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Sustainability and competition policy

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+ On-Topic

Sustainability and competition policy

The need to integrate sustainability considerations into all modern competition policies is more important than ever in the light of three factors: the effects of climate change becoming ever more apparent; inadequate policy and regulatory responses; and growing evidence that many businesses are looking to work together to fight climate change—but often fear that competition law limits what they can do. The good news is that considerable progress has been made since I introduced e-Competitions Bulletin's special issue on this topic in 2022. For example, the EU has published draft guidelines on sustainability agreements, and once finalised, they will come into effect on 30 June 2023: while far from perfect, they are a big step forward from where we were a couple of years ago. It is therefore with great pleasure that I introduce this year's issue on sustainability and competition policy. The eight articles here cover the key issues, the emerging guidelines and perspectives from a range of competition authorities and jurisdictions in Europe and beyond.

La nécessité d'intégrer les considérations de durabilité dans toutes les politiques de concurrence modernes est plus importante que jamais à la lumière de trois facteurs : les effets du changement climatique deviennent de plus en plus apparents ; les réponses politiques et réglementaires sont inadéquates ; et il est de plus en plus évident que de nombreuses entreprises cherchent à collaborer pour lutter contre le changement climatique – mais craignent souvent que le droit de la concurrence limite ce qu'elles peuvent faire. La bonne nouvelle est que des progrès considérables ont été réalisés depuis que j'ai présenté le numéro spécial du Bulletin e-Competitions sur ce sujet en 2022. Par exemple, l'UE a publié un projet de lignes directrices sur les accords de durabilité qui, une fois finalisées, entreront en vigueur le 30 juin 2023 : bien qu'elles soient loin d'être parfaites, elles constituent un grand pas en avant par rapport à la situation d'il y a deux ans. C'est donc avec grand plaisir que je vous présente le numéro de cette année sur la durabilité et la politique de concurrence. Les huit articles présentés ici couvrent les questions clés, les lignes directrices émergentes et les perspectives d'une série d'autorités de concurrence et de juridictions en Europe et au-delà.

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Introduction

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1. COP 27 made progress in some areas, notably an agreement to establish a fund to help vulnerable countries cope with the impact of climate change (the so-called loss and damage fund). Welcome as this is, this was (or rather will be) aimed at mitigating the consequences of climate change. What is urgently needed, and was largely missing from COP 27, was an agreement on measures to combat the causes of climate change—notably the failure to improve the commitments to cut emissions and phase out fossil fuels. As UN Secretary-General António Guterres put it: "*We are headed for a global catastrophe. The emissions gap is a byproduct of a commitments gap. A promises gap. An Action Gap*."

2. This political/regulatory failure makes it even more important that the private sector does everything it can to help in the fight against climate change. In turn, this makes it even more important that competition law/policy play its part—whether it is actively challenging unsustainable conduct, or simply not standing in the way of vital action to put our economy on a more sustainable footing.

3. This special edition on sustainability, climate change and competition law consists of eight articles setting out where we have got to and includes many practical ideas as to how competition policy can complement the other tools that we can (and must) use to the full.

4. First up is the doyen of this topic, Professor Suzanne Kingston (a judge at the General Court of the EU). She traces the origins of efforts to take account of environmental considerations in EU competition policy from as far back as 1994, showing what has changed since then and how the debate has been reinvigorated. She sets the discussion in its proper constitutional perspective and sets out paths to resolve the debate. She shows how the mainstream debate has moved on from the false dichotomy between sustainability and competition and from questioning the relevance of sustainability to competition policy, to the more practical question of how best to integrate them.

5. Our next contribution is from the Dechert trio of Alec Burnside, Marjolein De Backer and Delphine Strohl. They first identify the various guidelines published by the European Commission and national competition authorities (NCAs) and discuss the sustainability precedents from the NCAs most active in this area. This is intended to answer the call by much of the industry for more legal certainty and insight into the thinking of competition authorities.[1] They cover the work of the Dutch and German NCAs, but they also cover Australia. The latter is interesting as it shows that it is not just countries that have laws modelled on EU law that can approve sustainability cooperation agreements (even those which result in an increase in the price to the end consumer). The words in the law may be different, but the substantive analysis is often very similar. The article concludes with lessons for future sustainability agreements showing how one can weigh the benefits of such agreements against any negative impact on competition. Helpful as this is, they rightly note that the precedents do not help much in identifying those (probably many) agreements that fall outside Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) completely (under the *Wouters* and *Meca-Medina* line of cases[2]). Nor do the precedents so far address how the Commission and NCAs will deal with the boldest initiatives where an entire industry (and on an international scale) looks to cooperate to tackle the most pressing of all issues, such as phasing out support for fossil fuels (e.g. restricting its access to insurance or finance).

6. Having set the scene, our next three articles are by officials in three of the NCAs looking to play a leading role in the debate: the Netherlands, Austria and France.

* The views expressed here are personal and cannot be attributed to any institution with which Simon is connected or to any future competition law case or deal. Simon Holmes, Selected papers on climate change, Sustainability and Competition Policy. (May, 2022). www.concurrences.com".

1 On this, *see* the paper produced by the ICC for COP 27, « When Chilling Contributes to Warming: How Competition Policy Acts as a Barrier to Climate Action », November 2022.

2 CJEC, 19 February 2002, case C-309/99, EU:C:2002:98, and 18 July 2006, case C-519/04 P, EU:C:2006:492.

7. The first of these comes from Siún O'Keeffe at the Dutch competition authority, the ACM. The ACM has very much led the debate in this area, most notably introducing a more favourable treatment for "*environmental damage agreements*" ; recognising that it is not necessary to quantify the benefits of an agreement in every case ; and spelling out that firms will not be fined if they try to follow the ACM's draft guidelines in good faith—even if the ACM subsequently takes a different view of the legality of their arrangements.[3]

8. This article describes the work done by the ACM in this area over the last few years, starting with ACM's draft sustainability guidelines, the work it has done on quantifying sustainability claims and recent cases the ACM has dealt with on this issue (e.g. collaboration on CO2 storage and an agreement between soft-drink suppliers on discontinuation of plastic handles), and referring to possible criticism of this work. It also touches on issues indirectly affecting competition and sustainability, such as the ACM's call on the legislature to improve the reliability of information for consumers to make sustainable choices and the prioritisation of sustainable projects by energy system operators.

9. Siún rightly notes that many companies are willing to act on sustainability and that there is public support for them to do so. In this context, the biggest potential legal hurdle the ACM has had to grapple with has been the issue of necessity/proportionality. That said, she addresses head-on the argument that nothing can be done in the absence of legislation (which is so often inefficient and/or inadequate): "[I]*n the case of sustainability, the stakes are too high to consider doing nothing*."

10. The Dutch have done so much to advance the debate in this area—but they are no longer alone and we now turn to the Austrians and the French.

11. Perhaps the biggest obstacle to exempting sustainability cooperation agreements under EU competition law (and national laws that have the same legal provisions) is the requirement that consumers must get a "fair share" of the benefits of the agreement.[4] Even with the Commission's draft guidelines on sustainability agreements,[5] there is considerable uncertainty as to how this should be applied. To remedy this, the Austrian government boldly took the initiative and introduced into Austrian law an explicit sustainability exemption. This took the form of a "*legal fiction*" that consumers are deemed to get a fair share of the benefits of an exemption if "*those benefits contribute substantially to an ecologically sustainable or climate-neutral economy*." This concept is narrower than the wider concept of sustainability agreements under the UN's Sustainable Development Goals (SDGs) and in the Commission's draft guidelines, but is wider than climate change and is perhaps closer to the concept of "*environmental damage agreements*" in the Dutch draft guidelines.

12. Anton Hartl, Alexander Koprivnikar, and Ralph Taschke (all officials at the Austrian competition authority) explain how this will be applied and set out a five-step test for evaluating sustainability agreements.

13. Our third contribution from officials at competition authorities comes from Elise Provost, sustainability network lead at the French Competition Authority. One reason that this is welcome is that the focus so far has been very much on several smaller authorities that have historically taken the lead in this area (e.g. the Dutch, Greeks and Austrians). This article is a timely reminder that the issue of sustainability and competition policy is now an issue of near-universal focus in Europe and the biggest authorities are all active in this area.[6]

14 Elise's article charts what she calls a "*medium approach*" between a view that competition law needs to be clarified to allow "*green collaborations*," and the views of those who are concerned about greenwashing and blurring the frontiers of competition law. It sets out "three actions" that could be taken to support firms seeking to achieve sustainability objectives without falling foul of competition law. First, clarifying what is already possible without being caught by competition law at all (e.g. "safe harbours"). Secondly, better integrating so-called out-of-market efficiencies into the analysis. Thirdly, competition authorities providing more *ex ante* guidance (comfort letters, informal advice and press releases, etc.).

15. Changing gear, our next article is a case study by economists Sahar Shamsi and Dr Nicole Rosenboom of Oxera. This examines the recent approval by the Dutch ACM of proposed cooperation between Shell and TotalEnergies on the storage of CO2 in empty gas fields in the North Sea. This was a classic situation where there was a risk that, without a pooling of risks among multiple industry players (or some form of taxpayer support), the necessary investments in decarbonisation simply would not happen. The ACM was satisfied that the "fair share" criterion (referenced above) was met without the need for a quantitative assessment of cost versus benefit. There was, however, a detailed analysis of the need for the cooperation to be "indispensable," and the article examines the reasons why this criterion was met (first-mover disadvantage, substantial levels of investment needed, and high investment risks). It also explains how the risk of competition being eliminated was reduced, including provisions to safeguard against anti-competitive behaviour by the parties.

3 *See* the ACM's draft guidelines on "Sustainability agreements: Opportunities within competition law" of 26 February 2021 (and various press releases of the ACM in relation to individual agreements to promote sustainability).

4 An exemption from the Article 101(1) TFEU's prohibition on anti-competitive agreements is available under Article 101(3) if each of the following four conditions are met: the first relates to the benefits of the agreement; the second requires that consumers get a "fair share" of those benefits; the third says the agreement must be no more restrictive than necessary (the "proportionality" requirement); and the fourth says there must be no elimination of competition.

5 *See* chapter 9 ("Sustainability Agreements") of the European Commission's draft horizontal guidelines of 1 March 2022 (currently being finalised and due to take effect at the end of June 2023). *See also* the response to this of April 2022 by ClientEarth and Simon Holmes.

6 E.g. the German competition authority—as can be seen from the article in this issue by Burnside, De Backer and Strohl. The Italian authority's cases featured strongly in *Concurrences*' special issue of January 2022 on sustainability and competition policy, and by the time this issue is published, we anticipate that the UK's CMA will have published new and progressive draft guidance for consultation.

16. The case study demonstrates how approval of such projects by a competition authority can reduce technological risks and boost investor confidence. This should encourage more such projects and reduce both costs and risk-adjusted return requirements to the benefit of future investors and consumers.

17. Our next contribution from Professor Peter Georg Picht of Zurich University is a scholarly and innovative look at the possibilities for dual pricing, according to which downstream sales channel is the most sustainable.[7] This is most welcome for two reasons.

