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# "SUSTAINABILITY AND COMPETITION POLICY: An overview between environmental protection and article 101 TFEU, with an emphasis at the scope of paragraph 3"

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## INTRODUCTION

European Union must secure the dignity and the free development of personality of its citizens, inasmuch civil liberties are sine qua non prerequisite for democracy and a state governed by the rule of law. Protecting EU citizens and their rights, in a holistic and consecutive manner, guarantees a legal certainty and the unification and solidity of the European integration. Environmental protection and conservation of a free internal market are two legally protected goods of vital importance, which contribute to the broader protection of the EU citizens.

Environmental protection and particularly environmental sustainability, on the one hand, is a constantly increasing issue in recent years, since the urgency and necessity to cope with it is continuously acuter. As pressing as ever in the past is it needed to address pollution, natural disasters, and in general every aspect of the climate change. The environmental degradation is a matter of genuine public interest. Paris agreement on climate change of 2016[1], and European Green Deal approved in 2020[2] are both great instances for the ecumenical and European direction of the legislative frameworks to environmental protection and sustainability. Besides the fact that, there are already provisions, from the Charter of Fundamental Rights and the Treaties of the European Union ("TEU") and on the Functioning of the EU ("TFEU"), which establish the objective of a sustainable environmental area in the EU[3]. Nevertheless, it is not certain that all the above are enough yet.

On the other hand, the subsistence of free internal market among the member states is one of the utmost fundamental aims of the European integration since the beginning of the EU, as European Coal and Steel Community in 1951, and later as European Economic Community in 1957, and constituting up to this day still an imperative goal of the EU; in spite of the fact that EU nowadays has a much wider agenda.

Main branch of EU law that achieves the protection of free internal market is European Competition Law[4]. The free internal market is an aspect of: economic freedom (component of the aforementioned free development of personality), and competition as such; those two are the essential objectives of EU's Competition Law. Protocol No 27 on the internal market and competition, regarding Article 3 of the Treaty on European Union ("TEU")[5], notes that one of the objectives of the EU is to establish an

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[1] Paris Agreement - UN Framework Convention on Climate Change, signed on 22 April 2016 and ratified by the European Union on 5 October 2016.

[2] Communication from the Commission, *The European Green* Deal, COM(2019) 640.

[3] Articles 11, 191-193 TFEU, Articles 3(3),(5) and 21(2) TEU, and Articles 37 of the EU Charter of Fundamental Rights.

[4] Article 3(1)(b) TFEU, states, among others, that the Union shall have exclusive competence in "*the establishing of the competition rules necessary for the functioning of the internal market*".

[5] Article 3(3) TEU, in particular, states that "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance*".

internal market with a "*system ensuring that competition law is not distorted*"[6]. Articles 101 and 102 of Treaty on the Functioning of the EU ("TFEU") are the core of the legislation for the unlawful practices that are targeted from the European Competition Law. However, the relevant EU legislations may achieve multiple goals besides the protection of competition as such; for instance consumer welfare, small and medium enterprises ("SMEs") protection, privatization and market liberalization, or more generic such as fairness, equality and efficiency maximization. Their weighting is a matter of friction for academics over the years and there may be problems in their practical application, too. Nevertheless, Article 101 of the TFEU consolidates some of the anti-competitive practices that "*shall be prohibited as incompatible with the internal market*"[7]. In particular, it addresses anticompetitive agreements, decisions, or concerted practices; namely collusions (vertical, or mainly horizontal agreements - cartels). Although, the unlawful character of those anticompetitive acts may be removed, in principle, if the provisions of Article 101(3) TFEU cumulatively occur.

Over the last years, European Commission is actively promoting how competition rules could be applied to environmental sustainability objectives[8]. Moreover, several National Competition Authorities have assessed and taken a position regarding the matter of environmental sustainability and Article 101 TFEU. Under those circumstances, the Commission published Draft Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, which include a new chapter particularly for "Sustainability agreements"[9]. Current Commissioner of Competition policy, the Executive Vice-President Margrethe Vestager, said: "*The revision of the Horizontal Block Exemption Regulations and Guidelines is an important policy project as it clarifies for businesses when they can cooperate with rivals. Horizontal cooperation may lead to substantial economic and sustainability benefits, including support for the digital and green transition. The proposed revised rules aim to keep up with developments so that beneficial cooperation can take place, for example when it comes to sustainability or data sharing. We now invite interested parties to provide comments on our draft revised rules, which will help us finalise the new rules to enter*

[6] Consolidated version of the Treaty on European Union - PROTOCOLS - Protocol on the internal market and competition (No 27), [OJ C 115, 9.5.2008].

[7] Article 101(1) of the TFEU.

[8] See, Commission's Green Gazette on *Competition policy's contribution to the European Green Deal*, https://competition-policy.ec.europa.eu/policy/green-gazette/competition-policy_en; Executive Vice-President Vestager's keynote speech at the 25th IBA Competition Conference, *Competition policy in support of the Green Deal* (September 2021), available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en; and Competition policy brief, *Competition policy in support of Europe's Green Ambition* (September 2021), available at https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF.

[9] Revised Draft *Guidelines on The applicability of Article 101 of the TFEU to horizontal co-operation agreements* (published on March 2022, and consultation period ended on April 2022), Chapter 9, available at https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en#view-the-consultation-document.

*into force on 1 January 2023*"[10]; making clear that the green transition of European Competition Law is indeed an aim to pursuit in policy making, adding probably a new goal for the EU's Competition Law; the environmental sustainability.

Therefore, EU's Competition Law aims and provisions, and environmental sustainability requirements are not necessarily inconsistent with one another. Nonetheless, issues may arise if those cannot be achieved simultaneously; for instance, could or should other predominant aims of competition law, and specifically of Article 101 TFEU, be limited? Subsequently, if they can, to what extend would that be acceptable? Is Article 101 TFEU a suitable medium for achieving aims of environmental sustainability, or are those practices tooling the Competition Law? These questions and the opaque limits of them is ventured to be examined, assessing the current and pre-existing legal framework, the new direction of the European Competition legislative framework, and the views of the National Competition Authorities ("NCAs") on the matter, with a special emphasis at the critical role of Article 101(3) TFEU on environmental sustainability agreements.

## A. The legal framework of European Environmental Protection then and now

First time that environmental protection was plainly mentioned as one of the essential objectives of the, former, European Community ("EC"), was in 1986 with the addition of Article 25 of the Single European Act ("SEA")[11]. It is further specified, in the third point of Article 25(130r)(1) SEA, that the Community's environmental policy shall have the objective "*to ensure a prudent and rational utilization of natural resources*", introducing a sustainability dimension on the matter, besides the protection, preservation and improvement of the environment and human health. Later, it was established, in Article 2 of the EC by the Maastrich Treaty of 1993, indirect obligation of harmonization of environmental protection prerequisites when applying other community policies[12]. In 1999, by the Amsterdam Treaty, the integration principle was established, according to which the environmental protection ought to be integrated "*into all EU sectoral policies with a view to promoting sustainable development*", while the aim became specific with the Treaty of Lisbon of 2009[13]. Moreover, Article 37 of the EU Charter of Fundamental Rights ("the Charter") states that: "*A high level of*

[10] Commission's press release on *Antitrust: Commission invites comments on draft revised rules on horizontal cooperation agreements between companies*, (March 2022), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1371.

[11] Article 25 of the Single European Act [OJ L 169, 29.6.1987].

[12] Treaty establishing the European Community (Nice consolidated version) - Part One: Principles - Article 2 - Article 2 - EC Treaty (Maastricht consolidated version) - Article 2 - EEC Treaty, states that: "*The Community shall have as its task* [...] *to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment*".

[13] European Parliament's Fact Sheets on the European Union, on *Environment policy: general principles and basic framework* (October 2021), available at https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.5.1.pdf.

*environmental protection and 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*"; along with Article 11 TFEU[14], they consolidate the integration clause for all EU policies to contain a high level of environmental protection in accordance with the principle of sustainable development, trying to balance the environmental concerns with the economic ones. However, Article 7 TFEU is the crucial to address the "policy linking" issue, since it guarantees the harmony among the multidimensional policies of the EU[15].

Nowadays, due to the augmentation of the environmental alert, there are recent European environmental protection legislations and initiatives linking those objectives with other policies, and particularly with competition policy. In November 2016, the European Commission introduced some ambitious measures for maintaining competitiveness in EU during the wanted transition to clean energy of the global energy markets[16]; the Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment ("Taxonomy Regulation") recognizes that environmental sustainability is crucial for ensuring the long-term competitiveness of the Union economy[17]; and Directive 2003/87/EC, with its' multiple recent amendments, establishes a system for greenhouse gas emission allowance trading within the Union[18].

Generally, there are the predominant provisions of EU's environmental protection of Article 3(3),(5) and 21(2) TEU and Article 11, 191, 192 - and more specifically 192(2) (polluter pays principle[19]), and 193 TFEU, and there is also a variety of EU's ancillary means for the better confrontation of the matter of environmental sustainability. Additionally, the pursuit of genuine environmental sustainability objectives became more clear in the EU by the signing of the Paris agreement on climate change in 2016, and the approval of the European Green Deal in 2020. However, the current legislative

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[14] Article 11 TFEU says: "*Environmental protection requirements must be integrated into the definition and interpretation of the Union policies and activities, in particular with a view to promoting sustainable development*".

[15] Article 7 TFEU states: "*The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers*".

[16] Communication from the Commission, *Clean Energy for All Europeans*, COM (2016) 860, available at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52016DC0860.

[17] "*Sustainability and the transition to a safe, climate-neutral, climate-resilient, more resource-efficient and circular economy are crucial to ensuring the long-term competitiveness of the Union economy. Sustainability has long been central to the Union project, and the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) reflect its social and environmental dimensions*", Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on *the establishment of a framework to facilitate sustainable investment*, and amending Regulation (EU) 2019/2088, recital 4.

[18] Consolidated text (of 2021) of the Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 *Establishing a system for greenhouse gas emission allowance trading within the Union* and amending Council Directive 96/61/EC, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02003L0087-20210101.

[19] European Parliament's Fact Sheets on the European Union, on *Environment policy: general principles and basic framework* (October 2021), available at https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.5.1.pdf; see also, Dolmans M., *The 'polluter Pays' Principle as a Basis for Sustainable Competition Policy* (October 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3735561.

framework is probably still immature and, hence, insufficient, despite all the efforts. "*The general organisational and environmental governance set up in the Member States is very complex and diverse*"[20]. Those circumstances could lead to the approach that having the integration principle as a ground, and along with the complexity of the current framework on Environmental Protection, other well-established European policies could assist at the promotion of environmental objectives. Such a policy could be the Competition policy and its provisions. Specifically, an evaluation of 2021 regarding regulations and guidelines of Article 101 TFEU illustrated that, in spite of their great importance as tools, they need to be revised in order to illustrate some essential sectors, such as the concerning, environmental sustainability[21].

### B. Sustainability and the environmental aspect of it: An EU's objective

In general, sustainability constitutes a broad concept. It is commonly applied in science (e.g. thermodynamic equilibrium); not only in natural science but also in economics and in jurisprudence, increasingly. Presently, 'sustainability' and 'sustainable development' are often used interchangeably. Sustainability may have its core in environmental protection but it also includes dimensions of economic and social protection[22], meeting the objectives of an economic approach[23] that comprises, in terms of allocative efficiency, a scarcity of resources management, and specifically the resources of the environment in principle, but also the resources of the economy and society, for instance the insufficient workforce. The European Green Deal approved by resolution of the European Parliament in January 2020[24] aims for a "*modern, resource-efficient and competitive economy*" that ensures "*no net emissions of greenhouse gases by 2050*" [25] and reduction of them by at least 55% by 2030 - compared to 1990 levels, "*economic growth decoupled from resource use", and "no person and no place left*

[20] See Conclusions of the IEEP's (Institute for European Environmental Policy) *Development of an assessment framework on environmental governance in the EU Member States* (May 2019), available at https://ec.europa.eu/environment/environmental_governance/pdf/development_assessment_framework_environmental_governance.pdf.

[21] Commission Staff working Document, *Executive Summary of the Evaluation of the Horizontal Block Exemption Regulations* (SWD/2021/0104), part 3 "findings" para 2, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2021:104:FIN

[22] See OECD's paper on *Sustainability and Competition*, (2020), p. 13 para. 3, available at http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf.

[23] According to the sense of economic approach, the goal of competition precepts is the consumer welfare via the collateral of productive and allocative efficiency. Yet, the "more economic approach" of the "Chicago school" narrows the efficiency only to a financial dimension. See Δημήτρης Ν. Τζουγανάτος, *Δίκαιο του Ελεύθερου Ανταγωνισμού: Ουσιαστικό δίκαιο του ελεύθερου ανταγωνισμού* (Νομική Βιβλιοθήκη, 1ος Τόμος, 2η έκδ., 2020), p. 9.

[24] European Parliament resolution of 15 January 2020 on *The European Green Deal* (2019/2956(RSP)), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020IP0005

[25] Communication from the Commission, *The European Green Deal*, COM (2019) 640, (December 2019), Chapter 1 para. 2, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN.

*behind*"[26]. Moreover, Article 3(3) TEU, denotes that the EU shall establish an internal market which "*shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance*". This provision indicates a broader sense of sustainable development in EU's substantial legislation; particularly, it reveals the interconnection of sustainable development with both the environmental improvement, and economic prosperity, stating expressly the specific objective of high competition in social market economy. Furthermore, the Resolution of the UN 66/288 contains in the notion of sustainable development a very broad approach, including, among others, social matters such as labour and human rights[27]. OECD notes that "[t]*he sustainable growth should ensure that the development meets the essential needs for jobs, food, energy, water, and sanitation without compromising the needs of future generations. In decision making, it aims to merger environment and economics so that technology and risk management are in line with achieving sustainable growth. It also involves a reorientation of international economic relations to ensure the benefits of development are more widely shared*"[28]. Nonetheless, this dissertation emphasizes at the environmental subsistence of sustainability[29], and the correlation of it with the current European legislative framework of Competition Law provisions.

The Taxonomy Regulation 2020/852 comprises a framework according to which it can be assessed whether certain economic activities are "environmentally sustainable". This assessment is through conditions designated in this regulation. Hence, those criteria could be used safely as a roadmap for what environmental sustainability constitutes; especially in relation with the EU marketplace and the economic activities in it, where the Union's Competition law applies. The conditions of this Regulation, which have to be met cumulatively, are that of (i) contribution substantially to at least one of the environmental objectives this regulation sets, (ii) not significantly harm any of the environmental objectives, (iii) compliance with minimum social and governance safeguards, and (iv) compliance with technical screening criteria adopted under the Regulation[30]. The objectives, which are further clarified by other Articles of the

[26] See Official website of the Commission on the European Green Deal, available at https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

[27] In particular, gender equality and minimum wage issues; see Resolution 66/288 of the UN (July 2012), available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_66_288.pdf.

[28] OECD's paper on *Sustainability and Competition*, (2020), p. 13, available at http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf.

[29] For further reasons to focus on the environmental sustainability, see Hellenic Competition Commission (HCC) and Dutch Authority for Consumers and Markets (ACM), *Technical Report on Sustainability and Competition* (January 2019), available at https://www.acm.nl/en/publications/technical-report-sustainability-and-competition.

[30] Article 3 of the (Taxonomy) Regulation (EU) No 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198, 22 June 2020.

regulation, are set out in Article 9 of the Regulation, in particular: "*(a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems*".

Thus, after a brief overview on the matter, encouragement of environmental sustainability generally in EU policies is probably obvious; however, the issue remains. Is promotion of environmental sustainability, in terms of green transition, consistent with the EU's competition legislation and would it mitigate genuine objectives of competition law, and article 101 TFEU in particular?

## CHAPTER I: Environmental Sustainability agreements and Article 101 TFEU under EU's legislative framework

Due to a general current concernment of the public respecting environmental sustainability issues, several businesses desire to promote "green" products or services; others for reasons of corporate social liability, others for a genuine wish to a more sustainable environment, others because they bet to higher profits through green policies, in spite of the high short-term costs this may have, and others only for the regulatory obligations which may apply on them. However, private initiatives could assist to achieve the goal of a sustainable environment, by further actions than legislatively mandatory. Agreements among undertakings could attain this even more, since it could actuate the production process to be faster, more effective and with lower costs, and the development at the area of greener products will have the possibility to be more rapid, establishing them at the market; while all those could provide more options for consumers and could increase the competition for that relevant market.

