid, antitrust, and merger control.*[213]

The Commission states the following of the key findings related to antitrust. The stakeholders wished for more clarity on several types of co-operational agreements held necessary for attaining sustainability goals. These entail:

- industry-wide agreements to phase out unsustainable products and unsustainable and/or unethical modes of production;
- joint procurement of sustainable input products;
- joint R&D&I and production agreements, in the context of which information may need to be exchanged; and
- setting industry standards for the use of sustainable products and green technologies

The Commission remarks that the stakeholders have however not been able to provide real-life examples of situation where a certain sustainability initiative has failed because of the potential risk of competition rules.[214] I find it very normal that companies have not been willing to provide examples of these situations as they have probably not been developed far after concluding that it is highly likely to fail because of the risk of antitrust rules. When forming initiatives, the companies probably start with outlining possible risks before the evaluation of should they proceed with putting resources into such project.

It has been debated whether the scope of the exemption of the Article 101(3) TFEU should be broadened. Some stakeholders have suggested the scope of relevant benefits be extended to *non-economic benefits as well as to benefits that occur outside the relevant, investigated markets*. Some have wished for the notion of "consumers" to be expanded wider so that it would encompass citizens and society as a whole. Also the notion of "fair share" has been asked to be widened to allow *benefits from an agreement to be credited even if they do not fully compensate for the harm suffered by consumers in the market.* The Commission points out that there has also been views on abolishing the *consumer welfare standard as an underlying principle of competition law and policy.* Some stakeholders suggested that rules should be clarified for instance by using block exemption

[213] EC, Directorate-General for Competition: Competition policy brief, p. 1.
[214] Id., p. 2.

regulations, having an open-door policy allowing businesses to share their concerns with the Commission and introducing regulatory sandboxes. In addition, many held that there should be general guidance as well as specific guidance, on a case-by-case basis. The Commission states that the use of positive decisions (finding non-applicability of the competition rules) was also pointed out.[215]

The Commission seems to state that when it comes to antitrust enforcement, the way to achieve sustainability goals is principally by promoting and protecting competitive market. The Commission acknowledges that nevertheless there are circumstances where achieving sustainable solutions demands co-operation between companies which presupposes more guidance on what are the circumstances in which such co-operation can be allowed. The Commission states that it shall give such guidance in the context of the revision of horizontal and vertical guidelines. At this point the Commission already identifies certain aspects which it considers need clarification. Firstly, the Commission seeks to clarify the different forms of co-operation that do not go against the Article 101(1) TFEU by providing concrete examples of such forms of co-operational agreements (e.g. joint production or purchasing agreements, standard setting, etc.). In addition, the Commission intends to clarify the content of the exemption of Article 101(3) with regard to how sustainability benefits can meet the criteria and when can they be regarded to compensate consumers for the harm suffered. Thirdly, the Commission notes that sustainability per se can be sufficient to constitute a benefit and there is no need for direct or immediate noticeable product quality improvement or cost saving. Fourth, the Commission states that the evaluation of benefits and harm takes place in each relevant market. The Commission however adds that *benefits achieved on separated markets can possible be taken into account provided that the group of consumers affected by the restriction and the group benefiting consumers are substantially the same.* The Commission considers that this approach keeps the antitrust enforcement connected to consumer welfare whilst allowing to take sustainability gains benefitted by the society at whole into account. The Commission finds it possible in light of this interpretation to conclude that significant pollution reductions benefit the harmed consumers ("fair share") in line with Article 101(3) since that consumer is part of the whole society which benefits from the reduction of pollution.[216] I find this explicit statement to potentially have an enormous effect on the business sector. The Commission didn't need to change anything but just adjust and state explicitly what it is it all about and now it should be clear that sustainability can be taken into account.

[215] EC, Directorate-General for Competition: Competition policy brief, p. 2-3.
[216] Id., p. 5-6. The Commission also addresses shortly the issue of indispensability, which is not in the focus of this thesis and therefore not dealt in this connection more.