18. First, most work in this area has focused on horizontal agreements: this focuses on vertical agreements between a supplier and its downstream distributors. Secondly, it is important in the context of the urgent need to reduce emissions of greenhouse gases: for most organisations, so-called « scope 1 » emissions (i.e. those emissions for which an organisation is directly responsible) are much less than their « scope 3 » emissions (i.e. those of an organisation's —upstream or downstream—value chain for which it is not directly responsible but which it indirectly causes or impacts as a result of its activities). If a company can influence the channel through which its products are sold (e.g. online or through bricks and mortar) through its pricing policies, this could potentially make a significant contribution to reducing such emissions. This article explores the extent to which this can be done under current (and evolving) EU competition law and policy.

19. One of my biggest concerns in the drive to ensure competition policy works in harmony with sustainability and the fight against climate change is that (with notable exceptions such as Australia) the progress that has been made has been largely in Europe. However, climate change (and biodiversity) is a global issue and many companies' actions have global implications and they have to take into account competition laws and policies around the world. It is therefore important that competition policy move forward outside Europe.

20. It is therefore with great pleasure that I introduce our final paper, which comes from Khushi Singh of the Competition Commission of India (CCI). She explicitly notes that India is one of the biggest contributors to climate change and one of the countries most vulnerable to its adverse impacts. She first shows how there is scope (and a need) for India to join the "*competition law/ sustainability discourse*." She shows how India is "*very much part of the global ecosystem*," has played its part in international initiatives on sustainability for many years, and has a well-developed (if imperfect) set of domestic laws on the environment and sustainable development. Against this background,Khushi presents a way forward for India to incorporate sustainability into Indian competition law looking at horizontal agreements, abuse of dominance, and merger control.

21. If India can discuss taking sustainability and climate change into account in its competition laws, so can other countries around the world. In fact, 2022 saw welcome progress in this regard.

22. For example, the OECD continued its work in this area and the International Chamber of Commerce (ICC) presented a "call to arms," calling on all governments and competition authorities to do everything possible within their own legal systems to reduce or eliminate the disastrous inconsistency between the imperative of fighting climate change and competition law or policy. Its white paper "When Chilling Contributes to Warming: How Competition Policy Acts as a Barrier to Climate Action" was presented at COP 27 by its Task Force on Competition consisting of over fifty lawyers from over twenty jurisdictions worldwide.[8]

23. "Sustainability and competition law" was also the (sole) topic for the annual meeting of the Ligue internationale du droit de la concurrence (LIDC) in Milan in October 2022.[9]

24. I was particularly encouraged by the conference in November 2022 organised by APEC (Asia-Pacific Economic Cooperation) and hosted by the Thai competition authority. Its "call to arms" was one I would readily adopt: "*encouraging APEC member competition authorities to mobilize competition policy to contribute to the holistic fight against climate change, specifically encouraging sustainable business practices and initiatives and expediting the green innovation process.*"[10]Bravo APEC and Thailand, and I hope other countries and regions are taking note!

25. That said, it's not just up to the competition authorities to adapt their thinking and guidelines to reflect the climate and biodiversity crisis. Where businesses need to cooperate to put their industry on a more sustainable basis, there is an onus on them to think creatively as to how this can be done in compliance with competition law and, in cases of uncertainty, to bring real-life examples to the competition authorities. This should not only be of immediate help to them, but also embolden these authorities to issue more positive, practical and detailed guidelines going forward.[11]

7 This is something I have touched upon suggesting that sustainability may act as something akin to a "shield" against (false) accusations of abusing a dominant position where a company chooses to sell a product at a different price according to how sustainably it is used by its customer: e.g. recycling it or dumping it into landfills once used (e.g. in S. Holmes and M. Meagher, A Sustainable Future: How Can Control of Monopoly Power Play a Part, 2022).

8 See footnote 1 above

9 The competition law question addressed in 2022 was "*What role could/should sustainability goals play in competition policy and enforcement and how are competition authorities dealing with this?*" *See* for example the UK contribution by S. Holmes, N. Kar and L. Cunningham.

10 https://www.asean-competition.org

11 On this, *see* the "call to arms" and real-life examples in the ICC paper referred to in footnote 1 above.

Competition and sustainability in EU law: Nearer resolution of the old debate?

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I. An old debate reinvigorated

1. For many years now, a debate has raged about the potential role of environmental considerations in EU competition analysis. Writing back in 1994, Luc Gyselen observed the emerging interface between competition and environmental policy, and argued that the treaties should be interpreted as a "*seamless web*," interpreting each policy consistently with the other.[1] In 1996, the Commission confirmed that, in examining the compatibility of agreements with EU competition law, it weighs up the agreement's anti-competitive restrictions against its environmental agreements, and applies the principle of proportionality.[2] At that time, it noted that environmental benefits would be regarded as a factor which contributes to improving the production or distribution of goods or to promoting economic or technical progress under Article 101(3) of the Treaty on the Functioning of the European Union (TFEU). In 2001, the Commission's Horizontal Cooperation Guidelines addressed the issue directly again, including a chapter on environmental agreements, and stating that environmental agreements caught by Article 101(1) TFEU "*may attain economic benefits which, either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs.*"[3]

2. This suggested that the Commission was, at that point in time, open to going beyond a narrow conception of economic benefits in analysing the overall environmental benefits of an agreement, and was open to engaging in some form of valuation of environmental benefits. The details of how exactly that cost-benefit analysis was to be worked out in practice were not specified, beyond referring to the Commission's own experience with the *CECED* case.[4] In that case, the Commission had famously taken into account the pro-environmental benefits of an agreement between producers and importers of washing machines, which accounted for more than 95% of European sales. One of the aims of the agreement was to discontinue the production and importation of the least energy-efficient washing machines (at that time, representing some 10% of EU sales). Despite the fact that eliminating these dirtier machines risked increasing prices by around 14%, the Commission considered in that case that not only the agreement's benefits to the affected consumers, but also its collective environmental benefits for society—namely, an overall reduction in energy consumption—outweighed these costs.

* The views expressed herein are purely personal.

1 L. Gyselen, The Emerging Interface between Competition Policy and Environmental Policy in the EC, in *Trade and the Environment: The Search for Balance*, J. Cameron, P. Demaret and D. Geradin (eds.), Cameron May, London, 1994. *See also*, for instance, F. Vogelaar, Towards an Improved Integration of EC Environmental Policy and EC Competition Policy: An Interim Report, in *Proceedings of the Fordham Corporate Law Institute 1995*, B. Hawk (ed.), Juris Publishing, Huntington, 1996. On the history of the debate, *see generally* S. Kingston, *Greening EU Competition Law and Policy*, Cambridge University Press, 2011; P. Thieffry, *Droit de l'environnement de l'Union européenne*, Bruylant, Brussels, 1st ed. 2008, 2nd ed. 2011, chapter XVI on competition law, p. 717.

2 Comm. CE, *XXVth Report on Competition Policy*, Office for Official Publications of the European Communities, Luxembourg, 1996, paras. 83–85.

3 Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 6.1.2001, p. 2, para. 193.

4 Comm. CE, decision 2000/475/EC of 24 January 1999, *CECED*, case IV.F.1/36.718, OJ L 187, 26.7.2000, p. 47.

3. The policy winds appeared to change, however, from around 2004, with the publication of the Article 101(3) TFEU Guidelines,[5] one of the harbingers of what the Commission stated to be a more economic approach to EU competition policy (during the tenure of Mario Monti, who was himself an economist and academic by background). In these guidelines, the Commission revisited the first condition of Article 101(3) TFEU—namely, the aforementioned requirement that the agreement must improve the production or distribution of goods or promote technical or economic progress. Crucially, in the Article 101(3) Guidelines, the Commission made clear its view that only objective economic efficiencies, or what it termed pro-competitive effects, fulfil this condition.[6] Efficiencies, in this sense, were defined as stemming "*from an integration of economic activities whereby undertakings combine their assets to achieve what they could not achieve as efficiently on their own or whereby they entrust another undertaking with tasks that can be performed more efficiently by that other undertaking*."[7]

4. While the Commission indicated that, in addition to cost efficiencies, qualitative efficiencies creating value in the form of new or improved products may suffice, it was clear that such efficiencies must be proven using verifiable data, and must enure to the benefit of the consumers or potential consumers of the product in question, not to society at large. This approach was broadly confirmed in the 2010 Horizontal Cooperation Guidelines, which dropped the section on environmental agreements that had been present in the 2001 Guidelines.[8]

5. At that point, therefore, it is fair to say that there was some ambiguity over the potential relevance of pro-environmental benefits to the analysis of agreements under Article 101 TFEU, examining the Commission's own approach. It was commonly considered, however, that they should be excluded from the analysis, following the argument that competition regulators should focus purely on issues of economic efficiency and eliminating market distortions, to the exclusion of other public interest factors, which, it is argued, are a matter for the democratically elected legislature (beyond, of course, the fundamental public interest aim of controlling private market power).[9] Although views have differed on what precisely amounts to a "public interest" factor for this purpose,[10] they are typically understood to encompass issues such as industrial policy. Environmental protection considerations are also often categorised as a public interest factor for this purpose,[11] along with issues such as inequality and data privacy, which do not neatly fit into an inquiry based on consumer welfare in the narrow economic sense. On this thinking, competition policy should leave it to the legislator to regulate environmental standards, and competition authorities should not get involved in promoting greener corporate practices.

II. What has changed?

6. This debate has now been reinvigorated by a number of factors.[12]

7. First, new scientific data has exposed the scale and urgency of the climate and environmental crisis. As identified by UN Secretary-General Guterres, climate change is the defining challenge of our time.[13] In light of the particularly stark warnings in the 2018 Special Report of the Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C*,[14] many countries have issued parliamentary or governmental declarations of a climate emergency, including the United Kingdom, Canada, Japan, New Zealand and Singapore, as well as the European Union.[15] There is general consensus that sector-specific responses to this will fail. Action must involve "*all sectors of the society and the economy, including industry*."[16] This has led to calls for a rethink of the relationship between economic and environmental policies at the highest political level.

5 Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

6 Ibid., para. 59. *See further*, L. Hancher and P. Lugard, Honey, I Shrunk the Article! A Critical Assessment of the Commission's Notice on Article 81(3) of the EC Treaty, *ECLR*, Vol. 25, Issue 7, 2004, pp. 410–420.

7 Guidelines on the application of Article 81(3) of the Treaty, *supra* note 5, para. 60.

8 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, OJ C 11, 14.1.2011, p. 1.

9 For a classic account of this argument, *see*, e.g. G. Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market*, Hart Publishing, Oxford, 1997. In the US, this approach is typically associated with the Chicago School approach to antitrust economics, whereby consumer welfare, interpreted narrowly as consumer surplus, is largely focused on effects on prices or output to the exclusion of other impacts on human well-being. *See*, e.g. Y. Brozen, Competition, Efficiency, and Antitrust, *Journal of World Trade Law*, Vol. 3, Issue 6, 1969, pp. 659–670; R. Bork, *The Antitrust Paradox: A Policy at War With Itself*, Basic Books, New York, 1978; R. A. Posner, The Chicago School of Antitrust Analysis, *Univ. Pa. Law Rev.*, Vol. 127, 1979, pp. 925–948.