In fact, the Commission, twenty years before, had already recognized, by Communication 412 of 2002, the utility environmental agreements may grant through the flexibility they may present in comparison to regulatory methods[31]. More recently, in Communication of 2018 on "*A European Strategy for Plastics in a Circular Economy*", the Commission presents a need of "*cooperation by all its key players, from plastics producers to recyclers, retailers and consumers*" increasing sustainability and bringing "*new opportunities for innovation, competitiveness and job creation*"[32]. Although, there are various concerns on the private environmental co-operations, such as of the so-called "greenwashing"; namely that those co-operations could be used as a pretense for anti-competitive practices[33]. Furthermore, those agreements could be argued that they are unlawful as completely incompatible with the provision of the European Competition law on collusions, namely Article 101 TFEU.

Nonetheless, it is supported that environmental agreements do not necessarily distort significantly competition; they could even fall outside of the scope of Article 101 TFEU for anti-competitive agreements; or they could fall at the scope of the "standardization agreements"; or, if Article 101(1) TFEU is applicable, the assessment of Article 101(3) TFEU comes to the foreground.

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[31] Communication from the Commission on *Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment*, COM (2002) 412, Chapter 2 para. 6, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0412&from=EN.

[32] Communication from the Commission on *A European Strategy for Plastics in a Circular Economy*, COM (2018) 28, p. 1 para. 3, available at https://eur-lex.europa.eu/resource.html?uri=cellar:2df5d1d2-fac7-11e7-b8f5-01aa75ed71a1.0001.02/DOC_1&format=PDF.

[33] See Taxonomy Regulation 2020/852 for a definition of "greenwashing" recital 18.

### A. Agreements non distortive to competition

First, to implement Article 101(1) TFEU the conditions set out in it must be met. The subjective element shall be fulfilled; hence, entities practicing economic activities, while not acting at the context of official public authority, or of providing social welfare via quasi-private mechanisms. Nevertheless, in cases where there is an economic activity from the entity, Article 101(1) TFEU could be inapplicable for reasons of public interest only if the practice is imposed from the state. The "state action defence" is construed and implemented in a narrow sense. The state intervention shall essentially limit the free business activity of the undertaking in the market in order to expunge the anticompetitive character of the agreement, since it pervades the sphere of state enforcement[34]. Therefore, as regards an environmental agreement, it is not mandatory that it will have an economic substance, and even if it does, the state action defence could be raised.

Second, conditions of the "de minimis doctrine" may concur; according to which, it is not appreciably restrictive to internal competition and, hence, Article 101(1) TFEU is inapplicable, if the parties of an agreement are actual or potential competitors in any of the relevant markets affected and their cumulative market share does not exceed 10% (agreements between competing undertakings), or they do not consist competitors and each's market share does not exceed 15% (agreements between non-competitors)[35]. Thus, in situations where an environmental sustainability agreement occurs indeed in the context of an entity's economic activities, not enforced by the State, the de minimis doctrine might be applied.

In the alternative**,** theory and case law accept that even in instances of restraint agreements, the Article 101(1) TFEU may not be violated in some occasions where a limitation of competition is "objectively necessary" for a legitimate purpose[36]. This is sometimes argued as a defence and is traditionally characterized as "ancillary restraints doctrine", or more broadly as "commercial ancillarity"[37]. What is crucial to examine for this defence is the objectively necessary nature of the agreement to have mitigation

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[34] According to para. 22 of the 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* (2011/C 11/01), "*the fact that public authorities encourage a horizontal co-operation agreement does not mean that it is permissible under Article 101. It is only if anti-competitive conduct is required of companies by national legislation, or if the latter creates a legal framework which precludes all scope for competitive activity on their part, that Article 101 does not apply*", available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011XC0114%2804%29; see also Διαμαντοπούλου Γ., *Πράσινος Ανταγωνισμός; Ευρωπαϊκό δίκαιο ανταγωνισμού και περιβαλλοντική προστασία* (Νομική Βιβλιοθήκη, 2022), p. 23-25.

[35] Μικρουλέα Α. at, Τζουγανάτος Δ., *Δίκαιο του Ελεύθερου Ανταγωνισμού: Ουσιαστικό δίκαιο του ελεύθερου ανταγωνισμού* (Νομική Βιβλιοθήκη, 1ος Τόμος, 2η έκδ., 2020), p. 298-299; and Wish R. and Bailey D., Competition Law (Oxford University Press, 10th ed, 2021), p. 145-148.

[36] Wish R. and Bailey D., *Competition Law* (Oxford University Press, 10th ed, 2021), p. 139-144.

[37] Μικρουλέα Α. at, Τζουγανάτος Δ., *Δίκαιο του Ελεύθερου Ανταγωνισμού: Ουσιαστικό δίκαιο του ελεύθερου ανταγωνισμού* (Νομική Βιβλιοθήκη, 1ος Τόμος, 2η έκδ., 2020), p. 286.

on competition, so the pursued legitimate aim can be achieved[38]. Its essence is that, differently, no agreement would be made, if there was no restriction. It is not assessed the impact of the restriction, but the element of the necessity of it[39]. Assuredly, the Commission and the EU Courts should be "reasonable" while assessing, but this is neither the same as applying any US notion of "rule of reason"[40], neither as a weighting of pros and cons on the effects of a restriction which is admissible only under Article 101(3) TFEU. Otherwise, Article 101(3) TFEU would be useless[41]. In addition, there is the public interest ancillarity, according to which there is a minimum balance between competition policy and public interest, when the restraint of competition is inherent with the objective of the public interest cooperation agreement[42]. In "*Albany*" case, the Court stated that EU's activities include social policy, besides the competition policy, and the relevant actions of the Albany case where by their nature and (legitimate and of public interest) purpose out of the scope of Article 101(1) TFEU (former 81(1) TEC). In particular, the issue was about some trade union agreements which are, by their nature, restrictive to competition. The "*Wouters*" case, also, referred to deontological rules of professional services which were the pursuits of an agreement. Assessing their overall context, the court found that those agreements ensured that, the ultimate consumers of the relevant services and the sound administration of justice were provided, although the consequential effects were restrictive to competition by nature of those objectives. Therefore, there was no infringement of Article 101(1) TFEU since the public interest of non-competition objectives of the Wouters case outweighed a restriction of competition ("Wouters doctrine")[43]. Moreover, in Meca-Medina v Commission case, the Court of Justice applied the Wouters doctrine, and decided that the legitimate and of public interest objectives of the agreement were proportionate to the inherent restrictions on competition. It could be, hence, argued that those doctrines may apply on environmental agreements likewise; insomuch, on the one hand, they could be of legitimate character and situations could make the agreement objectively necessary restrictive on competition, otherwise the agreement would not occur (ancillary restraints doctrine). On the other hand, it could be easily raised that their objectives are not only legitimate, but also of public interest, necessary and proportionate (public interest ancillarity/ the Wouters doctrine). However, there are difficulties at the implementation of those, because they ought to be narrowly interpreted, due to the fact that an impact assessment could be made only through Article 101(3) TFEU. Therefore, those doctrines could be feasible in certain cases only

[38] Communication from the Commission — Notice — *Guidelines on the application of Article 81(3) of the Treaty* [current 101(3) TFEU], (2004/C 101/08), para. 18(2), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52004XC0427%2807%29; and Official Journal of the EU, C 56, (March 2005), p. 24, available at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=OJ%3AC%3A2005%3A056%3ATOC

[39] Metropole case T-112/99, grounds 108-109.

[40] Metropole case T-112/99, grounds 72.

[41] Metropole case T-112/99, grounds 74.

[42] Μικρουλέα Α. at, Τζουγανάτος Δ., *Δίκαιο του Ελεύθερου Ανταγωνισμού: Ουσιαστικό δίκαιο του ελεύθερου ανταγωνισμού* (Νομική Βιβλιοθήκη, 1ος Τόμος, 2η έκδ., 2020), p. 290.

[43] Wish R. and Bailey D., *Competition Law* (Oxford University Press, 10th ed, 2021), p. 141-142.

of objectively imperative reasons of environmental regulatory missions that led to agreements inherently restrictive, but out of the scope of the European Competition Law.

Moreover, particularly for agreements between related undertakings which operate at a different level of production or distribution chain, Commission's Guidelines on Vertical Restrains contain instances of vertical agreements excluded from the scope of Article 101(1) TFEU, while Commission's Vertical Block Exception Regulation ("VBER") refers to vertical agreements falling within the scope of Article 101(1) TFEU but Article 101(3) TFEU applies[44]. Regarding specifically environmental sustainability agreements, the VBER does not contain any reference to them, but their current Guidelines expressly note sustainability and its environmental substance as a major objective of the EU, but without that consisting a distinct category of vertical agreements. Thus, vertical agreements which pursue sustainability objectives should be assessed as any other vertical agreement under the Guidelines, while provisions of the VBER apply on them, likewise[45]. This position of the Guidelines is most likely a result of the 2020's evaluation, on the formerly in force VBER's of 2010[46], which did not detect any "*specific issue in relation to sustainability agreements in the vertical supply chain* […] *However, in line with the objectives of the European Green Deal, which is one of the priorities for this Commission mandate and which aims to make the EU's economy sustainable by turning climate and environmental challenges into opportunities across all policy areas, any related issues may be taken into account when considering next steps*"[47]. Hence, it is appropriate to present the Guideline's principles that exclude vertical agreements from the scope of Article 101 TFEU, since vertical sustainability agreements may meet the characteristics of those instances. Those are the agreements which have no effect on Trade, or they are of minor importance, or SME's cases, or some agency agreements, or subcontracting agreements[48]. Moreover, according to the VBER, article 101(1) TFEU is, in principle, inapplicable on vertical agreements if "*the market share held by the supplier does not exceed 30 % of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30 % of the relevant market on*

[44] Communication from the Commission - Commission Notice - *Guidelines on Vertical restrains* (2020/C 248/01), para. 23; and Article 2(1) of Commission Regulation (EU) 2022/720 *on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices* ("VBER").

[45] Communication from the Commission - Commission Notice - *Guidelines on Vertical restrains* (2020/C 248/01), para. 8. Additionally, para. 144 mentions an instance of sustainability objectives as a qualitative criterion for selective distribution systems, and para. 316 presents another example of sustainability objectives as non-compete obligations that could fall within the scope of Article 101(3) TFEU.

[46] Commission Regulation (EU) 330/2010 on *the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices*, no longer in force since 31/05/2022.

[47] Commission Staff Working Document *Evaluation of the Vertical Block Exemption Regulation*, SWD(2020) 72, Chapter 5.1, p. 31, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020SC0172.

[48] Communication from the Commission - Commission Notice - *Guidelines on Vertical restrains* (2020/C 248/01), Section 3, p. 10-17.

*which it purchases the contract goods or services*", but there are instances where article 101(1) TFEU applies for vertical restrains, such as vertical agreements with "*a total annual turnover exceeding EUR 50 million*"[49].

Last but, certainly, not least, concerning horizontals cooperation agreements cases, restrictions by object or by effect constitute basic assessment principles. They examine the possible obstruction, limitation restraint, or embezzlement of competition, which would make the agreement to fall into the realm of Article 101(1) TFEU. Nevertheless, a sustainability agreement between undertakings is not necessarily adversely effective on competition, nor by object, nor by effect. It could even fall in the scope of cases which may not always be unlawfully restrictive to competition, such as instances of "information exchange", or "Research and Development agreements" ("RnDs"), or "Production agreements", or "Purchasing agreements", or "agreements of Commercialisation", or "Standardisation Agreements", if the environmental agreement has the characteristics of any of these categories. Specifically, the Guidelines to horizontal agreements of 2011 include environmental agreements in the chapter of standardisation agreements as a part of them[50], notwithstanding the fact that the relevant Guidelines of 2001 devoted a distinct chapter for environmental agreements, separated from the "agreements on standards"[51], but this issue is examined later, along with the revised Draft Guidelines of 2022, in section D of this Chapter I.

Therefore, there are instances such as the aforementioned where a co-operation agreement may not fall into the scope of Article 101(1) TFEU. That applies on the environmental sustainability agreements which fulfill any of the above, likewise.

### B. Agreements falling in the scope of Article 101(1) TFEU

Sustainability agreements, which restrict competition by object or effect and they are not any of the cases previously reviewed in Section A, of Chapter I, oppose to Article 101(1) TFEU. They restrict competition by object when they do not genuinely pursue a sustainability objective but cover up price fixing, market or customer allocation, limitations of output or limitations of quality or innovation. These could be also in the context of "greenwashing", whereas according to recital 11 of the Taxonomy Regulation, it is "*the practice of gaining an unfair competitive advantage by marketing a financial product as environmentally friendly, when in fact basic environmental standards have not been met*".

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[49] Articles 2(2) and 3(1) of the VBER 2022/720, identically to the former VBER 330/2010.

[50] "*Agreements setting out standards on the environmental performance of products or production processes are also covered by this chapter*", namely chapter 7 on "Standardisation Agreements". Para. 257 of the 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*, (2011/C 11/01), available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011XC0114%2804%29.

[51] Chapters 6 and 7 of the Commission Notice - *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements* (2001/C 3/02), available at, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001Y0106%2801%29.

Agreements which are anticompetitive, and do not assist anyhow to the improvement of the environmental sustainability but they use it only as a stalking horse, are almost always falling in the scope of the Article 101(1) TFEU. A recent decision of the Commission, on the "*Car Emissions*" case of 2021, constitutes a bright example for another way that competition law could attain the pursuit of the Green Deal objectives, for environmentally sustainable development, along with the maintenance of a free, fair and innovative market[52]. In particular, the Commission fined BMW and Volkswagen group (Volkswagen, Audi and Porsche) for collusion agreement limiting technical development, implementing Article 101(1)(b) TFEU. It was proved that the car manufactures agreed to minimize harmful gas emissions of their products only to the level that they were obliged to by law, in spite of the fact that they possessed technology for further reduction. Thus, their agreement was simultaneously against EU antitrust policy and environmental improvement. Besides, the Commissioner Vestager expressly stated, regarding the case, that: "*Competition and innovation on managing car pollution are essential for Europe to meet our ambitious Green Deal objectives. And this decision shows that we will not hesitate to take action against all forms of cartel conduct putting in jeopardy this goal*"[53]. Similarly, in the "*Consumer Detergents*" case, there was an agreement aiming to a stabilization of the market, where nobody would use environmental incentives to acquire competitive advantage over the others and the positions of the market would remain the same, infringing Article 101(1) TFEU while it prevented an environmental sustainability development; hence, the Commission imposed fines totaling €315.2 million on them for that agreement[54]. Nevertheless, those cases compose situations where antitrust and environmental sustainability objectives are not incompatible with one another, since they are both mitigated; but the trickiest part remains when those two aims collide.

Examining ECJ's case law, there can be found instances that were by object collusions and used environmental sustainability as pretext, although they were friendly to the environment. In *VOTOB* case, the Commission detected that the agreement, among six Dutch undertakings for the transmission of a stable environmental charge on consumers, due to a storage cost of chemicals, was a direct price fixing, thus the agreement was falling under Article 101(1) TFEU[55]. Nevertheless, it is a very intriguing matter an anticompetitive agreement by object, being substantially beneficial to other European policies of fundamental importance by effect, such as environmental sustainability development. In such a situation Article 101(3) TFEU would be the most suitable means to assess if this condition could fall out of the scope of the Article 101(1) TFEU. Furthermore, the Article 101(3) TFEU would be again apposite to examine whether Article 101(1) TFEU may not apply in cases of genuine environmental sustainability objectives, which are restrictive to competition by effect. Such an

[52] Case AT.40178 - *Car Emissions*, C(2021) 4955.
[53] See Commission's press release on *Antitrust: Commission fines car manufactures*, 8th of July 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581
[54] Case AT.39579, COMP/39.579 - *Consumer detergents*, C(2011) 2528, para. 24.
[55] XXIInd Commission's *Report on competition policy* 1992, paras. 177-186, p. 108-110, available at https://op.europa.eu/en/publication-detail/-/publication/d406e5bd-53a6-4642-b7f9-00c2abb4d01b.

instance, of an environmental agreement restrictive to competition by effect under Article 101(1) TFEU, could be where the parties limit their individual ability to decide what to produce or how to produce it, but, as already mentioned, the requirements of Article 101(3) TFEU could be argued that they are satisfied, such as in the *CECED* case[56].