The advisers just have to do their jobs properly and argue solidly why a certain benefit is a large benefit that goes to the society at whole and eventually via this, the harmed consumer.

The Commission finds it to be also important to clarify when existing (environmental) regulation already *incentivises companies to produce in a sustainable manner and therefore obviates the need for cooperation, and when such incentives are not sufficient to do so.* The Commission states that it continues to develop the matter in co-operation with National Competition Authorities and by consulting stakeholders and experts. At the same time, the Commission also announces, that it *remains ready consider requests for individual guidance letters in relation to sustainability initiatives that raise novel issues*. The Commission also shows green light to the possibility of adopting decisions finding that the competition rules are not applicable to sustainability initiatives (pursuant to Article 10 of Regulation 1/2003).[217]

The Commission has stated that it will adopt new guidelines in the fourth quarter of 2022.[218] On the 1st of March 2022, the Commission published a communication called "Approval of the content of a draft for a Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements."[219] This document sheds light on what the amendments to the guidelines could look like. These suggestions will be looked into in the next chapter from the relevant point of view concerning the subject of this thesis.

6.2.2 Draft for horizontal guidelines

The Commission has published a draft document for revised horizontal guidelines. In this thesis I have investigated whether competition law could and should take sustainability into account and how could this be implemented especially in the light of Article 101 (3). The draft document gives an answer, in part, to how the Commission will answer this question.

The Commission states in its document containing overview of main changes, that it has noted that e.g. the horizontal guidelines *are not fully adapted to economic and societal developments of the last ten years, such as digitalization and the pursuit of sustainability goals*.[220]

As an answer to this gap, the Commission has drafted a chapter relating to sustainability agreements. In this chapter, the relevant provisions to the subject of this thesis are the following.

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[217] EC, Directorate-General for Competition: Competition policy brief, p. 6.
[218] EC: Horizontal agreements between companies – revision of EU competition rules.
[219] Available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13059-Yritysten-valiset-horisontaaliset-sopimukset-EUn-kilpailusaantojen-tarkistus_fi.
[220] EC: Overview, paragraph 6.

The section 9.4. contains assessment of sustainability agreements under Article 101(3). The section 9.4.3. contains proposed rules for the pass on to consumers. The Commission states in the paragraph 588 that the *concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement.* In this section, the Commission refers to case Asnef-Equifax.[221] In this case the Court stated that the overall benefit for consumers in the relevant markets must be favourable but it is not required that each consumer individually derives a benefit from an agreement, a decision or a concerted practice.[222] The Commission states that *sustainability benefits that ensue from the agreements have to be related to the consumers of the products covered by those agreements.* This means that the Commission would adopt an approach which would not allow out-of-market benefits at large and could possibly affect in companies' willingness to enter agreements that would not have directly countable benefits to the consumers in the relevant markets. I believe that in this way for instance agreements that have effects on mostly cleaner air might not fulfil the criteria.

The Commission has enumerated the different types of benefits that can be considered in the analysis as follows: individual use value benefits, individual non-use value benefits and collective benefits. In the first group, the consumers would benefit from better quality of products e.g. replacing plastic products with more durable material may increase the longevity of products. In the second group the value would derive from consumers preferences. The user experience of the product would not be directly improved but the consumers experience of the use and willingness to pay more would constitute the benefit. The third group encompasses situations where the society at large benefits from e.g. cleaner air. The Commission has stated that in some cases evidence and arguments on only one group of benefits might suffice whereas there are also situations where two or even all group of benefits must be presented.[223] The Commission has therefore stated that situations vary and in some instances a selection of different type of benefits might be needed. It has however clearly also pointed that even one group of benefits might suffice. This would mean that even though the bar is set high for meeting the criteria, even the collective benefits alone could suffice.[224] I find this a very important statement which points to a willingness to find ways to tackle the situation. At this point it is understandably challenging to state clearly how the benefits should be calculated to prove that they suffice. Also, for instance the question of future generations is not considered and the question of taking them into account remains unclear. I believe that the new round of comments will bring insight

[221] Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administación del Estado Asociación de Usuarios de Servicios Bancarios (Ausbanc).
[222] Ibid.
[223] EC: Draft Guidelines, p. 140-144.
[224] Ibid, 143-144.

into this and the Commission could probably estimate if it can provide more guidance on these issues if not in the form of guidelines, than at least as form of guidance.