10 Within EU law, *see* the discussion in N. Dunne, Public Interest and EU Competition Law, *The Antitrust Bulletin*, Vol. 65, Issue 2, 2020, pp. 256–281.

11 *See*, e.g. G. Monti, Four Options for a Greener Competition Law, *Journal of European Competition Law & Practice*, Vol. 11, Issue 3–4, 2020, pp. 124–132.

12 For recent contributions *see*, e.g. Monti, *supra* note 11; S. Kingston, Competition Law in an Environmental Crisis, *Journal of European Competition Law & Practice*, Vol. 10, Issue 9, 2019, pp. 517–518; S. Holmes, D. Middelschulte and M. Snoep (eds.), *Competition Law, Climate Change & Environmental Sustainability*, Concurrences, New York, 2021; M. Dolmans, Sustainable Competition Policy, *Competition Law & Policy Debate*, Vol. 5, Issue 4 and Vol. 6, Issue 1, 2020, pp. 4–23; G. Canivet, Towards a stronger linkage of competition policy with other policies: Sustainable development policy, in The integration of public interest considerations in the application of competition rules (26 Nov. 2020), *Concurrences* No. 2-2021, art. No. 100229, www.concurrences.com; J. Tirole, Socially Responsible Agencies, Speech to DG Competition, 7 December 2022, https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/by/tirole/socially_responsible_agencies_071222.pdf.

13 Eur. Comm., press release IP/19/881 of 6 February 2019, Mergers: Commission prohibits Siemens' proposed acquisition of Alstom.

14 IPCC, 2018: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, V. Masson-Delmotte, P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P. R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J. B. R. Matthews, Y. Chen, X. Zhou, M. I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.), Cambridge University Press, 2019.

15 For a list of climate emergency declarations compiled by the ENGO CEDAMIA, *see* Global Map of Climate Emergency Declarations, www.cedamia.org (accessed 23 December 2022). European Parliament, Resolution declaring a climate and environmental emergency 2019/2930 (RSP) (28 November 2019).

16 European Parliament, Resolution declaring a climate and environmental emergency 2019/2930 (RSP) (28 November 2019).

8. Within the EU, this is reflected in the European Green Deal, the flagship policy initiative of the Von der Leyen Commission, declared by President von der Leyen as a "*European man on the moon moment*." The European Green Deal is founded on an all-economy approach to environmental protection, demanding "*deeply transformative policies*" underpinned by an economic model that properly values environmental and natural resources.[17] That approach is buttressed by EU survey evidence that some 93% of EU citizens see climate change as a serious concern.[18]

9. Second, the nature of this challenge has blurred traditional conceptions of the role of the public and private sectors in environmental regulation. The idea that legislation is, in itself, the entire solution to environmental degradation has been questioned.[19] It has been argued that the state cannot possibly address many modern environmental problems rapidly or effectively enough, acting alone. Further, it has been argued that the environmental problems that threaten the existence of society as we know it—in particular climate change—do not respect the jurisdictional borders linked to traditional environmental regulation. These problems are in many cases caused, and may most effectively be solved, by private transnational corporations. Whereas traditional environmental regulation looked to the state to fashion and enforce environmental rules, there is now consensus that private environmental initiatives form an important part of the policy mix.[20]

10. This has led to innovative efforts to force environmental issues into the boardroom. For instance, new corporate transparency requirements are pushing corporations' environmental performance into the spotlight. The 2020 EU Taxonomy Regulation for the first time enshrines legal criteria for identifying whether private investments are environmentally sustainable or harmful.[21] This forms part of the European Green Deal, which, as noted above, seeks a radical transformation of the EU's economic model into a "*modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use.*"[22]

11. Greater transparency is aimed at better implementing the "polluter pays" principle "*so that costs for society are reflected in investment decision*s."[23] These requirements apply to financial market participants as well as to all undertakings which are subject to the EU's non-financial reporting obligations (including listed companies, banks and insurance companies).[24] A major aim of this is not just to further transparency as a value in its own right, but to enable truly informed consumer choices in the market. As the European Commission has argued: "*Our citizens want to live in a modern, sustainable, fair and resilient Europe. They are crucial partners in the fight against climate change, and can support it through political mobilisation and consumer choices. They can greatly contribute to decarbonisation by making more sustainable purchase decisions and lifestyle choices, but need to be assisted by actionable and reliable information*."[25]

12. In addition, we are seeing groundbreaking framework climate legislation that places obligations upon states to achieve economy-wide binding targets in line with the Paris Agreement.[26] Within the EU, the 2021 European Climate Law imposes a legal obligation to achieve climate neutrality by 2050 and a reduction of 55% in greenhouse gas emissions by 2030 compared to 1990 levels.[27] Further, the Commission has a legal obligation to take the "*necessary measures*" to ensure that the legally binding objective of climate neutrality in the Union is attained by 2050, and to eliminate inconsistent Union measures. These obligations, by their nature, impose legally binding requirements on the EU to achieve targets that, it is argued, are inherently dependent not just on state action, but on the actions of the private sector. The role of private businesses and consumers in making investment, innovation and purchasing decisions appears essential in meeting these obligations.

13. Third, changes in techniques of measuring environmental harms and goods mean that categorising environmental considerations as a public interest, noneconomic concern appears in itself increasingly incorrect and outdated. In the European case, environmental factors are increasingly relevant as an aspect of product quality that matters a great deal to consumers. Conversely, overblown or unfounded environmental claims (often termed "greenwashing")

17 Communication from the Commission, The European Green Deal, COM(2019) 640 final, 11 December 2019, section 2.1.

18 2019 Eurobarometer Survey, https://ec.europa.eu/clima (accessed 23 December 2022). *See* Communication from the Commission, European Climate Pact, COM(2020) 788 final, 9 December 2020, at 1. Contrast that to, for instance, the situation in 2004, when only 45% of surveyed citizens considered climate change to be an environmental priority: *see* Eurobarometer Special Report 217, "Attitudes of European citizens toward the environment," 2005.

19 *See generally*, V. Heyvaert, Transnational Environmental Regulation and Governance: Purpose, Strategies and Principles, Cambridge University Press, 2018.

20 This is reflected, for instance, in the UN Sustainable Development Goals, including UN SDG 12, addressing sustainable consumption and production patterns. *See* M. P. Vandenbergh, Private Environmental Governance, *Cornell Law Rev.*, Vol. 99, Issue 1, 2013, pp. 129–199.

21 Ibid. 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, OJ L 198, 22.6.2020, p. 13.

22 The European Green Deal, *supra* note 17, at 1.

23 Communication from the Commission, European Green Deal Investment Plan COM(2020) 21 final, 14 January 2020, at 10.

24 *See* Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182, 29.6.2013, p. 19, Article 19a and Article 29a.

25 Communication from the Commission, Stepping up Europe's 2030 climate ambition: Investing in a climate-neutral future for the benefit of our people, COM(2020) 562 final, 17 September 2020, at 4.

26 *See* T. L. Muinzer (ed.), National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation, Hart Publishing, Oxford, 2020.

27 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 ("European Climate Law"), OJ L 243, 9.7.2021, p. 1.

have been shown to damage corporate reputation.[28] Sustainability is increasingly a dimension of competition in the market. In the consultation as part of the revision of the EU's Horizontal Cooperation Guidelines, the European Commission noted that respondents indicated the "*most important development*" since the prior 2010 version to be "*climate change and the corresponding challenging environmental and sustainability goals. Respondents believe that this results in increased demand from consumers and businesses for sustainable, ethical and environmentally friendly business practices.*"[29]

14. Aside from qualitative considerations, advances in environmental economics make it possible to quantify and place a monetary value on environmental harms and benefits.[30] Many governments routinely use these techniques in undertaking cost-benefit analysis of regulatory innovations. An excellent overview of the menu of potential quantitative valuation techniques available to competition regulators, drawing from the environmental economics literature, is provided in the 2021 Technical Report on Sustainability and Competition jointly commissioned by the Dutch and Greek competition authorities.[31] Such work suggests that, assessed from within the consumer-welfare-based model of competition policy on its own terms, it is possible to take account of environmental considerations by using established environmental economics techniques such as revealed preference methods, contingent valuation, and discounting.

III. Constitutional perspectives

15. As a matter of EU law, a further dimension is added to the debate by the fact that, unlike perhaps certain other competition regimes, the EU competition rules form part of a constitutional framework that mandates a proportionality-based balancing of, for instance, the achievement of "*technical and economic progress*" against the aims of protecting effective competition. In the case of anti-competitive agreements, this balancing clause is provided in Article 101(3) TFEU, which, as noted above, may reasonably be interpreted as extending to environmental improvements. The Court of Justice has in the past held that the Commission "*is entitled to base itself on considerations connected with the pursuit of the public interest*" in granting exemptions under Article 101(3) TFEU.[32] It has also held that objectives of a "*different nature*" to those of competition law may justify competitive restrictions, if proportionate.[33] Thus, for instance, it is settled case law that market integration objectives are relevant in interpreting the EU competition rules.[34] In the context of Article 102 TFEU, the CJEU has expressed the function of the competition rules referenced in Article 3(1)(b) TEU as: "*precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union (see, to that effect, Case C-94/00* Roquette Frères [2002] ECR I-9011, paragraph 42)."[35]

16. This might suggest, therefore, that the principal objective of the EU competition rules is the protection of competition, viewed however from the perspective of not only undertakings and consumers, but also the public interest. Further, the EU's Charter of Fundamental Rights, and Article 11 TFEU, constitutionally oblige the integration of a "*high level of environmental protection and the improvement of the quality of the environment*" into competition policy.[36] This Article has been applied by the CJEU to require, for instance, the Commission to check compliance with EU environmental law when assessing the compatibility of Member States' grant of State aid with the internal market.[37]

IV. Paths to resolving the debate and avoiding false dichotomies

17. As sustainability issues take on increased importance for businesses and consumers, this has raised questions about the need for competition law to provide greater guidance. Within the EU, Commissioner Vestager has argued that "*businesses have a vital role, in helping to create markets that are sustainable in many different ways. And competition policy should support them in doing that.*"[38]

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28 *See*, for instance, S. Szabo and J. Webster, Perceived Greenwashing: The Effects of Green Marketing on Environmental and Product Perceptions, *Journal of Business Ethics*, Vol. 171, Issue 4, 2020, pp. 719–739.

29 Eur. Comm., Factual Summary of the Contributions Received during the Public Consultation on the Evaluation of the Two Block Exemption Regulations and the Guidelines on Horizontal Cooperation Agreements, at 16, p.HBERs_consultation_summary.pdf.

30 For an excellent overview, *see* C. D. Kolstad, *Environmental Economics*, 2nd ed., Oxford University Press, 2010; *see also* F. Ackerman and L. Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing*, The New Press, New York, 2004.