### C. Environmental Sustainability agreements and Article 101(3) TFEU

Article 101(3) TFEU sets a lawful exception for the first paragraph of Article 101 TFEU, when there is a restraint agreement but, under the conditions of this third paragraph, it could be assessed that pros overmatch cons of the restraint agreement and, thus, it is compatible with the Article 101(1) TFEU. Some of those exceptions are categorized by the Block Exception Regulations ("BERs"), as the ones viewed earlier in Section A, Chapter I; in those instances their existence proves the satisfaction of the conditions of the Article 101(3) TFEU. On the other hand, the non-regulated instances have to be examined case-by-case for the fulfilling of the prerequisites of the Article 101(3) TFEU, while the parties ought to self-assess their action at those circumstances[57]. Essential tool, to construe the conditions and for the implementation of the Article 101(3) TFEU, are the Commission's Guidelines, analyzed in the next Section D, Chapter I.

Therefore, this third paragraph of Article 101 TFEU could be the key for the harmonization of environmental sustainability objectives and restraint agreements which present those objectives[58]. The conditions have to be met cumulatively, and they are (1) the contribution "*to improving the production or distribution of goods or to promoting technical or economic progress*", while (2) "*allowing consumers a fair share of the resulting benefit*", (3) the restrictions are "*indispensable to the attainment of these objectives*", and (4) the restrictions are not "*eliminating competition in respect of a substantial part of the products in question*"; as they are presented below.

1. <u>Improvement of the production or distribution of goods or promotion of technical or economic progress</u>

According to the first condition of the Article 101(3) TFEU, the agreement or decision or concerted practice needs to contribute "*to improving the production or distribution of goods or to promoting technical or economic progress*". The essence of this condition is that there have to be created some efficiency gains and benefits from the agreement; particularly, cost and qualitative efficiencies. Moreover, this improvement has to be of objective value for the EU as a whole and not of a private nature beneficial

[56] Case IV.F.1/36.718.*CECED*, Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (2000/475/EC), paras. 62-66.
[57] Council Regulation (EC) 1/2003 on *The implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* (December 2002), [OJ L 1, 4.1.2003, p. 1–25].
[58] See Holmes S., "Climate change, sustainability, and competition law", Journal of Antitrust Enforcement, 2020, p. 371-372, available at https://academic.oup.com/antitrust/article/8/2/354/5819564.

to the parties of the agreement. There is a dichotomy, however, whether the efficiency could be assessed in a narrow or in broader view. The narrow view examine it only to an economic-financial substance, and it is argued that this reflects the view of the European Commission and its Guidelines, while the EU's courts and National Competition Authorities ("NCAs") have followed this approach in several cases. The broader view of Article 101(3) TFEU presents as legitimate to take into account, while assessing it, non-economic considerations of other EU's policies, such as environmental protection objectives, while there are case decisions supporting this approach, likewise (e.g. the aforementioned CECED case)[59]. Nonetheless, this debate could be bypassed if someone identifies the direct economic efficiencies that an environmental sustainability agreement could function[60]. Besides the fact that, such an agreement could satisfy, at first, the qualitative efficiencies; the improvement of production, by the better allocation of resources that sustainability advocates; the improvement of distrusting goods, by practices which lower "*the ecological footprint of transport*"; and the potential technological progress in developing green technologies[61]. Thus, it could be supported that an agreement with environmental sustainability objectives may fulfill the first condition of the Article 101(3) TFEU, since it can be in compliance with the concepts of "*improving the production or distribution of goods or to promoting technical* [...] *progress*", while all those could be estimated in "*economic progress*" terms. However, there are practical issues and uncertainty for the economic valuation of non-competitive objectives, such as the one in question.

2. Consumers' fair share of the resulting benefits

The second condition of the Article 101(3) TFEU, requires that the consumers should have a fair share of the efficiency gains that the restraint agreement produces, as examined in the first condition. It is also known as "pass-on" condition. Under the veil of this condition, "consumer" is regarded as any direct or indirect user of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers. It must be estimated "*the overall effect on all consumers in the relevant markets*"; while "*out of market efficiencies*" could be taken into account. The overall benefits for the consumers should be greater than the restriction; particularly for agreements that may lead to higher prices, consumers "*must be compensated through increased quality or other benefits*".[62] However, this condition is interpreted in a narrow sense constituting an obstacle on the application of environmental sustainability objectives[63]. Environmental benefits may be visible in a

[59] Wish R. and Bailey D., *Competition Law* (Oxford University Press, 10th ed, 2021), p. 160-167.
[60] Holmes S., "*Climate change, sustainability, and competition law*", Journal of Antitrust Enforcement, 2020, p. 372, available at https://academic.oup.com/antitrust/article/8/2/354/5819564.
[61] Dolmans M., *The 'polluter Pays' Principle as a Basis for Sustainable Competition Policy* (October 2020), p. 15, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3735561.
[62] Wish R. and Bailey D., *Competition Law* (Oxford University Press, 10th ed, 2021), p. 169-170.
[63] In favor of this view, see Veljanovski C., *Collusion as Environmental Protection - An Economic Assessment*, Journal of Competition Law & Economics, Vol. 17 (2021) p. 5-6, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3693381; Costa-Cabral Francisco, *Reply to European Commission Call on 'Competition Policy Supporting the European Green Deal'*, Tilburg Law

long-term evaluation, but the Guidelines of Article 101(3) TFEU emphasize on the current consumers, since future gains cannot compensate a present loss equally, thus they have to be much greater[64]. Regarding the "fair share" element of the condition, the balancing between the costs and benefits of a sustainability agreement and its gains, could be through the assessment of the qualitative efficiencies, which is probably a vague method[65]. Although, there are instances were such an agreement could have direct positive impact to consumers. In the CECED case, it was judged that besides the general environmental gains of utmost importance, consumers could balance the, distortive to competition, high prices paid by them, with great cost savings in their electricity bills[66]. Therefore, there are ways that environmental sustainability fulfill the fair-share-to-consumers test. Nonetheless, the issue of how to calculate the environmental sustainability benefits remains at this point, but will be further analyzed in following sections.

3. Indispensability of the restrictions

The third condition regards the reasonably necessary nature that the restrictions shall have compared to the efficiencies. It is examined before the fair-share-to-consumers test, since if the efficiency gains are not indispensable, there would be no reason to search for the fair share of it to the consumers. Despite the fact that the necessity factor constitutes a crucial role for this condition, it is conceptually distinct for the "ancillary restraints doctrine". The assessment of the reasonable necessity, through the prism of the indispensability criterion, contains a balancing of positive and negative effects to competition, while the ancillary restraints doctrine does not.[67] It expresses the proportionality principle in the context of the Article 101(3) TFEU.[68]

Therefore, in cases of an environmental sustainability agreement, under Article 101(3) TFEU, there should be an examination of the indispensability condition, which would assess the pros and cons and could conclude that they are, or not, reasonably necessary for the restrictions that they engender. The *VOTOB* case constitutes an example of a restriction which was beyond the necessity boundaries and detrimental to competition[69]. On the contrary, there are occasions, for instance in the *CECED* case,

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and Economics Center (TILEC), 2021, p. 5-7, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3778154.

[64] Commission's *Guidelines on the application of Article 81(3) of the Treaty* [current Article 101(3) TFEU] (2004/C 101/08), paras. 87-88.

[65] Commission's *Guidelines on the application of Article 81(3) of the Treaty* [current Article 101(3) TFEU] (2004/C 101/08), paras. 102-104.

[66] Case IV.F.1/36.718.*CECED*, Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (2000/475/EC), grounds 47-57.

[67] Wish R. and Bailey D., *Competition Law* (Oxford University Press, 10th ed, 2021), p. 167-168.

[68] Holmes S., "*Climate change, sustainability, and competition law*", Journal of Antitrust Enforcement (2020), p. 381, available at https://academic.oup.com/antitrust/article/8/2/354/5819564.

[69] XXIInd Commission's *Report on competition policy* 1992, paras. 177, p. 108, available at https://op.europa.eu/en/publication-detail/-/publication/d406e5bd-53a6-4642-b7f9-00c2abb4d01b.

where an environmental sustainability agreement can be necessarily restrictive to competition, to achieve its objectives, while other means would not be that effective[70].

4. Risk of a total elimination of competition

As in the proportionality principle where a legally protected right shall not be completely constrained, hence the hard-core of the right will remain in place, respectively the fourth condition of the Article 101(3) TFEU prevents the substantial elimination of competition, likewise. It reflects the pivotal limit, which shall not be surpassed, of the exemption granted from Article 101(3) TFEU; while both actual and potential competition should be taken into consideration while assessing it[71]. Thus, the extreme border of an environmental sustainability agreement shall be that it does not totally expunge the competition.

## D. Environmental Sustainability agreements and Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements

A mere examination of the Article 101 TFEU, without taking into account the European Commission's Guidance on the application of it, would be not proper. However, the Commission has followed some different approaches over the years for the issue of the environmental sustainability agreements. So far, the probably insufficiently clear view on the matter of the EU's Courts and of the Commission - which will be reviewed below -, alongside with a narrow perception of the third paragraph of the Article 101 TFEU, create complication for the interpretation, and drawbacks at the implementation of environmental sustainability agreements assessed under the Article 101 TFEU. But, nowadays, the topic of environmental sustainability has obtained a much greater significance, especially in the EU with the approval of the Green Deal in 2020. The revised Draft Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements of 2022 will reflect this importance and might bring some light to the matter.

In particular, the revised Draft Horizontal Guidelines were published on March 2022 and the consultation period ended on April 2022; thereafter, it is almost certain that they will include a concrete chapter on "*Sustainability Agreements*" as they present it in their 9th Chapter[72]. Contrariwise, Guidelines of 2011 on the applicability of Article 101 of the TFEU to horizontal co-operation agreements, omitted completely any special examination on Environmental Sustainability Agreements, while the last Chapter of 2001's Guidelines, regarding Article 81 of the EC Treaty, namely the current Article 101 TFEU, was especially for the construe and enactment of "*Environmental*

[70] Case IV.F.1/36.718.*CECED*, Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (2000/475/EC), paras. 58-63.
[71] Wish R. and Bailey D., *Competition Law* (Oxford University Press, 10th ed, 2021), p. 171.
[72] Revised Draft *Guidelines on The applicability of Article 101 of the TFEU to horizontal co-operation agreements*, (published on March 2022), Chapter 9, available at https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en#view-the-consultation-document

*Agreements*"[73]. In the 2011's Guidelines, there is only a brief reference to agreements that set standards on environmental performance in the context of "*Standardisation Agreements*"[74].

1. The current and pre-existing status

i. Guidelines of 2001 on horizontal co-operation agreements

Concerning the Guidelines of 2001 on the application of the Article 101 TFEU [formerly 81 EC] to horizontal co-operation agreements, the separate report on environmental agreements in its seventh chapter is supported that it may still be used as an ancillary interpretation tool for any potential vacuums of the 2011's Guidelines, despite the fact that they are substituted by the latter ones[75]. Hence, it would be unorthodox not to examine the Commission's 2001 Horizontal Guidelines regarding the approach of them on environmental agreements.

Particularly, paragraph 179 of them, defined environmental agreements as "*agreements by which parties undertake to achieve pollution abatement, as defined in environmental law, or other environmental objectives ... in particular those set out in Article* [191 TFEU, formerly] *174 of the* [EC] *Treaty*". The objectives of these Articles were and are the: "*preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combatting climate change*".

Afterwards, paras. 184-189 mention some categories of environmental agreements that do no restrain competition, hence they fall out of the scope of Article 101 TFEU. At first, this can occur if there is not any precise individual obligation on the parties "*or if they are loosely committed to contributing to the attainment of a sector-wide environmental target*", while variety of technical and economical means is presented as critical for the assessment of a potential restriction, namely the more the means, the less the appreciable potentials for restrictive effects (para. 185)[76]. Secondly, para. 186 reveals, as not falling under Article 101(1) TFEU, the environmental agreements on "*products or processes that do not appreciably affect product and production diversity in the relevant market or whose importance is marginal for influencing purchase decisions*". Thus, crucial criterion could be the relevant market-share on the products or production process, or a significant influence at the consumer[77]. Furthermore, out of the scope, of the anti-competitive horizontal co-operation agreements, are the environmental agreements which create a genuine new market, as far as there was no other competitor and/or no other alternative than conducting a co-operational

[73] Commission Notice - *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements* (2001/C 3/02), Chapter 7: Environmental Agreements.

[74] 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*, (2011/C 11/01), Chapter 7: Standardisation Agreements, para. 308.

[75] Holmes S., "*Climate change, sustainability, and competition law*", Journal of Antitrust Enforcement (2020), p. 369, available at https://academic.oup.com/antitrust/article/8/2/354/5819564.

[76] See "ACEA" case, COMP/37.231 (1998) p. 151

[77] See CEMEP case

agreement (para. 187)[78]. This last instance could constitute a great instrument for environmental agreements, since it composes an "objective necessity" criterion alongside with a substantial benefit to competition, that of the creation of a new market, which both could make jointly an essential reasoning for such agreements not to fall at all under Article 101(1) TFEU.

In contrast, a case where environmental agreements "*almost always come under*" the relevant article on horizontal agreements is when the agreement is not genuinely for environmental purposes, but it is used as a pretense to hide its' prohibited character (para. 188)[79]. Such a case was a Belgian association of water services, which agreed with all the producers and importers of washing machines to use a label for environmental compliance, but the European Court judged that the real aim of it was the obstruction of parallel imports[80]. Moreover, these 2001's Guidelines present conditions possibly restrictive to competition (paras. 189-191). Particularly, it concerns instances where the parties of an environmental agreement hold a significant market-share in a substantial part of the Union.

It also presents criteria to asses if the agreement could fall under the third paragraph of Article 101 TFEU - formerly Article 81(3) EC (paras. 192-198). What needs to be assessed are the economic benefits; the indispensability "*to the attainment of the environmental goal within its economic context*"; and the no elimination to competition. This reflects especially that the environmental benefits can be valuated as economic benefits, too. That could be achieved, either by assessing the benefits of consumers individually, namely that they have "*a positive rate of return from the agreement under reasonable payback periods*", either, when the previous is not feasible, by assessing "*under reasonable assumptions*" the net benefits of the consumers to an aggregate level; in both instances, the benefits of the environmental agreements shall outweigh their negative effects on competition, which (negative effects) include "*the lessened competition along with compliance costs for economic operators and/or effects on third parties*" (paras. 193-194). That demonstrates an overall "impact-assessment analysis", seeing also that para. 194 expressly refers to a "*cost-benefit analysis*" of the net benefits for consumers in general, and para. 196, regarding the indispensability criterion, to a "*cost-effectiveness analysis*". Furthermore, a case where such economic benefits existed for consumers individually is the *CECED*[81], while in para. 198 is presented a hypothetical example of an environmental agreement applicable to Article 101(3) TFEU, similar with the facts of the *CECED* case but with a slightly different approach, since the example regards only the economic benefits, while the *CECED* case took, also, under consideration the mere environmental gains of the agreement. However, a pivotal addition, of the 2001's Guidelines in paras. 193-194, besides that they provide

[78] See "European Council for Automotive R&D" (EUCAR) case, IV/35.742-F/2

[79] See relatively for "greenwashing" in Chapter I, Section B.

[80] European Court Reports 1983 -03369, NV IAZ *International Belgium and others v Commission of the European Communities* (1983), Joined cases 96-102, 104, 105, 108 and 110/82, p. 3391, grounds (4)(a), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61982CJ0096.

[81] See footnote 66 for individual gains in CECED case, in Chapter I, Section B.2 on *Consumers' fair share of the resulting benefits*.

a way to assess those economic benefits, is that of the further benefits that an environmental agreement could attain for consumers in general which could outweigh the negative effects.

ii. Guidelines of 2011 - Standardisation Agreements

The Guidelines of 2011, on the applicability of the Article 101 TFEU to horizontal co-operation agreements, did not dedicate any special chapter for the environmental agreements, but they reference them as included in their seventh Chapter of "*Standardisation Agreements*". However, a 2010's memo of the Commission states that "[t]*he 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*"[82]. Thus, under the currently in force Horizontal Guidelines, environmental agreements should be assessed through the prism of standardisation agreements.