The communication on the draft guidelines marks a new era and show the direction. Future will tell how the guidelines will be interpreted and if there is enough courage among businesses to enter sustainability agreements with this new direction.

6.2.3 Summary

The Commission has adopted a change of gear and is actively promoting new rules to enhance the tension between competition policy and green objectives. This change is very welcome, and the renewal of guidelines long awaited for.

Guidelines alone will not fix the situation and more profound legal review could be waited for. This road is long and windy and therefore more dynamic solutions must be created. The situation cannot wait for legal rules to change but we need actions now. In addition to the renewal of guidelines, the Commission could find even more rapid ways to react to the crisis by giving for instance guidance such as it provided with the Covid-19 pandemic.

7 How the provisions should be interpreted and possible needs for amending them

One part of the reason why the field of competition is divided on whether the competition law could take sustainability into account might lie in fact that the European Commission has not been consistent on its take on the matter. In the 1990's the EC showed somewhat pioneering attitude towards environmentally friendly solutions by allowing collusion between washing machine producers. The Commission was ahead of its time stating that *Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines.*[225] One might assume that this would have meant a new era in the competition law. This however was not the case. The 2001 Horizontal Guidelines contained a section on environmental agreements, which was taken out from the renewed 2010 Horizontal Guidelines.

Dolmans has strongly advised including an environmental section in the next round and is of the opinion that excluding these from the renewed version would be a negative signal and inconsistent with the current EU's focus on environmental issues.[226] It admittedly seems strange that the removal of environmental references from the 2010 Horizontal Guidelines would have no meaning. Such an action does not happen by accident but is a result of long negotiations and must have had a clear reason behind. It would be interesting to investigate further how the political climate has changed regarding this issue and why the jacket has been turned. The Commission stated that the removal of this chapter *does not imply any downgrading for the assessment of environmental agreements.*[227] I think that this removal should have been replaced by adding references to environmental issues and the absence of those tells a story. Combining this with the Commission's Modernization White Paper's message to narrow analysis to economic assessment and the worry of political considerations being considered points the other way.

Legal development does not happen in a vacuum and I believe that the Commission and courts are affected by the era and the politics. Sustainability was not trending back when the horizontal guidelines were renewed in 2010. The times have changed, and sustainability currently lies at the

[225] CECED, paragraph 56.
[226] Dolmans 2020, p.15-16.
[227] EC: Memo. Question *12. Why is there no longer a separate chapter on environmental agreements in the Horizontal Guidelines? Standard-setting in the environment sector – which was what the environmental chapter in the previous Horizontal Guidelines effectively dealt with – is more appropriately dealt with in the standardisation chapter. The removal of the chapter does not imply any downgrading for the assessment of environmental agreements. On the contrary, instead of having a chapter addressing a narrow aspect of environmental standards, the Commission now makes it clear that environmental agreements are to be assessed under the relevant chapter of the Horizontal Guidelines, be it R&D, production, commercialisation or standardisation. Moreover, appropriate examples have been inserted in the R&D and production chapters.*

heart of EU politics, which can for instance be seen in the fact that it is one of the political spearheads. The Commission has now published draft guidelines and in this clearly stated the importance of environmental affairs and included a whole chapter on sustainability agreements. The message is clear – the Commission seeks to find ways to meet the Green Deal's objectives.

I think the time for the narrow consumer welfare standard and narrow viewpoint on how the fair share for consumer should be evaluated is over. As Einstein has said, *not everything that can be counted counts and not everything that counts can be counted*. The view on assessing what is worth to be counted should be wide and longsighted. The Commission has taken a step towards the right direction, but I think that the pace should be quicker as the race is hard. It is important to carefully assess who holds the power to for instance set the price tag for clean air and where does that entity's legitimacy originate. The assessment should be cautious and bear in mind that we are living in a fast-paced constantly evolving world, where the value of something like clean air can change overnight. If this is not considered and benefits are interpreted in a narrow and short sight manner, the steps that have now been taken will not suffice.