31 *See* ACM and HCC, Technical Report on Sustainability and Competition, January 2021, https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf (accessed 23 December 2022).

32 CFIEC, 11 July 1996, *Métropole Télévision*, joined cases T-528/93, T-542/93, T-543/93 and T-546/93, EU:T:1996:99, para. 118.

33 CJEC, 22 October 1986, *Metro II*, case 75/84, EU:C:1986:399.

34 *See*, for instance, CJEC, 6 October 2009, *GlaxoSmithKline*, joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610.

35 CJEU, 17 February 2011, *TeliaSonera*, case C-52/09, EU:C:2011:83, para. 22.

36 Article 37 of the Charter of Fundamental Rights provides: "*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.*"

37 *See* CJEU, 22 September 2020, *Austria v. Commission (Hinkley Point C)*, case C-594/18 P, EU:2020:742, para. 100.

38 GCLC Conference on Sustainability and Competition Policy, Speech of Commissioner Vestager, 24 October 2019.

18. As noted elsewhere in this special edition, a number of national competition authorities originally took the lead on this. The Dutch, Greek and, beyond the EU, the UK competition authorities have released guidance on sustainability.[39] Prior to that the Dutch competition authority had already sought to quantify environmental benefits in certain of its decisions (*Chicken of Tomorrow*; *Coal Plant Closure*);[40] it has since approved a number of sustainability initiatives in the CO_2 capture and storage, beverages and floriculture sectors.[41] The French Autorité de la concurrence has also been active in the field, considering environmental issues in imposing commitments (*Nespresso*, *Engie*); it has, in May 2020, published a working paper on the climate emergency together with other national authorities.[42]

19. Further, in February 2022, the Commission published a draft of its revised Horizontal Cooperation Guidelines, which contain significant new detail on the issue, including a new chapter on sustainability agreements.[43] The starting point of the analysis is the importance of sustainable development as a "*core principle*" of EU law, and the Commission's commitment to the EU Green Deal.[44] While space precludes full discussion of the draft, it observes that "[w]*here market failures are addressed by appropriate regulation, for example, mandatory Union pollution standards, pricing mechanisms, such as the Union's Emissions Trading System ('ETS') and taxes, additional measures by undertakings, for example through cooperation agreements, may be unnecessary. However, cooperation agreements may become necessary if there are residual market failures that are not fully addressed by public policies and regulations*."[45]

20. The draft goes on to set out instances where sustainability agreements would not be considered as falling under Article 101(1) TFEU,[46] and principles for the assessment of those sustainability agreements that do fall under this provision, including potential application of Article 101(3) TFEU. Here, it notes that sustainability agreements can produce efficiencies such as cleaner technologies and less pollution, contributing to a "*resilient internal market*," which can be taken into account if objective, concrete and verifiable.[47] As concerns indispensability, the draft notes that, while public policy and regulations "*often take care*" of negative environmental externalities, this is not always so, and "[t]*here may be other instances where, due to market failures, sustainability benefits cannot be achieved if left to the free interplay of market forces or can be achieved more cost efficiently if undertakings cooperate*."[48] Furthermore, as concerns pass-on of benefits to consumers, the draft contains an innovative new section setting out principles for valuation of not only individual use-value and non-use value benefits, but also collective benefits, opening the possibility of taking into account sustainability benefits to a larger group of society (so-called out-of-market benefits).[49]

21. These significant developments show a welcome rejection of false dichotomies that may portray the sustainability/competition interplay as a binary choice (for sustainability, or for competition). They suggest a resolution to the old debate, moving on from the question of whether sustainability can be relevant to analysing the nuts and bolts of how it can be relevant. The path ahead, applying these to additional practical cases, looks set to be as fascinating as it is important. ■

39 ACM, Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law, 26 January 2021, https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf; HCC, Draft Staff Discussion Paper on Sustainability Issues and Competition Law, January 2021, https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf; CMA, Guidance, Environmental sustainability agreements and competition law, 27 January 2021, https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law (all accessed 23 December 2022).

40 ACM decision of 26 January 2015, *Chicken of Tomorrow*, case 13.0195.66; ACM decision of 26 September 2013, *SER Energieakkoord*.

41 *See* the contribution of S. O'Keeffe in this special edition.

42 Autorité de la concurrence, AMF, Arcep, ART, CNIL, CRE, CSA, HADOPI, Accord de Paris et urgence climatique : Enjeux de régulation, May 2020, https://www.autoritedelaconcurrence.fr/sites/default/files/2020-05/publication_aai-api_accord_de_paris_052020_2.pdf (accessed 31 March 2021).

43 Communication from the Commission, Approval of the content of a draft for a Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 164, 19.4.2022, p. 1

44 Ibid., para. 542.

45 Ibid., para. 546.

46 *See* in particular ibid., para. 572.

47 Ibid., para. 579.

48 Ibid., para. 584.

49 Ibid., para. 601 *et seq*.

Competition law and sustainability: Where have we reached? An analysis of decisional practice by national competition authorities

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1. In the past years, several competition authorities have issued guidelines—or are consulting on guidelines—on sustainability agreements. The Netherlands' Authority for Consumers and Markets (ACM) has been a frontrunner as the first national competition authority (NCA) to publish guidelines[1] and call on the European Commission (EC) to take an EU-wide initiative. The EC responded to that request and introduced a new chapter on sustainability agreements in its revised draft Horizontal Guidelines.[2]

2. Other NCAs have followed suit: the Competition and Markets Authority (CMA) published an information sheet on 27 January 2021 to help businesses and trade associations better understand how competition law applies to sustainability agreements, and where issues may arise.[3] Greece's Hellenic Competition Commission (HCC) created a so-called sandbox where companies can submit initiatives for examination.[4] In its assessment, the HCC will refer to its Technical Report for Sustainable Development, jointly commissioned with the ACM.[5] Austria's Federal Competition Authority (AFCA) published final guidelines on sustainability agreements in September 2022,[6] providing guidance on the so-called sustainability exemption introduced in the Austrian Cartel Act[7] in September 2021 for corporate agreements that restrict competition but contribute significantly to an ecologically sustainable or carbon-neutral economy. France's Autorité de la concurrence did not issue guidelines but has recently appointed a new head of its sustainability development network.[8] In its press release, the authority stated that this appointment is part of its commitment to the sustainable development objectives set at national, European and international level.

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1 ACM, Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law, 26 January 2021, https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf.

2 Draft revised Horizontal Guidelines, available at https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en.

3 CMA, Guidance, Environmental sustainability agreements and competition law, 27 January 2021, https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements -and-competition-law.

4 For further information on the Sustainability Sandbox, *see* https://www.epant.gr/en/enimerosi/sandbox.html.

5 ACM and HCC, Technical Report on Sustainability and Competition, January 2021, https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf.

6 AFCA, Leitlinien zur Anwendung von § 2 Abs 1 KartG auf Nachhaltigkeitskooperationen (Nachhaltigkeits-LL), September 2022, https://www.bwb.gv.at/fileadmin/user_upload/Leitlinien_zur_Anwendung_von____2_Abs_1_KartG_auf_Nachhaltigkeitskooperationen__Nachhaltigkeits-LL__final.pdf.

7 Federal Act against Cartels and other Restrictions of Competition (Cartel Act 2005 – KartG 2005), as amended.

8 Fr. NCA, press release, Elise Provost is appointed adviser to the General Rapporteur and head of the sustainable development network of the Autorité de la concurrence, 7 September 2022, https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/elise-provost-appointed-adviser-general-rapporteur-and-head-sustainable.

3. Further, the EU introduced a specific sustainability exemption for certain agricultural agreements: Article 210a of the EU CMO Regulation[9] exempts agricultural agreements from the application of Article 101 TFEU if these agreements (i) contribute to environmental objectives, sustainable production (reduction of pesticides) or animal welfare; (ii) aim to apply sustainability standards higher than mandated by EU or national law; and (iii) their restrictions are indispensable to attaining that standard. The ACM issued new guidelines regarding collaborations between farmers, including a section on sustainability collaborations.[10]

4. Notwithstanding this focus on competition law and sustainability, much of the industry seems to hold to the view that there is insufficient legal certainty to proceed with sustainability collaborations, in particular larger projects with significant impact and those that go beyond environmental benefits addressing broader social concerns such as living wages. This article seeks to respond to the demand for greater insight by discussing the decisional practice of several NCAs and examining whether further guiding principles can be derived from these opinions. Such an analysis cannot, of course, overcome a broader concern that bold initiatives whose effects are not limited to national borders will likely only proceed if more NCAs show at least an understanding of the need to consider the interplay between competition law and sustainability.

5. Notably missing from the list of NCAs stepping up to the sustainability plate are the US agencies—the Department of Justice (DoJ) and the Federal Trade Commission (FTC).[11] This is the more surprising given the activist credentials of the new incumbents, Jonathan Kanter at DoJ and Lina Khan at the FTC. Movement on the US front will be essential if bold global initiatives are to advance. Australia's ACCC is, in contrast, commendably active. Meanwhile, Japan has announced guidelines on sustainability efforts and competition issues that are likely to address not only horizontal but also vertical collaborations.

6. The article will first discuss sustainability precedents from NCAs active in the area (I.) and then draw lessons for future sustainability agreements (II.).

9 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.

10 ACM, Guidelines regarding collaborations between farmers, 7 September 2022, https://www.acm.nl/en/publications/many-arrangements-within-production-chains-regarding-sustainable-agriculture-are-allowed.

11 This silence is all the more striking in view of the recent controversies around ESG and net zero commitments at the United Nations level, and calls for stronger antitrust enforcement in this sector. *See*, e.g. D. Papscun and C. Hudson, Republicans seize on 'Climate Collusion' to muzzle ESG plans, *Bloomberg Law News*, 8 November 2022, https://news.bloomberglaw.com/antitrust/republicans-seize-on-climate-collusion-to-muzzle-esg-plans.

I. Overview of national competition authorities' practice

1. Netherlands

7. Since the adoption of its guidelines, the ACM has been requested to review several sustainability initiatives. We discuss five—each focused on the environment/climate, for which the ACM published either a press release or an informal opinion in the form of a no-action letter. In cases where the ACM finds restrictions, it carefully assesses whether the proven benefits outweigh the negative impact on competition under the relevant standard, i.e. the restrictions are necessary, a fair share of the benefits is passed on to consumers, and competition remains.

8. The ACM issued a no-action letter regarding the proposed agreement among grid operators to reduce CO_2 emissions.[12] The use of more sustainable materials in the construction of new gas and electricity grids will reduce CO_2 emissions. Each region has only one grid operator, but there is cross-regional competition on costs because the regulated grid tariffs are determined by law on the basis of cost information from all operators. This means that grid operators who can reduce their costs have an advantage leading to an incentive for all grid operators to minimise their costs. Therefore the grid operators considered it necessary to jointly determine the price of CO_2 used when calculating investments. Without such a common determination, the grid operators would continue to have an incentive to purchase at the lowest possible price without taking CO_2 emissions into account.