Specifically, para. 257 of the 2011 Horizontal Guidelines says: "*standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply* [...] *Agreements setting out standards on the environmental performance of products or production processes are also covered by this chapter*". "*Standard terms*" are also covered by the Guidelines to the extent that they establish standard conditions of sale or purchase between competitors and consumers for competing products (para. 259); while they are lawful when the conditions are non-binding and they are effectively accessible to everyone, namely unrestricted for the competitors (para. 301). Moreover, according to para. 280, a standardisation agreement is not restrictive to competition under Article 101 TFEU "*where participation in standard-setting is* ***unrestricted*** *and the procedure for adopting the standard in question is* ***transparent***, *standardisation agreements which contain* ***no obligation to comply*** *with the standard and provide* ***access to the standard on fair, reasonable and non-discriminatory terms***".

Nevertheless, if they fall in the scope of Article 101(1) TFEU, the standards may be assessed in the context of the Article 101(3) TFEU (paras. 308-324). The integration of environmental objectives in standardisation agreements does not constitute the agreements non-distortive to competition; it merely provides a more plain and legally certain method to be assessed whether the criteria of standardisation agreements are applicable. For instance, an "*open standardisation of product packaging*" is possible not to fall under Article 101(1) TFEU, since the barriers of entry could be counterbalanced, under the conditions of the Article 101(3) TFEU, by the transparency

[82] Commission's Press Corner, *Competition: Commission adopts revised competition rules on horizontal co-operation agreements* (MEMO/10/676), p. 4, available at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_10_676.

of the procedure and its voluntary nature, just as the example that para. 331 illustrates. On the contrary, a "*closed standardisation of product packaging*" would cause compliance issues in an industry, restricting competition in it (para. 332). One issue before the Commission was that of the "*Ford Volkswagen*" case, where the two car manufacturers agreed to compose a joint venture company, which would lead to an improvement of production of goods and promotion of technical progress [first condition of the Article 101(3) TFEU], by containing, among "*several new standards*", a considerable improvement "*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*"[83]. Even in this case, in 1993, the objective of mitigation of gas emissions constitutes a crucial parameter for environmental requirements, while the case indicates that it can be contained in standards for the improvement of the production and the technical progress. Now, in 2022, the European Green Deal grants a much higher substance for this aim of reducing gas emissions[84].

From the moment that EU has conducted a new development strategy with the European Green Deal and its goals, and as a contracting party of the Paris agreement on Climate Change, it is imperative that the issue of environmental sustainability agreements and their lawful or restrictive to competition character will be at least clarified in a revision of the Guidelines. A 2018's report of a Committee of the European Parliament, evaluating Competition Policy, indicates that the provisions of competition law about co-operation agreements should aim at constituting legal certainty across all the markets and at promoting collective agreements of sustainability objectives, while narrow interpretation of Article 101 TFEU by Commission's Horizontal Guidelines has created obstacles to some co-operations that adopt higher environmental standards[85]. Additionally, an evaluation on HBERS of 2021 concluded that "*there are indications that the HBERs and Horizontal Guidelines are not fully adapted to economic and societal developments of the last ten years, such as digitisation and the pursuit of sustainability goals. Some of the provisions in the HBERs are considered rigid and complex, while other provisions are considered unclear and difficult to interpret by companies. The level of legal certainty provided by the Horizontal Guidelines is found to be uneven for different types of horizontal cooperation agreements covered*"[86]. This evaluation identifies potential improvements, of the Horizontal Guidelines, in "effectiveness", "relevance" and "coherence", and

[83] Commission Decision 93/49/EEC, relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/33.814 - Ford Volkswagen), grounds 1, and 26.

[84] See Official website of the Commission on the European Green Deal, available at https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

[85] Report of the European Parliament's Committee on Economic and Monetary Affairs, *on the Annual Report on Competition Policy*, of 18.12.2018 - (2018/2102(INI)), para. 48.

[86] Commission Staff working Document, *Executive Summary of the Evaluation of the Horizontal Block Exemption Regulations* (SWD/2021/0104), available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2021:104:FIN

considers a number of areas "insufficiently clear", "overly strict" or "difficult to interpret", while such an area is considered the environmental sustainability agreements. This does not negate that Commission's Guidelines, on the applicability of Article 101 TFEU on horizontal co-operation agreements, remain useful instruments and are still relevant for stakeholder. Nonetheless, the recent revised Draft Guidelines are published and the consultation period has ended now, and it appears that those assessments were taken under serious consideration.

2. New Draft Guidelines

i. Revised Draft Horizontal Guidelines of 2022[87]

The European Commission had already explored, in "Policy Brief" of 2021, the way competition rules could facilitate environmental objectives and that the revision of the Guidelines on the application of Article 101 TFEU to horizontal co-operation agreements should assist for them to be more efficient[88]. Specifically, in the revised Horizontal Draft Guidelines of 2022, it has been proposed a Chapter on "*Sustainability Agreements*" (i.e. Chapter 9, paras. 541-621), which will include a definition of them (para. 543), it will define occasions falling out of the scope of Article 101 TFEU (Chapter 2: "*Sustainability agreements not raising competition concerns*", paras. 551-554), it will provide guidance on sustainability agreements falling under Article 101(1) TFEU (paras. 555-575) and may qualify an exemption pursuant to Article 101(3) TFEU (paras. 576-614), while it is proposed specific attention for "*Sustainability standardization agreements*" (paras. 561-575), since it is expected to be the most frequent case and they are distinct from the technological types of "*Standardisation Agreements*" which are explored in Chapter 7 (paras. 462-513)[89]. A recent commentary on them estimates as key innovations that the draft Guidelines introduce, "[i] *a broader view of benefits relevant to the competitive analysis, including qualitative and 'out of market' benefits in certain circumstances* [paras. 590-608], [ii] *a 'soft safe harbour' for sustainability standards that appears to be capable of covering binding standards* [paras. 572-574], [iii] *a fair-minded approach to deciding when sustainability cooperation is anticompetitive by object –exemplified by the reassurance that an*

[87] Revised Draft *Guidelines on The applicability of Article 101 of the TFEU to horizontal co-operation agreements* (published on March 2022, and consultation period ended on April 2022), available at https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en#view-the-consultation-document.

[88] Ashurst - Waelbroeck D. and Antypas I., *European Commission consults on draft guidance on sustainability agreements* (April 2022), available at https://www.lexology.com/library/detail.aspx?g=7cc762d2-91c0-438f-b0d9-960d20ab71a2&fbclid=IwAR3uP-tZ6Cho3EWo6Nuo3V0HHMRKI7AENAEqoegAUEZVDYhwPYyhju_x-MY; and Competition policy brief, *Competition policy in support of Europe's Green Ambition* (September 2021), available at https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF.

[89] Background Explanatory note on *Revision of the HBERs and Horizontal Guidelines - Overview of main proposed changes*, accompanying the public consultation of the draft revised HBERs and Horizontal Guidelines (2022), paras. 20-21, available at https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en#reference-documents-and-other-related-consultations.

*agreement to buy only from sustainable suppliers is not a joint boycott of non-sustainable suppliers* [paras. 559, 570-571]"[90]. This view primarily reflects the innovations of the draft guidelines regarding "sustainability standardisation agreements" (paras. 561-575); nonetheless, the 18-page chapter on Sustainability Agreements, of the revised Draft Guidelines, is not limited only to those novelties[91].

Para. 543, of the Sustainability Agreements' "Introduction", provides a broad "sustainable development" definition, as "*the ability of society to consume and use the available resources today without compromising the ability of future generations to meet their own needs. It encompasses activities that support economic, environmental and social (including labour and human rights) development*". This broad approach of sustainability reveals that the Commission did not remain solely to the environmental aspect that the previous guidelines did. It refers to the Treaties of the EU and to the European Green Deal reflecting the sustainability objectives in them (para. 542); while it follows the prescription of sustainability from the 17 Sustainability Development Goals and 169 targets of the 2030 United Nations Agenda "*facilitating a shift to healthy and nutrious food, ensuring animal welfare, etc.*" (para. 543, and footnote 313), besides the predominant aim of the environmental improvement. Thus, undertakings can pursue a more economic and social environmental sustainability, whereas environmental degradation can disproportionately affect those in disadvantaged areas[92]. Moreover, the Draft Guidelines, in para. 544, state that "*competition law enforcement contributes to sustainable development by ensuring effective competition,* [...] *and thereby contributes to consumer welfare*", while sustainable development can present "negative externalities", thus market failures holding back sustainable development based on unilateral actions, which could be mitigated by collective actions (public policies/sector specific regulations) or by co-operation agreements (paras. 545-547). In particular, when residual market failures are not solved by public policy and regulation, cooperation agreements on sustainability might be "necessary" (para 546)[93]. In para. 548, it is highlighted that such sustainability agreements "*only raise competition concerns under Article 101(1) if they entail serious restrictions of competition in the form of restrictions by object, or produce appreciable negative effects on competition contrary to Article 101(1). When sustainability agreements infringe Article 101(1), they can still be justified under Article 101(3), if the four conditions of that provision are met*", presenting that sustainability agreements have limited anti-completive character.

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[90] Murray G., *Making EU competition law sustainable: all good things come in threes* (March 2022), available at http://competitionlawblog.kluwercompetitionlaw.com/2022/03/16/making-eu-competition-law-sustainable-all-good-things-come-in-threes/.

[91] See Bird & Bird - Metsa-Tolika P., Karpathaki M., Broncher A., *Greening Competition Law - The European Commission's Draft Horizontal Guidelines and Sustainability Agreements* (September 2022), available at https://www.lexology.com/library/detail.aspx?g=1c943ab0-3488-4ed2-8c26-8dfc073df246.

[92] Murray G., *Making EU competition law sustainable: all good things come in threes* (March 2022), available at http://competitionlawblog.kluwercompetitionlaw.com/2022/03/16/making-eu-competition-law-sustainable-all-good-things-come-in-threes/.

[93] See also Murray G., *Making EU competition law sustainable: all good things come in threes* (March 2022), available at http://competitionlawblog.kluwercompetitionlaw.com/2022/03/16/making-eu-competition-law-sustainable-all-good-things-come-in-threes/.

However, a too mild approach carries dangers, and competition authorities ought to be mindful when they assess an agreement which contributes to sustainability goals, since it could be a case of greenwashing[94].

In particular, paras. 551-554 define the circumstances of "*Agreements falling outside the scope of Article 101 TFEU*". If agreements do not affect parameters of competition, such as price, quantity, quality, choice, or innovation, they are not capable of raising competition law concerns (para. 551). Paras. 552-554 contain a list of illustrative and not exhaustive examples of "green agreements" that fall outside of the application of Article 101 TFEU; such as, agreements that do not concern the economic activity of competitors, but their internal corporate conduct (para.552), or agreements to create databases containing information about sustainable suppliers or distributors, without requiring any of the involved parties to necessarily do a purchase transaction, as it will normally not affect competition (para. 553), or agreements relating to the organisation of industry-wide awareness campaigns or campaigns raising consumers' awareness (para. 554).

After, in paras. 555-575 is provided the "*Assessment of sustainability agreements under Article 101(1)*" which examines several types of sustainability agreements and set some "principles" regarding them (paras. 555-560), but focuses more on agreements setting sustainability standards (paras. 561-575), which have distinct features when compared with traditional technical standards. In paras. 555-560, it is noticed that, since sustainability agreements often relate to some other form of cooperation, such as agreements concerning R&D, specialisation, production, or joint purchasing, the agreements should be assessed under the industry-specific or agreement-specific guidance (paras. 555-558). Furthermore, the pursuit of sustainability objectives is relevant for determining whether the agreement is of a by object or by effect nature. The parties bear the burden of proof that an agreement does not pursue a by object restriction, such as price fixing, market or customer allocation, limitation of output or innovation, and has an actual sustainability objective; if that occurs, then the effects on competition will have to be assessed (paras. 559-560). This practice is the safeguard that sustainability agreement will not be used as a cover for illegal cartels, namely greenwashing[95].

As regards the sustainability standardisation agreements (paras. 561-575), the revised Horizontal Draft Guidelines provide a section for "Definition and characteristics" of

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[94] Ashurst - Waelbroeck D. and Antypas I., *European Commission consults on draft guidance on sustainability agreements* (April 2022), available at https://www.lexology.com/library/detail.aspx?g=7cc762d2-91c0-438f-b0d9-960d20ab71a2&fbclid=IwAR3uP-tZ6Cho3EWo6Nuo3V0HHMRKI7AENAEqoegAUEZVDYhwPYyhju_x-MY; and Bird & Bird LLP - Kuipers P., Beetstra T. and Roosmalen J., *A risk of "greenwashing" by competition authorities?* (September 2022), available at https://www.lexology.com/library/detail.aspx?g=7c8abc0a-dd20-4ca5-8fbf-34ce2998e7cb.

[95] Ashurst - Waelbroeck D. and Antypas I., *European Commission consults on draft guidance on sustainability agreements* (April 2022), available at https://www.lexology.com/library/detail.aspx?g=7cc762d2-91c0-438f-b0d9-960d20ab71a2&fbclid=IwAR3uP-tZ6Cho3EWo6Nuo3V0HHMRKI7AENAEqoegAUEZVDYhwPYyhju_x-MY.

them (para. 561-567), some "main competition concerns" (para. 568-569), "restrictions by object" (paras. 570-571), and "restrictive effects on competition" with the sub-sections "(a) Soft safe harbour" (paras. 572-574) and "(b) need to assess the effects of the agreement" (para. 575).

Sustainability standardisation agreements often have positive effects on competition as they contribute to a sustainable development and may therefore enable the development of new products or markets, increase product quality, or improve supply or distribution conditions. In addition, sustainability standards often have positive effects on competition by allowing consumers to make well informed decisions (para. 568). However, they still need to be assessed in case of appreciable negative effects on competition. In some occasions, sustainability standards may also restrict competition, in spite of the generally positive effects. This can occur in three main ways: "*through price coordination, foreclosure of alternative standards, and the exclusion of, or discrimination against certain competitors*" (para. 569).

In the context of the "soft safe harbour" for sustainability standardisation agreements, if seven cumulative conditions are fulfilled, the agreement is unlikely to produce appreciable negative effects on competition and will therefore fall outside of the scope of the Article 101(1) TFEU. Those conditions are: (i) unlimited participation in and transparent process leading to the selection of the standard, (ii) no obligation to participate in the standard or to comply with it, (iii) participating companies can adopt a higher sustainability standard for themselves, (iv) no exchange of commercially sensitive information beyond what is necessary for the standard, (v) effective and non-discriminatory access to the outcome of the standardisation process, (vi) no appreciable increase in price nor an appreciable reduction in choice of products; and (vii) a mechanism or monitoring system in place ensuring compliance. If the conditions are not met, it does not automatically make the agreement prohibited, but the appreciable negative effects of the agreement on competition will need to be assessed and hence it will come under the Article 101(1) TFEU (paras. 573-574).

Then follows, in paras. 576-614, the utmost of importance "*Assessment of sustainability agreements under Article 101(3)*". It is provided particular guidance for each of the four cumulative condition of Article 101(3) TFEU, while emphasis is added at the "*pass-on to consumers*" condition (paras. 588-609), separating it in the categories: "*Individual use value benefits*" (paras. 590-593), "*Individual non-use value benefits*" (paras. 594-600), "C*ollective benefits*" (paras. 601-608), and "*Any or all types of benefits*" (para. 609).

For the pursuant to Article 101(3) TFEU exemption, the parties of the agreement must be able to document objective efficiency contributions of the agreement. It is expressly noticed that, this is taken under a broad view of benefits that are relevant to the competitive analysis, including the individual use and non-use value benefits, and collective benefits, "*as encompassing not only reductions in production and distribution costs but also increases in product variety and quality, improvements in production or distribution processes, and increases in innovation*" (para. 577). Despite the broad spectrum of the efficiencies, including for instance less pollution, more resilient infrastructure or supply chains and better quality products, they have "*to be*

*substantiated and cannot be simply assumed. They also need to be objective, concrete and verifiable*" (paras. 578-579).

Additionally, for the "indispensability" condition, "*the parties to the agreement need to demonstrate that their agreement as such, and each of the restrictions of competition it entails, are reasonably necessary for the claimed sustainability benefits to materialise and that there are no other economically practicable and less restrictive means of achieving them*" (para. 581). This condition precedes in assessing the typically second condition, namely the fair-share-to-consumers test (para. 580).