The Commission's draft guidelines link to the present moment and don't take the future enough into account. I feel that the valuation of benefits should take inspiration from the idea of the veil of ignorance. The idea in this John Rawls' moral reasoning device is that if the decision maker is not aware of hers/his position, what decision would she or he make. In this way the decision-making is objective. As an individual would most likely seek self-interest, the decision-making has been left for the government. We have democratically elected bodies setting legislation and independent judiciary which is bound by law. Ideally this would mean that the decision-making on what counts would be objective and seek the greater good. In the evaluation of benefits, the present consumers' benefits should be combined with future generations' interests we are accountable to them since the globe belongs to no present generations but also to the generations to come. If the present generations would not know would they belong to this generation that is able to exploit the Earth or the one that would suffer from previous generations' exploitation, the consumers' view of welfare and benefits might look quite different.

What should the next steps be? It goes without saying that the legal provisions should be amended and updated to fully support the aim of taking sustainability into account as it *should* and *could*. Needless to say, there is no time to sit back and wait for legal renovation. The process takes time and entails a lot of political compromise. The Commission has published communication on the draft horizontal guidelines. As stated previously in this thesis, the importance of the guidelines should not be underestimated. I feel that the updates are welcome and long awaited.

Guidance from official sources has been marginal and the situation has been somewhat unclear. As Suzanne Kingston points out *the current guidance vacuum at EU level should be filled as a matter of urgency*[228]. Kalpana Tyagi states *Considering the still under-developed case law on sustainability-driven and prima facie anticompetitive agreements, companies may sometimes refrain from cooperating and entering into horizontal cooperation agreements as referred to in scenario 1 above. Considering that there remain some grey areas in such agreements, it may be a good idea to revive the old approach for at least some period of time. Once the Commission, and the national competition authorities have gathered substantial experience based on their assessment of such incoming requests and assessments therein, it may be advisable to incorporate them in the subsequent Guidelines. In their current form, the Guidelines at recital 7 state that one of the objectives is to help businesses assess the 'compatibility of an individual co-operation agreement with Article 101'.*[229] The Commission is on a good track of adding legal certainty by stating explicitly in the guidelines the relevance of sustainability agreements and details relating to the TFEU 101(3) exemption with this regard. The Commission has been accused of bringing confusion and now would be an excellent time for a fresh start by giving also supporting guidance along with the guidelines. In addition, the Commission should assess how it can best support business to work for a more sustainable future. Giving case examples would probably turn out to be very useful for the business.

The Hellenic Competition Commission calls for a transition to a sustainable economy, which it states demands support from all public and private sectors. The HCC holds that the private sector requires in addition to some legal certainty, a complex system of nudges and incentives in order to integrate sustainability objectives in their business strategies. The HCC states, that *competition authorities should facilitate this transition to a Green economy.*[230] I find that the EU should also seek ways to nudge and incentive companies to co-operate within the area of sustainability. How this should in practice be done would be a question of a different study.

The court is anyway not tied to the Commissions' views and I think that the companies should look more importantly to what the direction of the legal jurisprudence has been and what is the existing political climate on how much sustainability needs to be promoted. It seems clear that the EU wishes all actions to be taken to get to its target of being the first carbon neutral continent by 2050. The EU cannot get to this goal only via explicit regulatory provisions but also needs more dynamic actions

[228] Kingston 2021, p. 6.
[229] Tyagi 2020, p. 4.
[230] HCC 2020, paragraph 110.

from the field. Therefore, I think it seems evident that all of EU institutions will strive towards pro-sustainable interpretation in all possible ways and whenever there is room for manouevre.