9. The ACM found that this environmental-damage agreement generates benefits outweighing the restrictions. First, the benefits are the value of the CO_2 emissions that are avoided, calculated on the basis of a specific formula. Second, these benefits would not be achieved without cooperation because, as mentioned above, the grid operators would continue to have an incentive to purchase at the lowest possible cost. The uniform price, however, allows a grid operator not to incur higher costs than other grid operators, which will incentivise them to purchase more sustainable materials. The ACM also considered it important that the agreed CO_2 price was not higher than the environmental prices charged by two government agencies. Third, consumers, in and outside the relevant market, will receive a fair share given the nature of CO_2 emissions. Fourth, sufficient competition will remain because the grid operators will have enough other incentives to search for the most efficient investments, also after the valuation of the expected CO_2 emission.

12 ACM, No action letter for Agreement among distribution system operators regarding CO_2 valuation, 24 February 2002, https://www.acm.nl/sites/default/files/documents/system-operators-can-collaborate-in-order-to-reduce-co2-emissions.pdf.

10. In the press release issued about the grid operators' agreement, the ACM also mentioned it did not object to another collaboration promoting sustainability in the energy sector.[13] VEMW, an association for business energy users and business water users, wants its members to be able to collectively contract with the developers of a planned offshore wind farm. Long-term supply contracts, according to VEMW, will be beneficial to the developers and also allow VEMW's members to have fixed long-term green energy rates allowing the companies to promote the generation of green energy. The ACM considered the initiative to be competition law compliant because it concerns one specific wind farm which still needs to be put out for tender. Businesses and wind-farm developers will also have other options to buy and sell green energy. Finally, the collaboration will allow VEMW's membership, including smaller companies, to procure green energy directly from producers, which helps realise climate goals.

11. The ACM's most interesting decision, because it involves cooperation between direct competitors, relates to the agreement between Shell and TotalEnergies for the storage of CO_2 in empty North Sea gas fields.[14] The two parties will collaborate on transporting CO_2 through pipes and storing it in old gas fields. This collaboration is part of a larger project (Project Aramis) whereby the parties, the Dutch government, Gasunie (an energy network operator) and Energie Beheer Nederland (a government-owned energy company) work together to build a high-capacity trunkline that connects to empty gas fields. To launch Project Aramis, Shell and TotalEnergies will offer the CO_2 storage and set the price jointly to start the operation of the first 20% of the trunkline's capacity. For the remaining capacity, no collective agreements will be made.

12. The ACM considered that the benefits of the agreement outweighed the anti-competitive impact. First, the ACM found that a new market is being created through Project Aramis: the market for CO_2 storage in empty gas fields. In the start-up phase, Shell and TotalEnergies will jointly offer storage facilities. This launch phase will be followed by a large-scale commercial phase when other companies operating empty gas fields will also be able to connect to the trunkline. The benefits relate to improving production or distribution of goods or promoting technical or economic progress. The pre-competitive launch phase will create significant new capacity and also new infrastructure, which, if successful, will be part of the larger Project Aramis in the commercial phase. Second, the benefits will not only accrue to the parties but also allow third parties to provide "carbon capture storage" if they operate empty gas fields and connect to the new trunkline. These third-party services will compete with those of the parties in the commercial phase. Under the Dutch Mining Act and Carbon Capture and Storage Directive, the parties will be required to provide open and non-discriminatory access to the infrastructure for the remaining capacity. Third, a fair share of the benefits will be passed on to the CO_2 emitters because, without the agreement, this type of "carbon capture storage" would not be offered by the parties and likely not be available to CO_2 emitters in the short term or at a similar cost. So overall, the emitters will be better off, certainly not worse off, the ACM concluded. Fourth, to demonstrate the indispensability of the joint exploitation and joint pricing in the start-up phase, the parties presented three counterfactuals whereby the parties would either construct the infrastructure individually and unilaterally offer capacity or would jointly construct the infrastructure but individually market the start-up phase capacity. The parties explained that (i) neither of these counterfactuals would be feasible because, inter alia, the parties would individually not be able to construct the necessary infrastructure since they each own insufficient depleted gas fields that can be deployed for the capacity that is required to start up the project; (ii) the costs would be insurmountable; and (iii) the parties would not be in a position to unilaterally guarantee the necessary reliability of the infrastructure required. The parties raised similar cost and risk concerns if there was no joint marketing at the start-up phase. The ACM considered it plausible that the competitive restrictions aim to address the risks and investments involved in order to help create a new market for integrated "carbon capture storage" services in the Netherlands, and that they are proportionate to that purpose.

13. The ACM issued a press release about an agreement among soft-drink suppliers to discontinue the use of plastic handles.[15] The agreement falls into at least two categories of agreements identified in the ACM's sustainability guidelines: (i) agreements that incentivise undertakings to make a positive contribution to a sustainability objective without binding the individual companies, and (ii) 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. The assessment in the press release is succinct but shows that the parties provided evidence to demonstrate that the plastic handles are not an element on which the participants compete. In addition, the ACM underlined that the participants continue to independently take decisions on sustainability, including on when and how to discontinue adding plastic handles to their multipacks.

14. Most recently the ACM issued a non-action letter for an agreement between garden centres to curtail the use of illegal pesticides.[16] The garden centres made arrangements to prevent growers from using substances that are harmful to humans, animals and the environment. If a participant

13 ACM, press release, ACM favors collaborations between businesses promoting sustainability in the energy sector, 28 February 2022, https://www.acm.nl/en/publications/acm-favors-collaborations-between-businesses-promoting-sustainability-energy-sector.

14 ACM, No action letter for the Agreement between Shell and TotalEnergies regarding a joint marketing initiative for CCS services (project Aramis), 27 June 2022, https://www.acm.nl/system/files/documents/no-action-letter-agreement-shell-and-totalenergies-regarding-storage-of-co2-northsea.pdf.

15 ACM, press release, ACM is favorable to joint agreement between soft-drink suppliers about discontinuation of plastic handles, 26 July 2022, https://www.acm.nl/en/publications/acm-favorable-joint-agreement-between-soft-drink-suppliers-about-discontinuation-plastic-handles.

16 ACM, ACM agrees to arrangements of garden centers to curtail use of illegal pesticides, 2 September 2022, https://www.acm.nl/en/publications/acm-agrees-arrangements-garden-centers-curtail-use-illegal-pesticides.

identifies a harmful substance, the grower will be warned and if they do not comply, these growers will no longer be allowed to supply participating garden centres. The ACM had no objections to this type of "boycott" because it targets products that have been manufactured with illegal substances. The ACM also found that the processes followed to inform growers using illegal pesticides were open and transparent.

2. Germany

15. The German Federal Cartel Office (FCO) has not issued guidelines but has reviewed a number of sustainability collaborations, which gives insight into the FCO's approach to initiatives which have animal welfare goals, in which case the FCO also refers to the CMO Regulation, and industry collaborations focused on living wages. The FCO stopped one initiative where there were no proven sustainability benefits.

16. The FCO approved an initiative regarding living wages in the banana sector between the German retail sector and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), a government agency.[17] The initiative is a pilot project to promote living wages established in the context of the German Act on Corporate Due Diligence in Supply Chains. Food retailers will agree on voluntary common standards and strategic goals, for private label products, along the banana supply chain.

17. The FCO considered that the initiative does not infringe competition law. It was particularly relevant that the project does not call for uniform wages and that there is no plan to set up compensation or redistribution mechanisms. In addition, there is no exchange of information on purchasing prices or other costs, on production volumes, or on margins. The agreement does not introduce binding minimum prices or surcharges. The minimum sales levels of living-wage bananas are targets only, and no monitoring mechanism will be put in place. No agreement has been made on whether increased production costs will be passed on in the supply chain or to consumers.

18. This analysis contrasts with the view formed of Agrardialog Milch, a proposed index-based price surcharge to be applied by German milk producers.[18] This price stabilisation mechanism was intended to cover the costs of milk production. The FCO found that this initiative did not yield any improvements since no efficiency in milk production or distribution could be identified. Further, the surcharge would increase the retail price without any advantage arising, e.g. improved product quality.

19. The FCO also found that the CMO exemption does not apply as (i) the surcharges do not aim to introduce a higher sustainability standard, either directly or indirectly, and (ii) a higher income for milk producers does not directly contribute to protecting the environment, reducing pesticide use or better animal welfare.

20. The FCO did not oppose an initiative related to animal welfare.[19] The initiative, financed by the four largest German food retailers, focuses on improving product labelling, which will make it easier for consumers to identify the meat on offer that comes from a participating farm with improved sustainability standards. The participating retailers pay the participating livestock owners a standard premium—the animal welfare payment—via the participating slaughterhouses. The FCO required the participating retailers to introduce more transparency in the labelling and to adjust the financing model.

21. Later in the year, the FCO made public that it does not oppose the "industry agreement milk" presented by QM-Milch to improve animal welfare in milk production.[20] Farmers and retailers can participate in the voluntary programme. Retailers will pay dairies an animal welfare surcharge for milk products fulfilling the QM+ criteria. The dairies should pass on this surcharge to the participating farmers to cover the increased costs for implementing the animal welfare measures. The FCO's president said that the surcharge can be tolerated in the first phase of the programme until 2024 because (i) there are many competing labels and there is vigorous competition between different brands, and (ii) the number of dairies participating is limited. After the first phase, the FCO will assess to what extent additional elements of competition should be introduced. The press release mentions that the FCO used its discretion not to oppose the agreement but also made its decision in light of the CMO Regulation.

3. Australia

22. The Australian Competition and Consumer Commission (ACCC) has reviewed schemes and codes of conduct seeking to improve recycling of materials and the conditions of workers for over a decade. In the same way as the EU NCAs, the ACCC weighs, under its Competition Act, the benefits of these initiatives against the restrictive effects on competition.

17 FCO Case Summary, German Retailers Working Group Sector: Sustainability initiative to promote living wages in the banana sector, 8 March 2022, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2022/B2-90-21.pdf?__blob=publicationFile&v=2.

18 FCO Case Summary, Financing concept for a market-compliant and fair distribution of risks and burdens associated with agricultural transformation processes for milk producers, 8 March 2022, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2022/B2-87-21.pdf?__blob=publicationFile&v=2.

19 FCO, press release, Achieving sustainability in a competitive environment – Bundeskartellamt concludes examination of sector initiatives, 18 January 2022, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html.

20 FCO, press release, Increasing animal welfare in milk production – Bundeskartellamt tolerates the introduction of the QM+ programme, 29 March 2022, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/29_03_2022_Milch_Nachhaltigkeit.html.

23. The ACCC authorised Tyre Stewardship Australia (TSA) to continue its scheme for ten years.[21] The scheme is voluntary and aims to increase the rate of end-of-life tyres being recycled or used to produce other products. The scheme started in 2014 with a focus on increasing participation in the scheme and developing public awareness. The new provisions for which authorisation was sought are (i) obligations on accredited participants to deal only with other accredited participants in the tyre supply chain, and (ii) the imposing of a levy of AUD 0.25 per tyre on certain participants (tyre importers, vehicle manufacturers, and miners). The scheme does not directly fund tyre recycling but will fund research and market development activities for end-of-life tyres.