Under this "pass-on to consumers" condition, as consumers are regarded any direct or indirect user of the products covered by the agreement, while the overall effect on them is at least neutral, balancing the pros and cons for the fair share to them (para. 588). In some cases only one of the provided types of the consumers' benefits may be sufficient, but in other instances a combination of more than one may be required to satisfy the prerequisites of Article 101(3) TFEU (para. 609). One of the categories, the Horizontal Draft Guidelines propose as a benefit for the consumers, is the "individual use benefits"; namely the direct gains which typically derive from the consumption or the use of the products, for instance by means of improved product quality (e.g. healthier grown vegetables) or product variety resulting from qualitative efficiencies, or of price decrease as a result of cost efficiencies, which directly improve the consumers' experience with the product in question (paras. 590-593). On the other hand, "*Consumers' benefits from sustainability agreements may not only comprise direct benefits from the use of a sustainable product but also indirect benefits, resulting from the consumers' appreciation of the impact of their sustainable consumption on others. In particular, some consumers may value their consumption of a sustainable product more than the consumption of a non-sustainable product because the sustainable product has less negative impact on others than the non-sustainable one*" (para. 594). For instance, consumers may be prepared to pay more for a sustainable product if the sustainable product has a less negative impact on the environment (e.g. a less polluting car fuel) which benefits society as a whole and future generations, constituting indirect benefits for the consumers (paras. 595-596). Therefore, the Draft Guidelines take an unambiguous position for the matter in behalf of a broader approach for the benefits to consumers. This is reinforced by the "collective benefits" that the guidelines propose that could be used as one of the comprised types of consumer benefits, under the pass-on criterion. This category is not limited to the individual perception of benefits by the consumers, nor to the view that the benefits ought to be directed only to a narrow group of consumers, referring expressly to instances where the collective benefits "*objectively can accrue to the consumers in the relevant market if the latter are part of the larger group of beneficiaries*" (para. 601). Thus, co-operation agreement may be used as a tool to internalize negative externalities and bring sustainability benefits not accrued necessarily to the consuming individual but to a larger group of the society. The Horizontal Draft Guidelines mention examples of consumers that may be unwilling to pay a higher price for a product produced with a green but costly technology, but to ensure that the benefits related to the use of that green technology materialize, an agreement to phase out the polluting technology may be necessary (paras. 604-605).

Nevertheless, for a restriction to be justified by collective sustainability benefits, there needs to be a significant overlap between the individual consumers who suffer the harm of the restriction and the individuals who benefit (para. 604). For collective benefits to be taken into account, undertakings should be able to: "*(a) describe clearly the claimed benefits and provide evidence that they have already occurred or are likely to occur; (b) define clearly the beneficiaries; (c) demonstrate that the consumers in the relevant market substantially overlap with the beneficiaries or are part of them; and (d) demonstrate what part of the collective benefits occurring or likely to occur outside the relevant market accrue to the consumers of the product in the relevant market*" (para. 606). Despite the fact that, the Commission states that there is a lack of experience in this field and, hence, recognizes that the procedure of measuring and quantifying collective benefits remain vague, without prejudice to add further guidance in the future (para. 608).

As for the "no elimination of competition" condition in paras. 610-614, it is indicated as critical factors that the parties continue to compete "*vigorously*" on at least one crucial parameter of competition, such as price, even if the restraint agreement covers the whole industry (para. 611); while the period of the restrictive effects is also a determinant factor for this condition to be satisfied (para. 614).

Then, since the revised Horizontal Draft Guidelines explored and gave some answers for the way sustainability agreements should be interpreted under Article 101(3) TFEU, they complete their proposes with the "Involvement of Public authorities", Section 9.5., paras. 615-616, which declares that the involvement of public (i.e. governmental or local) authorities "*is not in itself a reason to consider such agreements compatible with the competition rules*". But the involvement and encouragement of public authorities may be relevant to show the objective of the agreement, inasmuch a "*compelled or required by public authorities*" conclusion of an agreement or where its effects is reinforced by the authorities, the parties of such a sustainability agreement which restricts competition "*will not be held liable for competition law infringements*" (para. 616). This reflects the Commission's perception of the "state action defence", examined in Chapter I.A. of this thesis.

Afterwards, in paras. 617-621 of the Horizontal Draft Guidelines, there are provided five different examples of sustainability agreements which contribute to a more sufficient comprehension of the matter and conclude the chapter. Nevertheless, it is noticed by recent commentary articles regarding the Horizontal Draft Guidelines, that there are areas which may need further clarification and assurance. Specifically, for the types of cooperation that are not significantly related to competition, including agreements complying with domestic laws or international treaties, and fall outside of the Article 101(1) TFEU; for the borderlines of societal aims and collective benefits and how to balance them against competitive harm; and a milder approach to the state action defence[96]. Others rise concerns on mild approaches of agreements which claim

[96] Murray G., *Making EU competition law sustainable: all good things come in threes* (March 2022), available at http://competitionlawblog.kluwercompetitionlaw.com/2022/03/16/making-eu-competition-law-sustainable-all-good-things-come-in-threes/

to pursue sustainability objectives, may be cases of "greenwashing"[97]; while there are some other reservations regarding an insufficient promotion of innovation through the way the Horizontal Draft Guidelines examine the matter[98]. Notwithstanding that, those concernments should not prejudice the essential value of such a guidance, regarding an issue which does not only constitutes a matter of academic research and theoretical controversies over it, but also an issue of everyday application in the internal market of the EU, containing ecumenical needs of imperative importance, namely those of a sustainable development.

ii. Draft Guidelines for Sustainability Agreements in Agriculture[99]

More recently, European Commission published draft Guidelines on a much further specified sector regarding Sustainability agreements. Particularly, on 10th of January of 2023, the Commission "*launched a public consultation inviting all interested parties to comment on its draft proposal for Guidelines on how to design sustainability agreements in the field of agriculture ('Guidelines') using the novel exclusion from EU competition rules introduced during the recent reform of the common agricultural policy ('CAP')*"[100].

Thus, these draft Guidelines attempt to illustrate how operators, in the agri-food sector, should conceive joint sustainability initiatives in line with Articles 101 TFEU and 210a of CMO Regulation[101]. This is in the context of Commission's new "Common Agricultural Policy"[102], the "CAP" of 2023-2027 which aims to ensure fair, sustainable and competitive agriculture and forestry in the EU. More specifically, it is expected to reinforce the competitiveness of the agri-food sector, and the status quo of farmers in the food supply chain. Those augmentations of producers' cooperation are in line, also, with the "Farm to Fork Strategy" by supporting competitiveness through sector specific interventions, making broader exceptions from competition law, and expanding the

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[97] Bird & Bird LLP - Kuipers P., Beetstra T. and Roosmalen J., *A risk of "greenwashing" by competition authorities?* (September 2022), available at https://www.lexology.com/library/detail.aspx?g=7c8abc0a-dd20-4ca5-8fbf-34ce2998e7cb.

[98] Modrall J., *The EU's Draft Horizontal Guidelines: Chilling Innovation on Sustainability?* (June 2022), Chapter III, available at https://www.competitionpolicyinternational.com/the-eus-draft-horizontal-guidelines-chilling-innovation-on-sustainability/.

[99] Commission's Draft proposed Guidelines on the *Application of the exclusion from Article 101 TFEU for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation 1308/2013*, available at https://competition-policy.ec.europa.eu/public-consultations/2023-sustainability-agreements-agriculture_en#consultation-documents.

[100] Commission's press release on *Antitrust: Commission invites comments on draft Guidelines for sustainability agreements in agriculture*, 10th of January 2023 available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_102.

[101] "CMO Reguglation" is the Common Market Organisation Regulation (EU) 1308/2013, amended by Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union, *OJ L 435, 6.12.2021, p. 262–314*.

[102] Article 39 TFEU.

supply regulation to assist producers of Protected Designation of Origin (PDO) and Protected Geographical Indications (PGI) products.[103] Moreover, the Article 210a of the CMO Regulation provides a relevant exception from Article 101 TFEU for such sustainability agreements on the agri-food sector. However, it was not sufficiently clear which agreements fall within the scope of the exemption provided.[104] In view of this lack of clarity, additional clarification seemed necessary in order to enhance the adoption of sustainable practices and to encourage green cooperation initiatives in the agricultural sector. Therefore, the Commission, launching these draft Guidelines, established the importance of all the above, as well as the need for further guidance and clarifications on the matter.

These draft guidelines elaborate on the exact scope of the exemption of the aforementioned Article 210a CMO, noting that the exemption only applies to agreements concluded by agricultural producers, either between themselves or with other actors who carry out activities along the agri-food chain, such as companies that supply inputs for the production, distribution, transport or packaging of the product. Agreements concluded only between undertakings in the agri-food supply chain that do not involve producers of agricultural products cannot benefit from the exemption, even where the agreement concerns an agricultural product. In the following, the eligible sustainability objectives are identified. According to the Article 210a CMO they are divided into three sub-categories; namely (i) environmental protection, (ii) reduction of pesticide use and microbial resistance and (iii) health and welfare of the targets. At the same time, although the draft guidelines do not set a minimum level of improvement that parties must achieve compared to mandatory sustainability standards as defined in European and national legislation, it is nevertheless noted that the level of constraints should be taken into account in order to assess the need for such improvement. In any event, it is clear that a sustainability agreement that adopts such a standard may fall within the exemption even if a mandatory minimum standard has not been set if the agreement pursues one of the sustainability objectives set out in the Article 210a CMO. Furthermore, it is provided that national competition authorities retain the power to intervene ex post if they consider that the scope of the sustainability agreement should be modified where this is necessary to avoid restrictions of competition or risks to the achievement of the objectives of the CAP. The burden of proof tends to be lower than an exception under Article 101(3) TFEU, and the parties are not required to examine the market coverage of a competition restriction to determine whether the agreement is indispensable, or to ensure that consumers receive a fair share of the benefits resulting from the sustainability agreement. Nonetheless, in the event that an agricultural sustainability agreement falls outside the exception of the Article 210a CMO, it could

[103] Commission's Common Agricaltural Policy on *Key reforms in the new CAP*, available at https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/new-cap-2023-27/key-reforms-new-cap_en#makingagriculturecompetitiveandrewarding.

[104] Blomstein, *Competition and Sustainability - New Guidance from Brussels* (January 2023), available at https://www.lexology.com/library/detail.aspx?g=5bf7c418-5c75-4afd-8131-e6a4522d0e72.

be assessed under the conditions of Article 101(3) TFEU.[105] Finally, the functionalities provided by these draft Guidelines for sustainability agreements in agriculture are to define (i) the scope of the exclusion, (ii) the eligible sustainability objectives, (iii) requirements for sustainability standards, (iv) a test to identify the "indispensability", and (v) the scope for ex post intervention.[106]

[105] Blomstein, *Competition and Sustainability - New Guidance from Brussels* (January 2023), available at https://www.lexology.com/library/detail.aspx?g=5bf7c418-5c75-4afd-8131-e6a4522d0e72.
[106] Commission's press release on *Antitrust: Commission invites comments on draft Guidelines for sustainability agreements in agriculture*, 10th of January 2023 available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_102.

## CHAPTER II: National Competition Authorities ("NCAs") view on Sustainability agreements and Article 101 TFEU - A comparative assessment

Over the last years, NCAs have provided some further insights on the sustainability agreements matter. Not only by case law under domestic authorities, but also by suggested guidelines on the matter. The Dutch "Autoriteit Consument & Markt" ("ACM"), alongside with the Hellenic Competition Commission ("HCC") have been pioneer NCAs on the issue[107], and UK's Competition and Markets Authority ("CMA") has taken position which is not negligible. HCC and ACM, besides their separate examinations on the matter, they have issued a common "Technical Report on Sustainability and Competition" which, among its several facilitations, indicates the environmental aspect as core for the sustainability notion[108]. The ACM had already announced in 2020 that the sustainability issue would be a basic matter for them to assess and would communicate the matter to investigate how sustainable development could be taken into consideration in an EU level[109]; while in 2021 the ACM reached the point to publish a second revision on their draft guidelines which concern only sustainability agreements[110]. The UK's CMA, on their behalf, had announced in 2020 that they will provide further informations regarding their way of dealing initiatives of sustainability in relation with competition policy[111]. Now, in 2022 the CMA have published advises for their Government regarding the environmental sustainability, in general, under the UK competition and consumers regimes[112]. Nevertheless, due to the common interest substance of the issue among the member-states, other NCAs of the EU have dealt with agreements engaging environmental sustainability aspects, likewise. For instance, the French Competition Authority have imposed sanctions to a cartel of the hard wearing floors industry, because they agreed to abstain from advertising environmental performances that was over a certain industrial standard, limiting potentially the innovation of the industry to improve environmental

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[107] Wish R. and Bailey D., *Competition Law* (Oxford University Press, 10th ed., 2021), p.164-165.

[108] Hellenic Competition Commission (HCC) and Dutch Authority for Consumers and Markets (ACM), *Technical Report on Sustainability and Competition* (January 2019), available at https://www.acm.nl/en/publications/technical-report-sustainability-and-competition.

[109] Press release, *The Autorité de la concurrence announces its priorities for 2020* (January 2020), available at https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/autorite-de-la-concurrence-announces-its-priorities-2020.

[110] Autoriteit Consument & Markt (ACM), *Second draft version: Guidelines on Sustainability agreements - Opportunities within competition law* (January 2021), available at https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.

[111] CMA's, *Competition and Markets Authority Annual Plan 2020/21*, paras. 3.43-3.44, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873689/Annual_Plan_2020-21.pdf.

[112] CMA Correspondence, *Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government* (March 2022), available at https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government.

performances, affecting the diversity of the products[113]. Although, several NCAs is argued that they have taken a more pensive approach on the relation of competition law and environmental concernments[114]. In general, NCAs modus operandi on environmental sustainability agreements is indicated that it affected broadly the position of the European Competition Commission and its current path on the matter, as expressed through the Horizontal Draft Guidelines of 2022. Despite the fact that, there are some concernments about NCAs approach on sustainability agreements, that they should be more delicate and in vigilance, especially if they tolerate "green cartels", since there is still room for further clarifications on the matter and the danger of "greenwashing" lurks[115].

### A. The Dutch Autoriteit Consument & Markt (ACM) Guidelines and case law

Dutch NCAs have concerned themselves over the years with several forms of agreements presenting an environmental sustainability aspect, such as in the context of non-restrictive to competition vertical agreements, or permissible information exchange under Article 101(1) TFEU[116]; while one of the most discussed cases of a sustainability agreement assessed from ACM, was the "Chicken of Tomorrow" case which had characteristics of a distortive to competition vertical agreement. Especially over the last years, the ACM has explored the issue of environmental sustainability agreements under Article 101 TFEU more thoroughly.

1. <u>ACM Guidelines on sustainability agreements and Article 101 TFEU: the assessment under Article 101(3) TFEU</u>

ACM has presented some of the most innovative manners to assess the benefits of sustainability agreements, even though it implements, at the same time, means already existing but with a positive construe for the environment[117]. It released its first Draft Guidelines on sustainability agreements in July 2020[118]. The ACM, after a public consultation, has also moved through with the release of a revised version of these

[113] Autorité de la Concurrence, Decision 17-D-20 (October 2017), available at https://www.autoritedelaconcurrence.fr/en/decision/regarding-practices-implemented-hard-wearing-floor-covering-sector; and see also Διαμαντοπούλου Γ., *Πράσινος Ανταγωνισμός; Ευρωπαϊκό δίκαιο ανταγωνισμού και περιβαλλοντική προστασία* (Νομική Βιβλιοθήκη, 2022), p. 42.
[114] Διαμαντοπούλου Γ., *Πράσινος Ανταγωνισμός; Ευρωπαϊκό δίκαιο ανταγωνισμού και περιβαλλοντική προστασία* (Νομική Βιβλιοθήκη, 2022), p. 60-61.
[115] See Bird & Bird LLP - Choulpek V. and Taimr M., *Tolerating Green Cartels - National Guidelines on Anticompetitive Agreements with Sustainability Aims* (September 2022), available at https://www.lexology.com/library/detail.aspx?g=a639fdca-ea60-4d60-9bda-1ca5a55202e9; and Bird & Bird LLP - Kuipers P., Beetstra T. and Roosmalen J., *A risk of "greenwashing" by competition authorities?* (September 2022), available at https://www.lexology.com/library/detail.aspx?g=7c8abc0a-dd20-4ca5-8fbf-34ce2998e7cb.
[116] See Διαμαντοπούλου Γ., *Πράσινος Ανταγωνισμός; Ευρωπαϊκό δίκαιο ανταγωνισμού και περιβαλλοντική προστασία* (Νομική Βιβλιοθήκη, 2022), p. 32 and 41.
[117] Διαμαντοπούλου Γ., *Πράσινος Ανταγωνισμός; Ευρωπαϊκό δίκαιο ανταγωνισμού και περιβαλλοντική προστασία* (Νομική Βιβλιοθήκη, 2022), p. 60.
[118] ACM's Draft Guidelines on *Sustainability agreements - Opportunities within competition law* (July 2020), available at https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements.