I think that the Netherlands Authority for Consumers and Markets (ACM) has provided an interesting point of view for analysing agreements with environmental effects. The ACM makes an interesting distinction with different stages of sustainability in its guidelines. The ACM sets up two categories according to which agreements should be evaluated. The basic principle of the EC which presupposes that users should be compensated at least for the harm caused by the restriction of competition for them, would apply in the normal cases ("other sustainability agreements"). However, the basic principle would not apply to "environmental-damage agreements". These agreements are made of two cumulative criteria: 1. *The agreement aims to prevent or limit any obvious environmental damage* and 2. *The agreement helps, in an efficient manner, comply with an international or national standard to prevent environmental damage to which the government is bound.*[231] In these agreements, the ACM thinks that the benefit could accrue to others than merely the users. ACM quite on point states that the rationale for this is, that the users' *demand for the products in question essentially creates the problem for which society needs to find solutions.*[232] I think that this way of separating agreements and the tools for evaluating them could come handy. Kristinn Már Reynisson analyses in her article, are non-economic benefits an option regarding the Article 101(3) TFEU. She points out that normally the analysis in based on monetary values. She however calls out for taking environmental concerns into account regardless whether they deliver economic benefits or not.[233] Taking environmental benefits into account when they can be translated into the language of economics and monetary units, should not be a problem per se. The practical way of executing the task of providing evidence of such economic benefit might however turn out to be quite hard and in the end, not convincing. Taking economic benefits into account based on their other than monetary value, is without a doubt an even tougher task. I think that this would still be what needs to be done to be able to truly take sustainability into account. A lot of things just are unmeasurable by their nature and albeit they would have a current monetary value, the question of their monetary value from years on remains a mystery. Take for instance clean air, how can it really be measured? Is it the people's willingness to pay for it as in Chicken of Tomorrow? Is it the likeliness of decreased chance of dying prematurely like in the Energy Accord? It is short sighed to state that clean air could have a simple price tag and through that it could be measured against e.g. increased electricity bills. I think, that in these kind of situations, the ACM's partition is useful. When it would be the case for "environmental-damage agreements", the demand

[231] ACM 2020, paragraph 38 and 39.
[232] Id., paragraph 41.
[233] Reynisson 2014, p. 736-738.

for economic evidence for constituting a fair share of benefits for consumers, should be cast aside. In these situations, the Courts should evaluate, whether the aim is something higher and based on that evaluate the harm and benefit. Obviously, the Court should stay alert in case of greenwashing, which I think, the Court would surely be able to spot. Putting much emphasis on the risk of greenwashing fails to acknowledge that the judiciary is formed of professionals dealing with complex issues of which greenwashing probably doesn't even come close. The national competition authorities nor EU authorities such as the Commission should neither be underestimated in not being able to spot greenwashing.[234] Leaving room for interpretation would not mean that greenwashing would happen, as there is still always a chance to state that the agreement fails to meet the criteria for the exemption.

To sum up, many different kinds of actions should be taken in all areas of society. Officials should adopt regulation and provide guidance and examples on allowed co-operation. The companies should take unilateral actions and co-operate even when there would not be total certainty of the actions considered to be exempted and hence allowed. Unilever's global general counsel on competition states in his article that in-house lawyers and external advisors need to *venture outside their comfort zones to make effective industry action happen.*[235] I could not agree more with Holmes who states in connection with the urgent need to act states that it is not the time to be timid.[236]

[234] The Commission has for instance posed fines on car manufacturers when they colluded on the levels of emission cleaning so that they none of them would go beyond the requirement of law despite there was technology available for that leap. EC: Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars.
[235] Middelschulte 2020, p. 41.
[236] Holmes 2020, p. 10.

8 Conclusions

European Union was established to bring about peace into a violent Europe.[237] in the beginning of this thesis I asked, can the goals of politics change over time when the world and the problems it poses, change. We are facing a problem that is completely unique in the history of the EU. There is no precedent for the climate change and responses to it. The acuteness of the crisis should be undisputed. I believe that promoting sustainability lies at the heart of current politics and has entered the set of goals EU's politics have. I believe that promoting sustainability also promotes the EU's traditional goal of ensuring peace. I believe that this is also how the issue has been seen in the EU as during this thesis I have noted that the EU seems to promote sustainability in every turn.