24. The ACCC assessed the proposed changes, and the benefits and detriments likely to arise from them, against the counterfactual that no changes would be implemented. The ACCC recognised that without the changes, TSA would halt its activities without a guarantee that an alternative industry-led scheme would take its place, while any regulatory government initiative would require significant time to be developed. The ACCC also agreed that, despite the scheme having been in operation for some years, improvements are possible and will lead to environmental, public health and safety benefits. The ACCC considered there not to be any public detriment because the scheme is voluntary; any impact on competition from the requirement to deal only with other participants is mitigated by the fact that there are exceptions to this rule in certain circumstances. The tyre importers remain free to determine the price, but even if the levy is passed on to consumers, it represents a very small portion of the overall price of tyres (less than 0.5% for tyres in the lower price ranges).

25. The ACCC also authorised the continuation of the Ethical Clothing Australia's Homeworkers Code of Practice, as revised, for a further ten years.[22] Various versions of the code have been authorised since 2000. The code is a voluntary mechanism within the textile, clothing and footwear industry to assist businesses in ensuring that they, and their supply chains, comply with relevant workplace laws. The code introduces four different measures: (i) yearly compliance auditing of accredited manufacturers and their supply chains; (ii) education of businesses as to their legal obligations; (iii) the right for accredited businesses to use the Ethical Certification trademark; and (iv) the education of industry workers and customers.

26. The ACCC concluded that the code has resulted in and will likely continue to achieve public benefits in the form of increased compliance by businesses with legal obligations regarding workers, efficiency in the management of supply chains, and in companies signalling their compliance with legal obligations. This also provides better information to consumers. In the ACCC's view, the code is unlikely to have restricted competition and is unlikely to have such effects in the future because obtaining the accreditation under the code is voluntary, and only businesses which do not comply with their legal obligations are potentially subject to a boycott—in fact, there has been no such boycott to date.

27. The ACCC also authorised the voluntary Battery Stewardship Scheme to proceed for a certain period.[23] The scheme imposes a levy on imported batteries which will visibly be passed on to consumers in battery prices. This levy will be used to fund rebates for recyclers at the collection, sorting and processing stages. It is expected that approximately 80% of the collected revenue from the levy (and membership fees) will be returned as a rebate to recyclers. The rebate should reduce barriers to entry to the battery recycling market by making battery recycling more profitable at the collection, sorting and processing stages. Members of the scheme will be allowed to deal only with each other, not with other companies. For example, participating battery suppliers will sell eligible batteries only to wholesalers that participate in the scheme. These wholesalers can, in turn, sell the eligible batteries only to participating retailers. The requirement for members not to deal with non-members should encourage participation in the scheme, and remove the ability for companies to free ride. There are exceptions to the obligation for current arrangements with non-members, and there is some flexibility during the first two years of the scheme if it is not possible for a member to contract with another member for a particular transaction. The scheme will also invest in raising consumer awareness about the scheme, drop-off options in their area and the importance of battery recycling. This will be done through inter alia co-branding of marketing materials and containers. Further, the Battery Stewardship Council commits to undertake research and development activities, and it will put in place audits and compliance programmes.

28. The ACCC found that the scheme will have negative impacts because the members of the scheme are allowed to deal only with each other. But the ACCC took the view that this public detriment would largely be mitigated (i) by certain exceptions; (ii) the ability for businesses to join the scheme without charge; and (iii) the benefits the scheme will likely achieve, i.e. the likely increase in collection, sorting and recycling service availability over time. The ACCC considered that the scheme would likely result in significant environmental benefits as well as other public benefits such as increased public awareness of battery disposal and re-use, and additional support

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21 ACCC, Determination, Application for authorisation AA1000409 lodged by Tyre Stewardship Australia in respect of the national Tyre Stewardship Scheme, 24 May 2018, https://www.accc.gov.au/system/files/public-registers/documents/AA1000409%20-%20Tyre%20Stewardship%20Australia%20-%20Final%20Determination%20-%2024.05.18%20-%20PR.pdf.

22 ACCC, Determination, Application for revocation of A91354-A91357 and the substitution of authorisation AA1000418 lodged by Homeworker Code Committee Incorporated in respect of the Homeworkers Code of Practice (to be renamed 'Ethical Clothing Australia's Code of Practice incorporating Homeworkers'), 30 August 2018, https://www.accc.gov.au/system/files/public-registers/documents/AA1000418%20-%20Homeworkers%20Code%20Committee%20Incorporated%20-%20Final%20Determination%20-%2030.08.18%20-%20PR.pdf.

23 ACCC, Determination Application for authorisation AA1000476 lodged by Battery Stewardship Council in respect of the Battery Stewardship Scheme, 4 September 2020, https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2004.09.20%20-%20PR%20-%20AA1000476%20-%20BSC_0.pdf.

for increased innovations research and development. In relation to the increased consumer price, the ACCC found that battery importers would not have an incentive to impose a recycling levy unilaterally. It was therefore necessary to do so collectively so as to achieve the benefits identified. Further, the ACCC did not believe that the agreement to impose a levy would increase the likelihood of coordination among importers, wholesalers and retailers on price and other areas in which they currently compete. The levy was also considered to represent a relatively small increase in the overall retail price for most of the eligible batteries. In the ACCC's view, such a small levy, which is directed at providing for the appropriate disposal and re-use of end-of-life batteries, is unlikely to constitute a material public detriment.

29. Most recently, the ACCC issued a press release about the interim conditional authorisation for three supermarket operators (Aldi, Coles and Woolworths) to cooperate over soft-plastic waste management.[24] The supermarkets will establish a Soft Plastics Taskforce to explore solutions to address the immediate effects of REDcycle suspending its activities. Since 2011, the industry-led REDcycle programme has been the only return-to-store soft plastics recovery programme in Australia that facilitates the collection and processing of soft plastics into different durable plastic products. The three supermarkets propose to set up a taskforce which will initially be chaired by the Department of Climate Change, Energy, the Environment and Water. They applied for an urgent interim authorisation to set up the taskforce, which was conditionally granted by the ACCC for a limited period of time. The members will have to report to the ACCC and will have to apply for a longer authorisation as the project develops.

II. Lessons for future sustainability agreements

30. From this case review, it emerges that nearly all initiatives have been assessed by way of weighing the benefits against the negative impact on competition—certainly those for which an analysis has been published. The lessons for this balancing exercise can be summarised as follows:

(a) Benefits: Sustainability agreements must be virtuous and demonstrably create—at least likely—sustainability benefits. Parties must invest in providing evidence to the authorities of such claimed benefits, and the assessment will depend on the type of benefits claimed. What is certain is that pure economic benefits such as in *Agrardialog Milch* will be insufficient.

Most of the initiatives that were allowed to proceed relate to environmental or animal welfare benefits. This may be a consequence of a general focus in guidelines (ACM in the Netherlands, AFCA in Austria, draft EU guidelines) on these types of benefits that can likely be achieved without introducing a surcharge, agreeing on minimum living wages, etc. That should not, however, lead to a prima facie conclusion that agreements that involve some determination of common cost elements are out of the question. The *Shell/TotalEnergies* agreement, for example, involves joint marketing and joint price-setting in a start-up phase when deemed necessary to enable the infrastructural investments to proceed. On the other hand, in its assessment of the banana living wage initiative, one of the elements the FCO identified as positive was that no living wages would be set during the pilot project. But, as demonstrated by the ACCC, agreeing on one element of cost in the entire supply chain does not necessarily prevent an initiative's benefits from outweighing such competitive restrictions. The ACCC considered that an agreed levy can be imposed if companies independently determine how to incorporate it throughout the supply chain (*TSA*). The ACCC also considered that when the levy formed a (very) small part of the product's retail price (*Battery Stewardship Scheme*), it would be unlikely to cause any detriment. The participants all agreed to pass on the levy to the end consumer through transparent communication, which makes the linkage between the surcharge and the benefits immediately visible to consumers.

(b) Necessity: None of the precedents put in doubt the aspect that joint action is needed in order to achieve the intended benefits. First-mover disadvantage is recognised (e.g. ACM *Grid operators*) as well as prohibitive unilateral investment costs (e.g. ACM *Shell/TotalEnergies*).

(c) Fair share for consumers: Only the ACM discusses this part of the test in its no-action letters. In none of the cases did the ACM have to examine whether the benefits arose out of the market where the restrictions applied. This is possibly one of the most important future challenges for sustainability initiatives such as e.g. living wage initiatives, if competition authorities take a narrow view of where the benefits must arise and what type of benefits that should be: e.g. if a farmer in Ecuador is paid a living wage, is a European consumer sufficiently compensated for the increased cost of a chocolate bar by the fact that she or he may value a more sustainable chocolate production chain? The FCO's assessment of the bananas initiative at least implicitly gives support to that view.

(d) Sufficient competition remains: As discussed under (a) above, the decisional precedents would not support the view that an agreement on one parameter of competition, such as costs, necessarily eliminates all competition, in particular if the participants still compete in many other ways. The case review shows that all initiatives impose somewhat narrow restrictions on competition (e.g. tyre and battery schemes in Australia, removal of plastic handles in the Netherlands), are limited in

24 ACCC, press release, Supermarkets can cooperate in Soft Plastics Taskforce after REDcycle pauses recycling program, 25 November 2022, https://www.accc.gov.au/media-release/supermarkets-can-cooperate-in-soft-plastics-taskforce-after-redcycle-pauses-recycling-program.

time (e.g. *Shell/TotalEnergies*) or are limited to a small number of industry participants (e.g. industry agreement on milk in Germany).

III. Conclusion

31. These precedents provide some welcome context and detail to existing guidelines. They demonstrate that there is appetite in certain branches of industry, and corresponding support from competition agencies, to promote joint sustainability initiatives.

32. At the same time, they do not address some of the larger questions still hanging over the antitrust and sustainability debate:

– First, identifying agreements that can be considered to fall altogether outside of the cartel prohibition so that no efficiencies assessment is needed: for example in application of the *Wouters*[25] and *Meca-Medina*[26] jurisprudence.[27]

– Second, how to address altogether bolder initiatives where an entire industry, cross-border and internationally, needs to participate to have any true sustainability impact.[28]

33. Five years ago, discussions about competition law and sustainability were mostly limited to academic circles. Competition authorities have, in the meantime, heard the concerns and engaged in the debate, leading to several NCAs adopting guidelines and calling on companies to come forward with their initiatives. Businesses have started to present joint projects, which will hopefully encourage others to start a dialogue with the authorities and also continue to reduce the argument that antitrust impedes sustainability initiatives. But promising as these developments are, great challenges remain. It is a topic for another contribution, but the recent imbroglio around the Glasgow Financial Alliance for Net Zero (GFANZ)[29] shows that antitrust authorities have failed to keep pace with the expectations on our leading businesses to live up to declared United Nations goals.[30] Antitrust needs to provide safe harbours for such initiatives. ■

25 CJEC, 19 February 2002, *J. C. J. Wouters e.a. v. Algemene Raad van de Nederlandse Orde van Advocaten*, case C-309/99, EU:C:2002:98.