Guidelines on January 2021[119]. The proposed adjustments were further described in a memo that was released with the second draft guidelines[120].

The ACM, in the Draft Guidelines, specifies how many agreements will be exempt from the ban in Article 101 (1) TFEU (paras. 19-23 of the first Draft Guidelines). Some key points of the first Draft Guidelines is the providence, in paras. 46-18, of instances where agreements meets the prerequisites of Article 101(3) TFEU without a quantification of the effects needed, and in paras. 60-67, instances where sanctions may not be implemented in sustainability agreements that might be revealed as unlawful in later assessments. Furthermore, the first Draft Guidelines address, in para. 6, the term sustainability agreements as "*any agreements between undertakings, as well as any decisions of associations of undertakings, that are aimed at the identification, prevention, restriction or mitigation of the negative impact of economic activities on people (including their working conditions), animals, the environment, or nature*"; while paras. 7 and 8, of the second Draft Guidelines version, add a new notion of "*environmental-damage agreements*"[121]. Such an agreement focuses on the reduction of harmful externalities that occur from environmental harm to society, namely greenhouse gas emissions and toxic air pollution and the waste of raw materials. It is regarded that if negative externalities are reduced, only positive efficiency gains may result, and this is what healthy competition seeks to have as its foundation. The ACM supports that these form of agreements, decisions, and coordinated practices between businesses can be treated more favourably under the competition laws.

Moreover, the Guidelines provide five categories of permissible sustainability agreements[122]. Those are - according to the second revision: (i) non-binding agreements that incentivize undertakings to a positive contribution to sustainability achievements; (ii) "*codes of conduct promoting environmentally-conscious, climate-conscious or socially-responsible practices*" under the condition that the procedure is transparent, the access is granted by reasonable and non-discriminatory criteria, and there are alternative standards or certification labels of equal value and to sell products which do not fall under such codes; (iii) agreements aiming to replace less sustainable products, under the improvement of product quality criterion, if they do not appreciably affect price and/or product diversity; (iv) agreements which contribute at innovation for new products or markets and are needed to achieve sufficient production resources or sufficient scale; and (v) agreements, involving non-EU member states, which aim only

[119] ACM's Second draft version: Guidelines on *Sustainability agreements - Opportunities within competition law* (January 2021), available at https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.

[120] ACM, *Accompanying memo to the second draft version of the Guidelines on Sustainability agreements - opportunities within competition law* (January 2021), available at https://www.acm.nl/en/publications/memo-concerning-results-public-consultation-second-draft-version-guidelines-sustainability-agreements.

[121] See also p. 1 of ACM, *Accompanying memo to the second draft version of the Guidelines on Sustainability agreements - opportunities within competition law* (January 2021), available at https://www.acm.nl/en/publications/memo-concerning-results-public-consultation-second-draft-version-guidelines-sustainability-agreements.

[122] ACM's Draft Guidelines (January 2020) paras. 19-23; and ACM's Second draft version: Guidelines on *Sustainability agreements* paras. 23-29.

at the contribution of respecting national or international standards, as far as they are not unjustified restrictive to competition and are publishing information that could be "*competition-sensitive*".

Concerning agreements that fall under Article 101(1) TFEU the Dutch Draft Guidelines provide an analysis on how sustainability agreements could fall under the Article 101(3) TFEU[123]. Under the first condition, the ACM presents that efficiencies ought to be identified, as much as attainable, and to be objective (paras. 34-42). It proposes that some descriptions of the sustainability benefits cannot be quantitative by nature (e.g. animal welfare or innovation), but they will have to remain qualitatively descriptive (para. 41). ACM supports that no quantification is needed in cases where the parties have a limited, combined market share and/or the harm of competition is evidently minor than the benefits of the agreement (paras. 54-56). Moreover, in para. 37 are presented some types of efficiencies that sustainability agreements can create, such as lowering the costs for sustainable products or informing consumers better for the sustainable attributes of products.

The Guidelines further suggest, for the second criterion, the consumers' fair share of the benefits, that long-term benefits may be included, and direct and/or indirect - future consumers can be the beneficiaries as well (paras. 43-44). Specifically, for sustainability agreements reducing environmental damage, the benefits of the whole society can be included, likewise (para. 52). Moreover, the ACM proposes a deflection of the basic principle that the consumer should be compensated at least equally for the harm caused by the restriction, if two cumulative criteria occur; in particular if "*(i) the agreement is an environmental-damage agreement, and (ii) the agreement helps, in an efficient manner, comply with an international or national standard, or it helps realize a concrete policy goal (to prevent such damage)*" (para. 45). This demonstrates a tolerating position of the ACM for the environmental sustainability agreements, due to their imperative nature pursued also by public policies, and emphasize to the distinction of them from every other type of sustainability agreements. In addition, as a predecessor of para. 601 for the "*collective benefits*" of the European Commission's Horizontal Draft Guidelines examined earlier in Chapter I.D.2, the ACM's second Draft guidelines indicates in its para. 60 that "*it is important to note that the consumers (the buyers of the product) in this example* [i.e. a sustainability agreement preventing environmental damage] *are also part of the wider group (society at large) that benefits from the agreement. These consumers therefore enjoy these benefits, in principle, as much as the rest of society does*". Also, another novelty represented in these ACM's Guidelines is the willingness to pay ("WTP") tool which is encompassed to determine more directly the value of gains of "other sustainability agreements", besides the environmental, using the purchasing public as an indicator for the value of the benefits. Similarly this instrument was used in the "Chicken of Tomorrow case" which will be analysed below.

[123] See ACM's Second draft version: Guidelines on *Sustainability agreements - Opportunities within competition law* (January 2021), paras. 30-69, available at https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.

Regarding the third "indispensability" condition of the Article 101(3) TFEU, the ACM's Draft Guidelines do not have much new to add than to clarify that in the context of necessity of the sustainability agreement "*(i) the agreement in itself must be necessary for the realization of the benefits, and (ii) each of the individual restrictions of competition that follow from the agreement are necessary*" (para. 64). Correspondingly, for the fourth condition of the elimination of competition the ACM highlights in para. 69 key parameters established on the matter. However, the great value of the novelties supported by the ACM's Draft Guidelines is that they are suggested through existing means of interpretation by a broader approach of the Article 101 TFEU provisions, while they are providing a more extensive representation of the sustainability agreements and their implementation in those provision[124].

2. The Chicken of Tomorrow case[125]

An interesting examination of the Article 101(3) TFEU by the ACM assessing sustainability concernments before the issuance of the ACM's Draft Guidelines, was the "Chicken of Tomorrow" case[126]. In this case, in 2013, there was the "Kip van Morgen" agreement between the chicken industry and super markets with the aim to improve the welfare of the chickens which the super markets purchase, replacing the "regular" chickens with the "chicken of tomorrow". Determining for the agreement was the complete replacement of the regular chicken with the more expensive new product, restricting the choice for the consumers. The consequences of the agreement were affecting internal market, since the Dutch super markets buy meat from other member states, too. The ACM concluded that the agreement was falling under Article 101(1) TFEU and at the corresponding domestic provision, likewise. Examining it, also, under Article 101(3) TFEU, the ACM assessed that the positive impact at the environment, at the animals proper way of living, and at the consumer health, would benefit the consumers only if there was established a "willingness to pay" ("WTP") by them for those positive externalities. It was found through a research on consumers that the higher price they were willing to pay was near the half of the additional cost implementing. Therefore, the economic gains were missing and the first two condition

[124] See Bird & Bird - Roosmalen J., *Revised guidelines of Dutch competition authority confirm more leeway for environmental sustainability initiatives* (February 2021), available at https://www.twobirds.com/en/insights/2021/netherlands/revised-guidelines-of-dutch-competition-authority; and Van Doorne, *More room for joint sustainability initiatives* (March 2021), available at https://www.lexology.com/library/detail.aspx?g=7bb5c418-792c-497a-a907-ac98b4c75e7f&utm_source=lexology%20daily%20newsfeed&utm_medium=html%20email%20-%20body%20-%20general%20section&utm_campaign=lexology%20subscriber%20daily%20feed&utm_content=lexology%20daily%20newsfeed%202022-10-28&utm_term=&fbclid=IwAR3ZUHyr5xqLslk47eZIaoitQlqgz2-EVIzgZGjbaD-RpKbMKhJPDO6_z5E.

[125] See ACM publications, *ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'* (January 2015), available at https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainabilityarrangements-concerning-the-Chicken-of-Tomorrow/.

[126] For further analysis see Lianos I., *Polycentric Competition Law*, UCL Faculty of Laws (2018), p.26-28 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257296.

of Article 101(3) TFEU could not be satisfied, while the indispensability criterion of the third condition was controversial, too, since there was other more sustainable chicken meat in the Dutch market. However, the ACM highlighted that it is recommended for super markets to compete on sustainability factors, centralizing to an awareness on the matter and to alternatives. Furthermore, the fourth criterion was also infringed, inasmuch the 95% market share eliminates competition, while the remaining competition regards only meat of even higher standards.

Therefore, in this case the potential advantages of the agreement did not manage to overweigh the mitigation of the choice for consumers and the higher prices. Nonetheless, there are argues supporting that if the concerned arrangements were assessed through the prism of standardisation agreements, then the animal welfare objectives of the "Chicken of Tomorrow" might have been approved as lawful[127]. Notwithstanding the fact that, this case has a great value, since it introduced the WTP instrument. As the ACM draft Guidelines later presented[128], such a tool can constitute a catalytic role for a way of estimating positive impacts of agreement which, otherwise, would be very difficult to evaluate, such as the animal welfare objective that falls into the scope of a broad sense of sustainability that the Dutch and European Draft guidelines are indicating to pursue.

Additionally, another case relevant to the matter, adjudicated by the ACM before the issuance of the ACM's Sustainability Draft Guidelines, was the "Coal Power Plants" case[129], where the environmental sustainability factor was insufficient for an exemption to occur for the agreement. However, the ACM, in a novelty course, considered the advantages of the Dutch "society as a whole".

3. Soft-drink suppliers' joint agreement

More recently, after a request from Coca-Cola, the ACM published its' assessment on a matter of a joint agreement among soft-drink suppliers, which had a sustainability substance.[130] Some of the suppliers were the Coca-Cola, Vrumona, a supermarket chain and Jumbo, and they wished to conclude an agreement for removing plastic handles from multipacks, making them more recyclable and reducing the need for plastic. An example presented is removing the plastic handle from a plastic wrap of six bottles of soda. The ACM's position for this agreement regards as key points the assistance of realization of sustainability goals and the no-negative effects on consumers, while it applied, for assessing the agreement, its' draft Guidelines on sustainability agreements.

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[127] Holmes S., "*Climate change, sustainability, and competition law*", Journal of Antitrust Enforcement (2020), p.382, available at https://academic.oup.com/antitrust/article/8/2/354/5819564.

[128] ACM's Second draft version: Guidelines on *Sustainability agreements - Opportunities within competition law* (January 2021), para. 62, available at https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.

[129] ACM's Case, *Coal Power Plants*, 26 September 2013, available at https://www.acm.nl/en/publications/publication/12082/ACM-analysis-of-closing-down-5-coal-power-plants-as-part-of-SER-Energieakkoord.

[130] ACM's Publications, *ACM is favorable to joint agreement between soft-drink suppliers about discontinuation of plastic handles* (July 2022), available at https://www.acm.nl/en/publications/acm-favorable-joint-agreement-between-soft-drink-suppliers-about-discontinuation-plastic-handles.

More specifically, required self-assessments of the suppliers, at the first stages for concluding such agreement, did not reveal any negative effects on competition and, particularly, no harm for the consumers, neither by higher prices, neither by reduced quality; hence the ACM regarded this agreement not restrictive to competition and allowed. According to its' second draft Guidelines[131], the ACM provided a reminder to the current suppliers that their sustainability claims ought to be honest, clear, correct and relevant to sustainability claims and it considered the agreement as falling in two of the five categories of Chapter 4 of those Guidelines, namely sustainability agreements without restrictions to competition. In particular, into the agreements that "*incentivize undertakings to make a positive contribution to a sustainability objective without being binding on the individual undertakings*", and into the agreements that "*are aimed at improving product quality, while, at the same time, certain products or products that are produced in a less sustainable manner are no longer sold*".

This was following the route of another recent opinion of the ACM, permitting a sustainability collaboration, between the competitors Shell and TotalEnergies, which was regarded as restrictive to competition, since it may have negative effects to competition, for instance in price, but with sustainability gains outweighing potential costs for energy users, by reducing CO2 emissions with the storage of CO2 in old empty natural-gas fields in the North Sea.[132] Those takes of the ACM on sustainability agreements are regarded as welcoming to sustainability collaborations and actively encouraging undertakings to submit such plans. By that the ACM lead the way for clarity in such proceedings of the companies and a safe manner to assure that the sustainability objectives are genuine.[133] Nevertheless, there are concerns that the ACM's position on those instances may indicate a tolerance and a more lenient field for sustainability initiatives of companies that may lead them to "greenwashing" initiatives[134]. Particularly for the soft-drinks suppliers' agreement, there are concernments if the omission of the handles is in fact contributing to the achievement of sustainability goals, since the rest of the packaging remains plastic and therefore the significance of this removal seems to be limited. Furthermore, there is questioning whether the use of some less materials by the companies is just cost saving for them and potentially not fulfilling the indispensability criterion.

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[131] ACM's Second draft version: Guidelines on *Sustainability agreements - Opportunities within competition law* (January 2021), available at https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.

[132] ACM's Publications, *ACM: Shell and TotalEnergies can collaborate in the storage of CO2 in empty North Sea gas fields* (June 2022), available at https://www.acm.nl/en/publications/acm-shell-and-totalenergies-can-collaborate-storage-co2-empty-north-sea-gas-fields; ACM's Informal opinion, *No action letter agreement Shell and TotalEnergies regarding storage of CO2 Northsea* (June 2022), available at https://www.acm.nl/en/publications/no-action-letter-agreement-shell-and-totalenergies-regarding-storage-co2-northsea.

[133] Kar N., Spring B., *Dutch competition authority continues to bubble to the top on sustainability* (July 2022), available at https://sustainablefutures.linklaters.com/post/102htsw/dutch-competition-authority-continues-to-bubble-to-the-top-on-sustainability.

[134] Bird & Bird LLP - Kuipers P., Beetstra T. and Roosmalen J., *A risk of "greenwashing" by competition authorities?* (September 2022), available at https://www.lexology.com/library/detail.aspx?g=7c8abc0a-dd20-4ca5-8fbf-34ce2998e7cb.

However, the fact that NCAs should assess those issues in a mindful and holistic approach cannot mitigate another fact, that sustainability constitutes a competition parameter of constantly increasing application and importance.

### B. The Hellenic Competition Commission's (HCC) Staff Discussion Paper, and the HCC's and ACM's Technical Report on Sustainability and Competition

The Hellenic Competition Commission (HCC) has revealed that it is in favor for an integration and promotion of the environmental sustainability concernments through the legislative framework of competition[135], while it will be in accordance with the "*horizontal integration clauses of the Treaty and the Charter of Fundamental Rights*"[136]. Hence, in 16th of September 2020, the HCC issued a "Staff Discussion Paper" promoting innovation alongside with a shift to a green economy, while considering potential generational externalities through the use of new tools and methodologies, in order to comprehend consumer behavior. Some of those proposed tools is a "Sandbox" (paras. 114-117) and another is the formation of an "Advise Unit" composed from a variety of regulatory authorities (para. 113), besides the proposal of the aforementioned WTP test from this NCA, too (para. 23).