The subject of this thesis lies in the question of balancing traditional competition law goals and sustainability aims. In the beginning of this thesis, I presented my research questions, which are:

1. Should and could competition law take sustainable goals into account when assessing co-operation between competitors and
2. more specifically, can agreements be exempted under Article 101 (3) TFEU when there are sustainability gains to be achieved

In this second chapter of this thesis, I also argumented the limitation to this thesis and why is this subject relevant and important to make a research on. In the third chapter I presented briefly the history of sustainability and pointed out that former underdog has become the topdog which lies at the heart of world politics.

The fourth chapter is divided into two sections which answer to the first research question. I found out that competition law should take sustainability into account and that taking sustainability into account is not a desirable goal but in essence a mandatory obligation. In the second section of this fourth chapter I found out that in the competition law's norms there exists room for taking sustainability into account and it is considered widely legitimate among the legal experts. In this chapter I also found an answer to my second research question. Albeit there are some limitations and situation remains unclear, based on current wordings of provisions, legal literature and jurisprudence, sustainability agreements could be to some extend be exempted under the TFEU 101(3) Article.

[237] EU: History.

In the fifth chapter I looked at current developments and in particular, how has the Commission promoted the development of competition law to a more sustainable direction. In this chapter I summarised the process of the guidelines' renewal and some opinions the Commission has received from different stakeholders. In this chapter I also presented the Commission's recently published document on the draft for new guidelines and commented my views on how they answer to the current challenges in combining sustainability agreements and competition law's goals.

In the sixth chapter of this thesis, I presented my analysis on how the provisions should be amended and sustainability in the future promoted. I enumerated several ways of promoting sustainability consisting of e.g. legal provisions' renewal to companies finding courage to be pioneers.

Looking at the different sources, the situation of combining competition law and sustainability aims has long seemed unclear. Taking sustainability into account as a benefit that would allow co-operation has previously asked for tremendous courage. The Commission has taken a step towards more sustainable competition law, but we are still in a very uncertain situation. When sustainable co-operation is planned, companies should have a broad perspective and take a leap of faith. As shown in this thesis, there is legal support for taking environmental issues into account in every policy, including competition policy. Also, competition law provisions leave room for interpretation and there is no rule against taking sustainability into account. In fact, quite the opposite: primary law presupposes for it to be taken into account and emphasized when possible as TFEU 191 (2) and supporting case law points out. The CJEU follows its own rules but reflects the society at large. If there would be a case before the court today, I believe it would be ruled as far as possible in favor of sustainability.

The EU mandates that all policies take sustainability into account and calls out for everyone, including business, to do their share in the strive towards the Green Deal's objectives i.e. a cleaner future. It is comforting that the political message and demand for a more sustainable future is nowadays explicit. This willingness to promote sustainability does not however translate currently into clear actions that the companies dare to trust in day-to-day business. Legal uncertainty and the chilling effect of certain rules have not made it compelling for undertakings to take action in this field. I claim that the times have changed, and a case brought to Court today would be dealt differently than it would have been previously. There is a clear legal basis for taking sustainability into account across the EU and all its policies. Competition policy also entails provisions that at minimum, do not explicitly shut taking sustainability into account out. I claim that there are, as a matter of fact, numerous legal sources that actually enable competition law to take sustainability into account.

The Commission has pointed out in the Communication for draft guidelines, that sustainability makes an excellent argument in the balancing of benefits. The next step after the guidelines have been finalised, would be that someone would dare to lead and be brave enough to test the boundaries and current legal environment. The field lacks jurisprudence and as long as no company dares to take a chance on sustainability and everyone just waits for the cavalry to arrive, the legal jurisprudence will remain weak.

Article 101(3) combined with sustainability should complement other means for striving towards a more sustainable future, not substitute them. The question is not who is responsible for the improvement of sustainability but who can gain an opportunity from it. We are accountable to future generations for the actions we take today. The value of sustainability is priceless, and sustainability should be pursued with this in mind.