26 CJEC, 18 July 2006, *David Meca-Medina and Igor Majcen v. Commission*, case C-519/04 P, EU:C:2006:492.

27 *See* discussion in the European Competition Lawyers Forum (ECLF) submission on the European Commission's proposed horizontal guidelines, 26 April 2022, para. 49 *et seq*. ("ECLF Paper"), https://www.europeancompetitionlawyersforum.com/_files/ugd/b7d241_89678937169b4150a2c03f0d2b22302b.pdf.

28 *See*, e.g. International Chamber of Commerce, When Chilling Contributes to Warming: How Competition Policy Acts As a Barrier to Climate Action, November 2022 ("ICC Paper"), https://iccwbo.org/content/uploads/sites/3/2022/11/when-chilling-contributes-to-warming-2.pdf.

29 https://www.gfanzero.com.

30 *See* ECLF Paper, ICC Paper, Papscun and Hudson, *supra* note 11, and K. Bryan, COP27: Mark Carney clings to his dream of a greener finance industry, *Financial Times*, 9 November 2022, https://www.ft.com/content/8d0c1064-881e-42b4-9075-18e646f3e1ad.

Competition and sustainability: Doing nothing is not an option

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1. The role of public interests other than promoting competition and consumer welfare in the enforcement of competition law has been the subject of increased attention in recent years, and not only within the competition community. In addition to discussions centred on industrial policy, an important debate in the Netherlands relates to a number of sustainability initiatives brought forward by private sector parties, which may contain elements that infringe competition law. This has given rise to questions on the interpretation of Section 6(3) of the Dutch Competition Act (DCA)—the Dutch equivalent of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU)—and in particular on when consumers can be said to receive a "fair share" of benefits resulting from an agreement for which an exception is claimed from the prohibition on cooperation between competitors. The mission of the Netherlands Authority for Consumers and Markets (ACM) is to ensure that markets work well for people and businesses, now and in the future, and so the authority sees it as important to respond to these developments.

2. The ACM has taken a prominent, and indeed pioneering, role in the debate around the assessment of sustainability agreements under the antitrust rules.[1] In 2020, the ACM published draft Guidelines and publicised ideas to move the debate forward. It seems to be an opportune time to take a next step on this topic. The European Commission is thinking ahead as it updates its Horizontal Guidelines on cooperation between undertakings.[2] The Dutch public is open to progress on sustainability but looks to the government to advance sustainability issues.[3]

3. This article describes the work done by the ACM on the issue of sustainability in competition law in recent years:

starting with ACM's draft sustainability guidelines, the work the ACM has done on quantifying sustainability claims and a few recent cases the ACM has dealt with on this issue, also referring to possible criticism of this work. The article also refers to issues indirectly affecting competition and sustainability, such as ACM's work on improving the reliability of information for consumers to make sustainable choices and the promotion of sustainable policies in the telecom and energy sectors.

I. ACM's pioneering role in the debate around the assessment of sustainability agreements under the antitrust rules

4. As early as 2003, the former Netherlands Competition Authority (NMa) had to deal with cartels among fishers in the shrimp industry.[4] These cartel practices involved limiting the size of the North-Sea catch, as well as imposing minimum prices. One of the arguments advanced by the fishers, as a defence based on Section 6(3) DCA and Article 101(3) TFEU was that there was a need to prevent overfishing of species of fish not covered by European fishery rules. This defence was dismissed by

* Thanks to Paul de Bijl and Martijn Snoep for their helpful comments. The author is responsible for errors and omissions, and the opinions expressed in the article are those of the author.

1 G. Monti, Four Options for a Greener Competition Law, *Journal of European Competition Law & Practice*, Vol. 11, Issue 3–4, 2020, pp. 124–132.

2 Eur. Comm., DG Comp, Review of the two Horizontal Block Exemption Regulations, https://competition-policy.ec.europa.eu/public-consultations/2019-hbers_en.

3 *See* for example the survey of the Netherlands Institute for Social Research, Burgers, overheid of bedrijven: wie is aan zet?, 2 November 2022. In 2019, 79% of Dutch people expected the national government to tackle climate change problems (Dutch National Energy and Climate Plan, 2019).

4 CBb (Dutch Trade and Industry Appeals Tribunal) 17 March 2011, ECLI:NL:CBB:2011:BP8077 (*Shrimp Fishery*). *See* ACM, press release, Highest Dutch court in antitrust cases upholds fines on shrimp cartel, 22 March 2011, https://www.acm.nl/en/publications/publication/6534/Highest-Dutch-court-in-antitrust-cases-upholds-fines-on-shrimp-cartel.

the Dutch court because the fishers did not demonstrate that the consumers would get a fair share of the benefits from the agreements. The infringement of competition law was upheld by the Dutch court, but in the aftermath of these cases, arguments that competition law was overly restrictive of environmentally friendly self-regulation continued to play a role in Dutch policy.[5]

5. In 2013, an issue arose concerning a proposed agreement to advance by several years the closure of five relatively old coal-fired power plants. In order to foster the transition towards a more sustainable energy industry in the Netherlands, a large group of over forty stakeholders entered into an agreement to implement a number of measures. The stakeholders included employer organisations, labour unions, environmental NGOs, energy firms and government representatives. The ACM advised that one of the proposed measures—for Dutch energy companies collectively to close five of their coal-powered energy plants at the same time—would lead to a 10% reduction in capacity and increased electricity prices for consumers. The ACM found that these disadvantages were not outweighed by the benefits of the planned reduction in CO_2, NO_x, SO_2 and small particulate matter. Using shadow prices, the authority calculated the total benefit for consumers of the restrictions, and in all scenarios, the net effect on consumer surplus was negative, in particular because of a "waterbed effect." The CO_2 emission rights of the Dutch energy companies would not be withdrawn from the market but could be deployed elsewhere. This neutralised the benefits for consumers of the envisaged reduction of CO_2 emissions resulting from the plant closures.[6]

6. Then, in 2015, the ACM considered the *Chicken of Tomorrow* case.[7] In that case, the ACM blocked a planned agreement between producers, suppliers, and retailers aimed at establishing a minimum level of welfare for chickens: the "Chicken of Tomorrow." The ACM conducted a "willingness to pay" survey among consumers, using conjoint analysis to assess quantitatively the benefits of the planned agreement for consumers. Respondents were asked to choose between different hypothetical products, and their willingness to pay a higher price for the proposed Chicken of Tomorrow product was derived from the responses. The results were used to calculate the consumers' valuation of the Chicken of Tomorrow, as a proxy for the benefits to consumers.

7. The ACM rejected the parties' Section 6(3) DCA defence because its study indicated that consumers found the planned improvement in poultry welfare too insignificant compared with the expected price increase. The conclusions were that the proposed Chicken of Tomorrow agreement ranked poorly in terms of animal welfare, and its benefits did not compensate consumers for the higher price.

8. A subsequent study in 2020 showed that despite the rejection of the Chicken of Tomorrow initiative, supermarkets have nevertheless proceeded independently to offer improved levels of animal welfare, based on welfare classifications of their own and market-wide levels.[8]

9. There were good reasons for stopping those agreements, but the cases left a perception among public interest groups, trade organisations, politicians and companies who want to cooperate on private sustainability initiatives that competition rules stand in the way of a more sustainable economy. Also, there is a perception that competition law is used as an excuse not to take action to promote sustainable production or distribution of goods and services.[9]

10. The ACM feels a responsibility to do what is possible under competition law to remove unnecessary (perceived) barriers to legitimate cooperation on sustainability. Therefore in 2020, the ACM published draft "Sustainability Agreements" Guidelines, which includes examples illustrating the opportunities for business collaboration that contributes to a sustainable society. The ACM presented these draft guidelines for consultation. The aim of the draft Guidelines is to accord businesses more scope to collaborate to achieve their environmentally friendly goal, without breaching competition rules. In addition, the draft aims to stimulate international debate in Europe and beyond on the application of competition law to legitimate sustainability initiatives. The Guidelines (still in draft) were revised, following the consultation, in 2021.[10]

II. The need for guidance

11. Much has been written on the underlying economic problem of externalities that led the ACM to adopt its Sustainability Agreements Guidelines. To summarise a prominent example of externalities, there is insufficient incentive for the purchaser of goods or services to take the overuse of common sources of air, soil and water into consideration when engaging in a purchase. Otherwise known as the "tragedy of the commons," this is the major cause of concern in the environmental crisis.[11]

5 *See* for example the call for a policy rule to instruct the ACM on assessing agreements regarding animal welfare and the environment in the agricultural sector, Dijkgraaf/Geurts motion of 24 January 2013, Parliamentary Documents II, 2012/2013, 33 400 XIII, nr. 99.

6 ACM, Analysis by the ACM of the planned agreement on closing down coal power plants from the 1980s as part of the Social and Economic Council of the Netherlands' SER Energieakkoord, 26 September 2013. *See* E. Kloosterhuis and M. Mulder, Competition law and environmental protection: The Dutch agreement on coal-fired power plants, *Journal of Competition Law & Economics*, Vol. 11, Issue 4, 2015, pp. 855–880.

7 ACM, Analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow', 26 January 2015.

8 ACM Study, Welfare of today's chicken and that of the 'Chicken of Tomorrow', 1 September 2020

9 ACM Chair, Martijn Snoep's keynote speech at the 24th IBA Competition Conference, 9 September 2020.

10 ACM, Draft Guidelines 'Sustainability Agreements' (published for consultation on 9 July 2020). Second Draft Guidelines (published 26 January 2021).

11 G. Hardin, The Tragedy of the Commons, *Science*, Vol. 162, No. 3859, 1968, pp. 1243–1248.

12. Companies could hypothetically amend their production processes independently to reduce the ecological footprint of their products, but this would likely lead to a higher cost price. In a competitive market, these companies are not able to pass on this cost price increase to consumers beyond what consumers are willing to pay extra, as otherwise, consumers will switch to the alternative cheaper product with a bigger footprint. This 'first-mover disadvantage' disincentivises companies from investing in production processes that go beyond the statutory minimum requirements.

13. There are also other barriers to reducing the ecological footprint of products and services. There can be coordination problems in the upstream supply chain. Fixed costs may be too high for an individual company to recover in the face of the risk of insufficient demand. There can be economy-of-scale problems if the market share of an individual company is simply too small for it to finance a more sustainable initiative alone.