Particularly for the sandbox initiative, its purpose is to leave room for the industry to experiment with innovative business layouts intending to materialize faster and more efficiently sustainable development objectives. This notion is borrowed from the UK Financial Conduct Authority which the HCC refers to for a definition and particularly state that it is: "*a safe space where both regulated and unregulated firms can experiment with innovative products, services, business models and delivery mechanisms without immediately incurring all the normal regulatory consequences of engaging in such activity*"[137]. A detailed plan was concluded through a public consultation for the procedures and the way of functioning of this regulatory sandbox[138]. The next steps to implement a sandbox are suggested to be: final settings and evaluations of legal issues regarding the operation of the sandbox; creating Key Performance Indicators; creating a framework for evaluating proposals; staffing of evaluators within the HCC; association with competent bodies / stakeholders; and creating the platform. The exercise of a sandbox would balance where, ultimately, the promotion of an outcome of wider public interest will be supported, assisting business innovation to move forward for a sustainable development. Such an instrument could overcome the uncertainty of undertakings for the lawfulness of co-operations aiming to

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[135] See Διαμαντοπούλου Γ., *Πράσινος Ανταγωνισμός; Ευρωπαϊκό δίκαιο ανταγωνισμού και περιβαλλοντική προστασία* (Νομική Βιβλιοθήκη, 2022), p. 59; and HCC Information on *Competition Law & Sustainability*, available at https://www.epant.gr/en/enimerosi/competition-law-sustainability.html.

[136] HCC, *Staff Discussion paper* (September 2020), para. 63, available at https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf.

[137] UK Financial Conduct Authority, *Regulatory Sandbox* (May 2015), available at https://www.fca.org.uk/firms/innovation/regulatory-sandbox.

[138] HCC, Public consultation of Sustainability Sandbox, available at https://www.epant.gr/en/enimerosi/sandbox.html#diavoulefsi.

sustainability incentives, establishing softly a first instance legitimacy of the sustainability agreement, while promoting both competition policy objectives, such as innovation and improvement of the production and goods, and sustainability goals, simultaneously.

Furthermore, it is clarified in para. 46 that sustainability agreements which are obligatory from regulations are in principal out of the scope of Article 101(1) TFEU, while in paras. 50-51 the HCC repeats the categories not falling under Article 101 TFEU, as the ACM presents them in its relevant Guidelines and the Staff Discussion paper reference them plainly. An addition of occasions falling out the scope of Article 101(1) TFEU, analysed by the HCC in paras. 55-58, regards the ancillary regulatory restraint and the objective necessity doctrines. Moreover, it clarifies in paras. 59-62 how sustainability agreements could be in the context of standardisation agreements, which would stimulate the manner of assessing the agreement under Article 101(3) TFEU. Respecting the Article 101(3) TFEU, the HCC assents with proposals of the ACM, although it notices that the broadening of the "consumers" notion, under the second condition of Article 101(3) TFEU, namely the pass-on to consumers, should be implemented with caution (para. 72).

Thus, from the moment that the NCA of Greece and Netherlands showed great interest and go along in the aspect of sustainability in relation with competition law, the HCC and the ACM released a common Technical Report concerning this matter, which describes possible mechanisms for efficiencies resulting from sustainability agreements to be more accurately measured and taken into consideration in an evaluation of competition law[139]. Concretely, the methods presented in the reports are (i) environmental valuations using case-specific data (i.e. based on market choices or hypothetical choices - stated preferences), (ii) valuations estimating and aggregating case-specific impact, (iii) valuations using data from existing studies and databases, and (iv) valuations derived from stated policy objectives.

### C. The UK Competition and Markets Authority (CMA) Guidance Paper

In January 2021, the UK Competition and Markets Authority (CMA) issued an information document to navigate businesses regarding sustainability agreements[140]. Later, in September of the same year, the "Green Claims Code", was announced by the CMA, laying out new guidelines for companies marketing products and services as environmentally friendly[141]. This comes in response to the CMA's scrutiny into deceptive environmental claims and growing interest in sustainability claims in

[139] Hellenic Competition Commission (HCC) and Dutch Authority for Consumers and Markets (ACM), *Technical Report on Sustainability and Competition* (January 2019), available at https://www.acm.nl/en/publications/technical-report-sustainability-and-competition.

[140] See UK Competition and Markets Authority (CMA) press release on *Sustainability agreements: CMA issues information for businesses* (January 2021), available at https://www.gov.uk/government/news/sustainability-agreements-cma-issues-information-for-businesses.

[141] ACM Guidance, *Green claims code: making environmental claims* (September 2021), available at https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims.

Europe[142]. As key legal issues are pointed out the information of the consumers for their choices about the products and services they purchase, and in regards with that the statements of businesses should be not false or misleading to present a greener impression for them, than the state that they really are environmentally friendly; "[t]*hat includes claims that suggest or create the impression that a product or a service: has a positive environmental impact or no impact on the environment; or is less damaging to the environment than competing goods or services*"[143]. Thus, the CMA seems to put weight on declaring and be protected of "greenwashing" cases, namely environmental incentives that are deceptive for the consuming public.

In particular, for the CMA guidance on sustainability agreements of January 2021[144], the sustainability element is seemed to be encompassed more at its environmental aspect. It impels the undertakings, which are uncertain for the legitimacy of their agreements, to seek independent legal consultation. However, emphasis is added in the proposal to the undertakings for using a fair standard-setting process, since many of the sustainability agreements are recognized by the CMA as standard-setting agreements, correspondingly to the EU direction of this. The guidance provides some ways of setting standards that the parties should follow and others that are not recommended. Moreover, it suggests avoiding some types of serious restriction and anti-competitive behavior. Specifically, they ought to be mindful for "by object" restrictions, not covering business cartels, while they should be cautious also when they exchange commercially sensitive informations. Also, it suggests to consider available allowances and exemptions, by defining the confines of their market and assessing whether their agreement satisfies the conditions for an exemption, whilst the UK still implements the EU Block Exemption Regulation, and it is referred as a crucial tool for defining exemptions. The ancillary cumulative criteria provided for an exemption, besides the EU BER, are that of: agreements generating efficiencies (e.g. increased quality of products); the efficiencies cannot be achieved by other means; they benefit consumers; and the agreement does not lead to the elimination of competition. Those conditions demonstrate the accordance of this guidance assessment with the Article 101(3) of the TFEU.

Co-operation agreements setting environmental standards are not a new issue for the UK NCAs. The Office of Fair Trading ("OFT"), namely a former UK's NCA, provides an example of a yogurt voluntary agreement among producers, importers and packaging suppliers to make the yogurt pots from recycled ingredients. The OFT view was that the agreement should not fall under Article 101(1) TFEU, inasmuch differentiation

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[142] Herbet Smith Frehills LLP, *CMA publishes "Green Claims Code" which sets out guidance for businesses making environmental claims* (March 2022), available at https://www.lexology.com/library/detail.aspx?g=bf71e7ed-9068-4da2-a8bc-f04ceae3b5ce.

[143] ACM Guidance, *Making environmental claims on goods and services* (September 2021), Chapter: *Appendix -Legal framework*, available at https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services#summary.

[144] ACM Guidance, *Environmental sustainability agreements and competition law* (January 2021), available at https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law#use-a-fair-standard-setting-process.

among the relevant product would not be sufficient and the competitors would be still able to compete at the price and the quality of the critical product comprised in the pots, besides the non-binding character of the agreement.[145]

### D. The approach of the NCAs of Germany and Austria

Recently, some of the NCAs that were considered as more "sceptic"[146], have proceeded to more radical approaches on the matter of sustainability agreements. The most recent annual report of Germany's NCA, the "Bundeskartellamt", expressly states that: "*sustainability is increasingly developing into a competition parameter*", and Andreas Mundt, the President of the Bundeskartellamt, said: "*Competition law does not stand in the way of cooperations for achieving sustainability objectives – on the contrary. Effective competition is part of the solution since sustainability requires innovation, which in turn only emerges in a competitive environment*".[147] Moreover, the Austrian legislator has amended the Cartel and Competition Act to include a new exception to the general ban on cartel agreements, strengthening corporate agreements which contribute significantly to an ecologically sustainable or carbon-neutral economy, and the Austrian Federal Competition Authority ("AFCA") published particular Guidelines on the Sustainability agreements applicable to the Austrian Cartel law.[148]

The AFCA's Guidelines, on the one hand, does not regard cases of cross-border character among member states, but only those of domestic interest, while they regard only the ecological/environmental substance of sustainability agreements, namely not the other aspects of them such as the social. On the other hand, they provide a broad and extensive protection for such environmental sustainability agreements, and on how they can be exempted as not anti-competitive within the confines of the Austrian market. The modified scheme of self-assessment introduced for the companies which wish to proceed to these agreements, consist of five cumulative conditions; specifically, the efficiency gains, indispensability, contribution to sustainability aim, substantiality and absence of elimination of competition. According to the first condition, it is manifested that the benefits are comprehended as improvements in the use of scarce resources. The crucial criterion for it, it is considered to be a total welfare, namely the enhancement of the welfare of society as a whole, and it is not regarded sufficient a mere redistribution of welfare between producers and consumers. Furthermore, these Guidelines recognize efficiency gains that materialize not only soon, but also later, for future generations. Nonetheless, the benefits shall be demonstrated convincingly and

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[145] OECD, Policy Roundtables - *Horizontal Agreements in the Environmental Context* (2010), p. 100, available at https://www.oecd.org/daf/competition/49139867.pdf.

[146] Διαμαντοπούλου Γ., *Πράσινος Ανταγωνισμός; Ευρωπαϊκό δίκαιο ανταγωνισμού και περιβαλλοντική προστασία* (Νομική Βιβλιοθήκη, 2022), p. 60-61.

[147] Bundeskartellamt's Annual Report of 2021/22, p. 51-52, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Jahresbericht/Jahresbericht_2021-2022.html.

[148] AFCA's final Guidelines on Sustainability Agreements for Companies (September 2022), available at https://www.bwb.gv.at/en/news/detail/afca-publishes-final-guidelines-on-sustainability-agreements-for-companies.

shall not be just assumed. Additionally, as regards the condition of "contribution to an ecologically sustainable or climate-neutral economy", it is provided a non-exhaustive list with concrete examples of what qualifies as ecological/environmental efficiency gains, for which list it has been commented that it follows closely the terminology and definitions of the EU Taxonomy Regulation[149]. Therefore, the Austrian NCA seems to have taken some considerable steps forward to a broadening perception on the weighing of efficiency gains occurring from environmental sustainability agreements, despite the fact that those Guidelines are directed towards only to the domestic law and market of Austria.

Regarding the Bundeskartellamt, it has provided some worth mentioned observations on sustainability agreements, likewise. Besides Germany's note to the OECD in 2020, where it was presented extensively their standpoint on the matter of Sustainability and Competition[150], the Bundeskartellamt has issued some more recent assessments on agreements with sustainability extensions. For instance, concerning a joint agreement on the milk sector, even though that it is declared from the NCA that it encourages cooperation among agricultural producers, it clarified that this does not apply on price-fixing agreements, constituting a border even for exempted sustainability agreements, while it noted that this agreement would be to the disadvantage of consumers and without improved sustainability in the sector[151]. On the contrary, reinforcing its support on sustainability initiatives through business cooperation, the Bundeskartellamt issued reviews on the living wages in the banana sector, and on the expanding animal welfare initiative "Initiative Tierwohl" to include cattle fattening[152]. These reviews are provided as an informal guidance for the relevant undertakings which wish to cooperate and, therefore, to ensure that the sustainability objectives are achieved while competition prerequisites, such as that choices are available to consumers, are not violated. Generally, key factors, for the German NCA on the assessment of permissible sustainability agreements, are presented to be "*how great are the restrictions of competition caused e.g. by aligning cost components; how does this affect the sales*

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[149] Gassler M., *New Draft Sustainability Guidelines for the New Austrian Sustainability Exemption* (June 2022), available at http://competitionlawblog.kluwercompetitionlaw.com/2022/06/02/new-draft-sustainability-guidelines-for-the-new-austrian-sustainability-exemption/.

[150] In a nutshell, under this note, public interest criteria, such as sustainability objectives, are encouraged to be considered as technical standards, there are presented unclear sets of problems regarding the implementation of conditions of the Article 101(3) TFEU, and the legislator is indicated as pioneer for balancing the conflicting objectives which are of public interests; see Bunderkartellamt's *OECD: Sustainability and Competition – Note by Germany* (December 2020), available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2020/OECD_2020_Sustainability_and_Competition.html.

[151] Bundeskartellamt's Press Release, *Surcharges without improved sustainability in the milk sector: Bundeskartellamt points out limits of competition law* (January 2022), available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/25_01_2022_Agrardialog.html?nn=3591568.

[152] Bundeskartellamt's Press Release, *Achieving sustainability in a competitive environment - Bundeskartellamt concludes examination of sector initiatives* (January 2022), available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html.

*prices; is access to the cooperation non-discriminatory?; were the sustainability criteria developed in an open process?; is there sufficient transparency for consumers ("labelling")?*"[153].

[153] Bundeskartellamt's Annual Report of 2021/22, p. 51-52, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Jahresbericht/Jahresbericht_2021-2022.html.

## CONCLUSION

Exploring the current legislative framework of the European Environmental policy, and the proposals of recent Guidelines on Competition law, both at EU and member-states level, it is revealed an intension of promoting environmental sustainability objectives through competition law. It is noticed that the international direction, in and out of the EU, indicates an effort to develop new approaches and tools for the implementation of environmental sustainability agreements in accordance with the competition law objectives and without distorting the latter but also not turning their back to a matter of imperative public importance. "Competition Policy International" ("CPI") especially referred to: the BIAC note to the OECD; the ICC[154] concerns in 2020 submission for an OECD roundtable on antitrust and sustainability; the European Green Deal consultation for ways competition law to contribute; AFCA draft guidelines of 2022 and Austrian Cartel Act amended in 2021 to include exemption for sustainability agreements; UK Competition and Market Authority (CMA) published advice on how competition law can contribute to environmental and sustainability objectives; Dutch Authority for Consumers & Markets published draft guidelines on the assessment of sustainability agreements (ACM Guidelines); and Europe's leading role in antitrust vs sustainability (ICN Survey and OECD)[155]. However, due to the complexity of the matter and the vague borders of competition law for some exemptions of agreements restraining competition but being lawful, a general rule for environmental sustainability agreements is not so easy to be implemented. Therefore, there is need for guidance on the issue and flexibility to mitigate concerns of antitrust liability under environmental sustainability agreements.

As this thesis examines, there are co-operation agreements that are not necessarily regarded anti-competitive under EU Competition law, as not falling at all in the scope of Article 101 TFEU, or being exempted through the BERs or the exemption of paragraph 3 of the Article 101 TFEU. Environmental sustainability agreements, as a part of co-operation agreements, could simulate various forms of agreements that are already explored by the existing legislative framework. Nevertheless, the European Commission's and some NCA's Guidelines indicate that an environmental sustainability agreement can predominantly comprise characteristics of a "standardisation agreement". This accommodates the implementation of environmental agreements in the context of the competition law preservation, since they can be assessed through a well-known type of agreement at the field of the EU's competition legislative framework. Although, agreements with environmental objectives include some distinct characteristics from other known types of agreements, but issues come to the surface when those objectives of special essence for a sustainable development,

[154] International Chamber of Commerce (ICC), *Competition policy and Environmental Sustainability*, p.6-7, available at https://iccwbo.org/publication/competition-policy-and-environmental-sustainability/.

[155] Modrall J., *The EU's Draft Horizontal Guidelines: Chilling Innovation on Sustainability?* (June 2022), available at https://www.competitionpolicyinternational.com/the-eus-draft-horizontal-guidelines-chilling-innovation-on-sustainability/.

collide with the objectives that Article 101 TFEU protects. The borders provided for an exemption under the Article 101(3) TFEU are often construed in a narrow manner, creating an obstacle for an agreement, which could be of imperative importance for the contribution to reserve the environmental degradation, to be admissible by the EU Competition Law provisions on co-operation agreements. Contrariwise, a too broad construe of those provisions could harm vitally the competition law safekeeping. At the same time, there is the existing danger that environmental sustainability objectives could be used as a cover for collusive antitrust agreements ("greenwashing"). Therefore, the boundaries for accepting a restraint agreement that presents environmental objectives should not be uncontrolled.

The European Commission's revised Horizontal Draft Guidelines of 2022, accompanied with NCAs perceptions on the matter, are taking the issue, of the need for clarification in this field, under serious consideration. Particularly, the Commission's Horizontal Draft Guidelines present a diversity of novelties on the matter, and primarily the fact that they do not remain at the environmental aspect that is variously represented as the core of sustainability, but they face the sustainable development in an equal manner for all of its included facets; in contrast with the previous, by the European Commission and NCAs, takes on the matter, which were directed at the environmental objectives. Furthermore, the NCAs contribution on the matter is crucial, since they provide, among other, innovative, useful and practical ways to value the benefits that an environmental sustainability agreement produces. The estimation of those efficiency gains constitutes a critical component for an assessment under Article 101(3) TFEU. However, a careful broadening of the interpretation of the Article 101(3) TFEU conditions is generally supported by Commissions and academics, since it could facilitate an efficient promotion of environmental sustainability objectives and be in accordance with the competition law provisions and goals, without the need of regulating new provisions. Therefore, if the confines of a lawful environmental sustainability agreement are well declared, the concernments, of them distorting competition, can be sufficiently mitigated; and instances where such agreements are disproportionately restrictive to competition or their environmental sustainability aims are not genuine, can be detected, protecting and promoting the competition law and the sustainability objectives simultaneously. That approach is in line, also, with fundamental provisions of the EU from the Charter, the TFEU and the TEU which are referred in the Draft Horizontal Guidelines, and they bind the competition policy to integrate sustainable development aims, besides the reinforcement of environmental protection and sustainable development objectives from recent legislations (e.g. the European Green Deal).

In conclusion, all the above are towards to a holistic approach of the TFEU, that obligates a parallel protection and promotion of Competition and Environmental Sustainability policies and their objectives. With the current revised Draft Horizontal Guidelines of 2022, the opaque areas between environmental sustainability agreements and competition law can be declared, and a legal certainty and safety of vital importance can be established at the matter. Under that assessment, a key element to achieve the aforementioned, even in the trickiest cases, is appeared to be a broader mindful

interpretation of the Article 101(3) of the TFEU. Thus, in those ways the competition policy will not constitute an obstacle for imperative goals of an environmental sustainable development, while competition law objectives, cornerstones of the European Union, will not be distorted and will not be used unlawfully.

## Bibliography

### Books


- Διαμαντοπούλου Γιολάντα, *Πράσινος Ανταγωνισμός; Ευρωπαϊκό δίκαιο ανταγωνισμού και περιβαλλοντική προστασία* (Νομική Βιβλιοθήκη, 2022).
- Τζουγανάτος Δημήτρης, *Δίκαιο του Ελεύθερου Ανταγωνισμού: Ουσιαστικό δίκαιο του ελεύθερου ανταγωνισμού* (Νομική Βιβλιοθήκη, 1ος Τόμος, 2η έκδ., 2020).
- Jones Alison and Sufrin Brenda, *EU Competition Law: Text, Cases, and Materials* (Oxford University Press, 6th ed., 2016).
- Lianos Ioannis, Korah Valentine, and Siciliani Paolo, *Competition Law: Analysis, Cases, & Materials* (Oxford University Press, 2019).
- Wish Richard and Bailey David, *Competition Law* (Oxford University Press, 10th ed., 2021).


### Articles, Papers, Guidelines and other ancillary documents and sources


- ACM, *Accompanying memo to the second draft version of the Guidelines on Sustainability agreements - opportunities within competition law* (January 2021), available at https://www.acm.nl/en/publications/memo-concerning-results-public-consultation-second-draft-version-guidelines-sustainability-agreements.
- ACM Guidance, *Environmental sustainability agreements and competition law* (January 2021), available at https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law#use-a-fair-standard-setting-process.
- ACM Guidance, *Green claims code: making environmental claims* (September 2021), available at https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims.
- ACM Guidance, *Making environmental claims on goods and services* (September 2021), Chapter: *Appendix -Legal framework*, available at https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services#summary.
- ACM publications, *ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'* (January 2015), available at https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainabilityarrangements-concerning-the-Chicken-of-Tomorrow/.
- ACM's Case, *Coal Power Plants*, 26 September 2013, available at https://www.acm.nl/en/publications/publication/12082/ACM-analysis-of-closing-down-5-coal-power-plants-as-part-of-SER-Energieakkoord.
- ACM's Draft Guidelines on *Sustainability agreements - Opportunities within competition law* (July 2020), available at

https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements.
- ACM's Informal opinion, *No action letter agreement Shell and TotalEnergies regarding storage of CO2 Northsea* (June 2022), available at https://www.acm.nl/en/publications/no-action-letter-agreement-shell-and-totalenergies-regarding-storage-co2-northsea.
- ACM's Publications, *ACM is favorable to joint agreement between soft-drink suppliers about discontinuation of plastic handles* (July 2022), available at https://www.acm.nl/en/publications/acm-favorable-joint-agreement-between-soft-drink-suppliers-about-discontinuation-plastic-handles.
- ACM's Publications, *ACM: Shell and TotalEnergies can collaborate in the storage of CO2 in empty North Sea gas fields* (June 2022), available at https://www.acm.nl/en/publications/acm-shell-and-totalenergies-can-collaborate-storage-co2-empty-north-sea-gas-fields.
- ACM's Second draft version: Guidelines on *Sustainability agreements - Opportunities within competition law* (January 2021), available at https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.
- AFCA's final Guidelines on Sustainability Agreements for Companies (September 2022), available at https://www.bwb.gv.at/en/news/detail/afca-publishes-final-guidelines-on-sustainability-agreements-for-companies.
- Ashurst - Waelbroeck D. and Antypas I., *European Commission consults on draft guidance on sustainability agreements* (April 2022), available at https://www.lexology.com/library/detail.aspx?g=7cc762d2-91c0-438f-b0d9-960d20ab71a2&fbclid=IwAR3uP-tZ6Cho3EWo6Nuo3V0HHMRKI7AENAEqoegAUEZVDYhwPYyhju_x-MY.
- Bird & Bird LLP - Choulpek Vojtech and Taimr Martin, *Tolerating Green Cartels - National Guidelines on Anticompetitive Agreements with Sustainability Aims* (September 2022), available at https://www.lexology.com/library/detail.aspx?g=a639fdca-ea60-4d60-9bda-1ca5a55202e9.
- Bird & Bird LLP - Kuipers P., Beetstra T. and Roosmalen J., *A risk of "greenwashing" by competition authorities?* (September 2022), available at https://www.lexology.com/library/detail.aspx?g=7c8abc0a-dd20-4ca5-8fbf-34ce2998e7cb.
- Bird & Bird - Metsa-Tolika P., Karpathaki M., Broncher A., *Greening Competition Law - The European Commission's Draft Horizontal Guidelines and Sustainability Agreements* (September 2022), available at https://www.lexology.com/library/detail.aspx?g=1c943ab0-3488-4ed2-8c26-8dfc073df246.
- Bird & Bird - Roosmalen J., *Revised guidelines of Dutch competition authority confirm more leeway for environmental sustainability initiatives*

(February 2021), available at https://www.twobirds.com/en/insights/2021/netherlands/revised-guidelines-of-dutch-competition-authority.
- Blomstein, *Competition and Sustainability - New Guidance from Brussels* (January 2023), available at https://www.lexology.com/library/detail.aspx?g=5bf7c418-5c75-4afd-8131-e6a4522d0e72.
- Bundeskartellamt's Annual Report of 2021/22, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Jahresbericht/Jahresbericht_2021-2022.html.
- Bunderkartellamt's *OECD: Sustainability and Competition – Note by Germany* (December 2020), available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2020/OECD_2020_Sustainability_and_Competition.html.
- Bundeskartellamt's Press Release, *Achieving sustainability in a competitive environment - Bundeskartellamt concludes examination of sector initiatives* (January 2022), available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html.
- Bundeskartellamt's Press Release, *Surcharges without improved sustainability in the milk sector: Bundeskartellamt points out limits of competition law* (January 2022), available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/25_01_2022_Agrardialog.html?nn=3591568.
- CMA, *Competition and Markets Authority Annual Plan 2020/21*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873689/Annual_Plan_2020-21.pdf.
- CMA Correspondence, *Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government* (March 2022), available at https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government.
- CMA, press release on *Sustainability agreements: CMA issues information for businesses* (January 2021), available at https://www.gov.uk/government/news/sustainability-agreements-cma-issues-information-for-businesses.
- Competition policy brief, *Competition policy in support of Europe's Green Ambition* (September 2021), available at https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF.
- Consolidated text of the Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas

emission allowance trading within the Union and amending Council Directive 96/61/EC, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02003L0087-20210101 .
- Costa-Cabral Francisco, "*Reply to European Commission Call on 'Competition Policy Supporting the European Green Deal*'", Tilburg Law and Economics Center (TILEC), 2021, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3778154
- Dolmans M., *The 'polluter Pays' Principle as a Basis for Sustainable Competition Policy* (October 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3735561.
- European Court Reports 1983 -03369, NV IAZ *International Belgium and others v Commission of the European Communities* (1983), Joined cases 96-102, 104, 105, 108 and 110/82, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61982CJ0096.
- European Parliament resolution of 15 January 2020 on *The European Green Deal* (2019/2956(RSP)), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020IP0005 .
- European Parliament's Fact Sheets on the European Union, on *Environment policy: general principles and basic framework* (October 2021), available at https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.5.1.pdf.
- Executive Vice-President Vestager's keynote speech at the 25th IBA Competition Conference, *Competition policy in support of the Green Deal* (September 2021), available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en.
- Gassler M., *New Draft Sustainability Guidelines for the New Austrian Sustainability Exemption* (June 2022), available at http://competitionlawblog.kluwercompetitionlaw.com/2022/06/02/new-draft-sustainability-guidelines-for-the-new-austrian-sustainability-exemption/.
- HCC Information on *Competition Law & Sustainability*, available at https://www.epant.gr/en/enimerosi/competition-law-sustainability.html .
- HCC, *Staff Discussion paper* (September 2020), available at https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf.
- Hellenic Competition Commission (HCC) and Dutch Authority for Consumers and Markets (ACM), *Technical Report on Sustainability and Competition* (January 2019), available at https://www.acm.nl/en/publications/technical-report-sustainability-and-competition.
- Herbet Smith Frehills LLP, *CMA publishes "Green Claims Code" which sets out guidance for businesses making environmental claims* (March 2022), available at https://www.lexology.com/library/detail.aspx?g=bf71e7ed-9068-4da2-a8bc-f04ceae3b5ce.

- Holmes Simon, "*Climate change, sustainability, and competition law*", Journal of Antitrust Enforcement, 2020, available at https://academic.oup.com/antitrust/article/8/2/354/5819564.
- Institute for European Environmental Policy (IEEP), *Development of an assessment framework on environmental governance in the EU Member States* (May 2019), available at https://ec.europa.eu/environment/environmental_governance/pdf/development_assessment_framework_environmental_governance.pdf.
- International Chamber of Commerce (ICC), *Competition policy and Environmental Sustainability*, available at https://iccwbo.org/publication/competition-policy-and-environmental-sustainability/
- Kar N., Spring B., *Dutch competition authority continues to bubble to the top on sustainability* (July 2022), available at https://sustainablefutures.linklaters.com/post/102htsw/dutch-competition-authority-continues-to-bubble-to-the-top-on-sustainability.
- Lianos Ioannis, *Polycentric Competition Law*, UCL Faculty of Laws (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257296.
- Modrall J., *The EU's Draft Horizontal Guidelines: Chilling Innovation on Sustainability?* (June 2022), available at https://www.competitionpolicyinternational.com/the-eus-draft-horizontal-guidelines-chilling-innovation-on-sustainability/
- Murray G., *Making EU competition law sustainable: all good things come in threes* (March 2022), available at http://competitionlawblog.kluwercompetitionlaw.com/2022/03/16/making-eu-competition-law-sustainable-all-good-things-come-in-threes/.
- OECD, Policy Roundtables - *Horizontal Agreements in the Environmental Context* (2010), available at https://www.oecd.org/daf/competition/49139867.pdf.
- OECD, *Sustainability and Competition* (2020), available at http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf.
- Official website of the Commission on the European Green Deal, available at https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.
- Paris Agreement available at https://eur-lex.europa.eu/content/paris-agreement/paris-agreement.html .
- Press release, *The Autorité de la concurrence announces its priorities for 2020* (January 2020), available at https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/autorite-de-la-concurrence-announces-its-priorities-2020.
- Protocol on the internal market and competition (No 27), regarding Article 3 TEU, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008M%2FPRO%2F27.

- Report of the Committee on Economic and Monetary Affairs, on the Annual Report on Competition Policy, of 18.12.2018 - (2018/2102(INI)).
- Resolution 66/288 of the UN (July 2012), available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_66_288.pdf.
- Revised Draft *Guidelines on The applicability of Article 101 of the TFEU to horizontal co-operation agreements* (published on March 2022, and consultation period ended on April 2022), available at https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en#view-the-consultation-document.
- The European Green Deal, COM (2019) 640, 11 December 2019, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN
- UK Financial Conduct Authority, *Regulatory Sandbox* (May 2015), available at https://www.fca.org.uk/firms/innovation/regulatory-sandbox.
- Van Doorne, *More room for joint sustainability initiatives* (March 2021), available at https://www.lexology.com/library/detail.aspx?g=7bb5c418-792c-497a-a907-ac98b4c75e7f&utm_source=lexology%20daily%20newsfeed&utm_medium=html%20email%20-%20body%20-%20general%20section&utm_campaign=lexology%20subscriber%20daily%20feed&utm_content=lexology%20daily%20newsfeed%202022-10-28&utm_term=&fbclid=IwAR3ZUHyr5xqLslk47eZIaoitQlqgz2-EVIzgZGjbaD-RpKbMKhJPDO6_z5E.
- Veljanovski Centro, "*Collusion as Environmental Protection - An Economic Assessment*", Journal of Competition Law & Economics, Vol. 17 (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3693381.
- XXIInd Commission's *Report on competition policy* 1992, available at https://op.europa.eu/en/publication-detail/-/publication/d406e5bd-53a6-4642-b7f9-00c2abb4d01b.

**European Commission's Communications, and other**

- Commission Notice - *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements* (2001/C 3/02).
- Commission Regulation (EU) No 330/2010 ("VBER") on *the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices*, no longer in force since 31/05/2022.
- Commission Regulation (EU) 2022/720 *on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices* ("VBER").
- Commission Staff Working Document *Evaluation of the Vertical Block Exemption Regulation*, SWD(2020) 72, Chapter 5.1, p. 31, available at

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020SC0172.

- Commission Staff working Document, *Executive Summary of the Evaluation of the Horizontal Block Exemption Regulations* (SWD/2021/0104), available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2021:104:FIN.
- Commission's Common Agricaltural Policy on *Key reforms in the new CAP*, available at https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/new-cap-2023-27/key-reforms-new-cap_en#makingagriculturecompetitiveandrewarding.
- Commission's Draft proposed Guidelines on *the Application of the ex-clusion from Article 101 TFEU for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation 1308/2013*, available at https://competition-policy.ec.europa.eu/public-consultations/2023-sustainability-agreements-agriculture_en#consultation-documents.
- Commission's Green Gazette on *Competition policy's contribution to the European Green Deal*, available at https://competition-policy.ec.europa.eu/policy/green-gazette/competition-policy_en.
- Commission's *Guidelines on the application of Article 81(3) of the Treaty* [current Article 101(3) TFEU] (2004/C 101/08).
- Commission's Press Corner, *Competition: Commission adopts revised competition rules on horizontal co-operation agreements* (MEMO/10/676), available at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_10_676.
- Commission's press release on *Antitrust: Commission fines car manufactures*, 8th of July 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581.
- Commission's press release on *Antitrust: Commission invites comments on draft revised rules on horizontal cooperation agreements between companies*, 1st of March 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1371.
- Commission's press release on *Antitrust: Commission invites com-ments on draft Guidelines for sustainability agreements in agriculture*, 10th of January 2023 available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_102.
- Communication from the Commission *A European Strategy for Plastics in a Circular Economy*, COM (2018) 28, available at https://eur-lex.europa.eu/resource.html?uri=cellar:2df5d1d2-fac7-11e7-b8f5-01aa75ed71a1.0001.02/DOC_1&format=PDF.
- Communication from the Commission, *Clean Energy for All Europeans*, COM (2016) 860, available at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52016DC0860.
- Communication from the Commission - Commission Notice - *Guidelines on Vertical restrains* (2020/C 248/01).

- 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* (2011/C 11/01).
- Communication from the Commission on *Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment*, COM (2002) 412, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0412&from=EN.