14. A possible solution would be to allow companies to cooperate in order to reduce the costs and the risk of tackling environmental concerns, such as CO_2 reduction, individually. However, competition law will only permit such cooperation provided it complies with the strict rules in Section 6(3) DCA (or Art. 101(3) TFEU). For instance, the cooperation has to be necessary and there has to be no method which would be less restrictive of competition which would achieve the same goal. Additionally, cooperation is only permitted where a "fair share" of the resulting benefit will go to the consumer. That fair share provision has traditionally been interpreted as applying to the consumer who has been deprived of the benefit of the competition by the agreement concerned. Also, the European Commission holds that the consumer even has to be fully compensated so that the net effect of the measure is neutral. Such an interpretation would seem to ignore benefits to other groups of consumers or future groups of consumers. That means that benefits to the environment, affecting as they do a broader or future group of consumers than only those immediately suffering due to potentially higher prices caused by the agreement between competitors, do not play a role in the analysis of whether the consumers negatively affected by the agreement receive a fair share of the benefits.

15. An additional problem was how to calculate the benefit to present or future consumers of environmental provisions agreed upon by competing companies. Traditional competition economics does not cover this type of calculation. Fortunately, there is a wealth of experience in this area in environmental economics.

16. Finally, even having found a sound economic basis for taking such externalities into account and enlisting environmental economics methods to calculate the benefit, how could the level of environmental benefit be assessed and finally, how could an authority distinguish between environmental benefits and other out-of-market benefits (such as animal welfare or labour rights)?

17. Given the urgency of the climate change problem, the ACM set itself to exploring if it would be possible, in specific and well-defined circumstances, to facilitate sustainability agreements that reduce negative external effects and increase the total surplus of citizens' welfare, including affected consumers and non-affected consumers.[12]

18. There has been much debate among academics, practitioners and enforcers around the world, including among the members of the European Competition Network, on the interpretation of the 'fair share' requirement, especially about taking out-of-market benefits into account.[13]

19. These are the problems that the ACM draft Guidelines are designed to combat. The Guidelines supersede the 2014 Vision Document on Competition and Sustainability[14] and the 2016 Basic Principles for ACM's oversight of sustainability agreements.[15]

III. ACM draft Guidelines

20. The ACM draft Guidelines give businesses more scope to collaborate on joint private initiatives in the Netherlands to reduce environmental damage caused by the overuse of common resources, such as damage due to greenhouse gases and air pollutant emissions. The ACM does not view competition law as the solution to the climate change crisis, but it believes that competition law should not stand in the way of legitimate initiatives that contribute to a solution. The Guidelines aim to complement public action in this area and to help businesses achieve sustainability goals without breaching competition rules. They do so in four ways.

21. Firstly, the ACM explains in the draft Guidelines that certain types of collaboration do not restrict competition and are therefore already permissible, such as agreements to introduce certain quality marks and labels or joint agreements to comply with laws in other countries, such as bans on child labour or illegal logging. These initiatives fall outside the scope of Section 6(1) of the DCA, either because no parameter of competition is affected by the agreement or because the correct counterfactual analysis assumes full compliance with the law, in which case there is no restriction of competition. For example, agreements on standards, bundling know-how, joint ambitions without being specific/mandatory, and agreements to ensure that undertakings concerned, their suppliers and/or distributors comply with the laws of the countries in which they do business—i.e. International Responsible Business Conduct.

12 *See* T. van Dijk, A New Approach to Assess Certain Sustainability Agreements under Competition Law, in *Competition Law, Climate Change & Environmental Sustainability*, S. Holmes, D. Middelschulte and M. Snoep (eds.), Concurrences, New York, 2021, pp. 55–68.

13 Various proposals for the treatment of cooperative agreements between undertakings that aim at promoting sustainability have been brought forward by the French, Finnish, Greek and Austrian authorities. *See also* for example S. Holmes, Climate Change, Sustainability, and Competition Law, *J. Antitrust Enforc.*, Vol. 8, Issue 2, 2020, pp. 354–405.

14 ACM, Vision Document on Competition and Sustainability, May 2014.

15 ACM, press release, ACM sets basic principles for oversight of sustainability arrangements, 2 December 2016.

22. Secondly, the draft Guidelines propose a broader interpretation of the term "fair share" in Section 6(3) DCA or Article 101(3) in cases where certain conditions are fulfilled for this legal exception to apply. Two criteria have to be met for, including out-of-market benefits:

- The agreement must reduce environmental damage (reduce the risk of global warming or the loss of biodiversity) and it must be specific (for example, reduce negative external effects associated with CO_2 or NO_x by x kg in time frame y).
- The government has set a goal for this reduction, a goal which is binding for the government but is not binding for firms. This adds to the democratic legitimacy of the exception.

23. Thirdly, the ACM tries to avoid an overemphasis on quantification when calculating costs and benefits. So a qualitative assessment of costs and benefits can be used. A quick-look analysis is sufficient if the benefits clearly outweigh the negative effects.

24. Finally, the draft Guidelines indicate a greater willingness to sit down with market participants and give them advice in an informal manner and the ACM has said to companies that it will not fine them when they come to consult on their proposals. Rather the ACM will advise companies on how their proposal can be made compatible with the law. Immunity from fines is also granted to companies who made bona fide attempts to comply with the draft Guidelines and who amend their agreement immediately upon a finding of non-compliance.

25. The draft Guidelines make use of the UN description of sustainable development as development towards "*an economically, socially and environmentally sustainable future for our planet and for present and future generations*."[16] The Guidelines refer to environmental damage as "*damage to the environment* [caused by] *the emission of harmful air pollutants and greenhouse gases, and* (. . .) *the waste of raw materials*."

26. The draft Guidelines make a distinction between anti-competitive environmental-damage arrangements that aim to reduce possible negative externalities of environmental and other agreements that aim to promote sustainable development. In the former cases, full compensation for users is not required. In these cases, it is seen as fair that users that cause the damage also bear (in full or partially) the costs, provided that they are part of the group that benefits from the agreement, and thus enjoy the same benefits. In the latter cases, full compensation for users is still the guiding principle.

27. To give a hypothetical example, the Dutch government is required to reduce CO_2 emissions by 25%. This was confirmed by the Supreme Court of the Netherlands in the *Urgenda* ruling.[17] This means that there is a clear standard to which the government is bound. The government takes measures to realise this goal (such as the provision of subsidies, closure of environmentally damaging energy plants, etc.). A private agreement aims to make an efficient contribution to this goal: and the costs for society are lower than the environmental gains (measured by estimating the shadow price, for example, the price the government would have paid to attain this goal).[18] In such a situation, even if the immediate negative effects for consumers (in the form of a price increase) are larger than the benefits of the environmental gains accruing to them, under the draft Guidelines, that would not be problematic because there is no need to compensate consumers fully for the costs (provided they are part of the group that benefits from the environmental gains).

28. Quantification of the costs and benefits is not required, provided the market share involved is limited to 30% or less. In this case, the undertakings involved need only demonstrate that their initiative focuses on a sustainability objective, and that it can reasonably be expected that the initiative will make a real contribution to the realisation of that objective. A market share of 30% means that there is substantial residual competition.

29. Where the market share is greater, then the undertakings concerned need to show how the sustainability initiative will be of value to customers or suppliers, and thus provide consumers with a fair share of the benefits, or alternatively show that the benefits clearly offset the costs. This is the case for example when arrangements will lead to a limited price increase or a limited restriction of choices for customers, while it is evident that users will have significant benefits.

30. In other anti-competitive sustainability agreements that do not aim to reduce negative externalities on the environment, for example agreements that improve animal welfare, but also lead to a price increase, the users will have to attach sufficient value to those quality improvements to offset the price increase.

31. Self-assessment remains necessary for all agreements, as under Section 6(3) of the DCA (and Art. 101(3)), companies need to demonstrate that their agreements carry benefits and are necessary and proportionate. In other words, the competition restriction is necessary to achieve the objective and competition is not eliminated for a substantial part of the product in question.

32. One way of quantifying these issues is by measuring the willingness to pay of consumers or of society

16 UN General Assembly, Resolution A/RES/66/288 of July 2012, RIO+20. *See also* Dutch parliament 2018–2019 session 35247, No. 3 Explanatory Memorandum to the Bill on Room for Sustainability Initiatives, at 11.

17 The Supreme Court in the Netherlands ruled that greenhouse gas emissions in the Netherlands should be 25% lower by the end of 2020 compared with 1990. Supreme Court of the Netherlands, 20 December 2019, *State of the Netherlands v. Urgenda Foundation*, case 19/00135, ECLI:NL:HR:2019:2006.

18 Van Dijk explains how shadow prices can be used in a practical assessment of the effects of environmental agreements, *see* Van Dijk, *supra* note 12, at 62.

as a whole. This can be done by analysing revealed preferences (studying what is observed in the market) or analysing stated preferences (interviewing consumers). Alternatively, policy goals can be used as indicators of society's willingness to pay, such as the shadow pricing referred to above. Finally, the authority can use a conjoint analysis method, such as that referred to above in the *Chicken of Tomorrow* case.

33. When market prices are not available, shadow prices can be used, for example, when dealing with public goods. Shadow prices are often used in social cost-benefit analyses to reflect the preference of society for a certain good and the willingness to pay for that good. Shadow prices can be derived from policy goals (and the costs to realise these goals) or from the damage costs of, for example, a certain emission.[19]

34. The Guidelines are published in draft form and are restricted to agreements that restrict competition in the Netherlands. Traditionally, the Dutch government relies heavily on self-regulatory measures to engineer market change. The Guidelines refer to the 2016 Policy Rule regarding competition and sustainability of the Dutch ministry in which the ministry encouraged the ACM to allow agreements between competitors that aimed to advance government sustainability goals.[20] Of course, ACM is bound by national and EU law, and any sustainability agreement that has effects in the Netherlands, as well as at the EU level is governed by both. The most ACM could do in cases where national or EU law prohibits an agreement would be to exercise its power not to prioritise a particular case. The ACM has been active in sharing its views at EU level and has made it clear that it would like for the law at the EU level to be interpreted similarly so that more weight could be given to out-of-market benefits to consumers in cases concerning an agreement to reduce environmental damage, in line with Article 101(3) TFEU.[21] Ultimately, it is up to the European Court of Justice to decide how Article 101(3) TFEU should be interpreted.

IV. Recent cases

35. The following range of cases have been considered since the publication of the draft Guidelines: agreements regarding the joint purchase of electricity from a wind farm, the joint setting of CO_2 prices, joint storage of CO_2, the removal of plastic handles from multipacks of soft drinks, and an arrangement by garden centres to combat the use of illicit pesticides.

36. In February 2022, the ACM published a press release stating that it was in favour of a proposal for the joint purchase of electricity from a wind farm by businesses and organisations.[22] VEMW, a Dutch association for business energy users and business water users, wanted its members to be able to conclude a contract collectively with the future developers of an offshore wind farm. The agreement would involve fixing the electricity rate for several years in long-term supply contracts, but businesses and wind-farm developers would continue to have options to buy and sell sustainable energy outside the agreement.

37. Also in February 2022, the ACM published its view on a proposal by system operators for electricity and natural gas to collaborate in order to reduce CO_2 emissions.[23] The ACM conducted a preliminary assessment of plans submitted by the system operators. These plans involved jointly determining a price for emitting one ton of CO_2, which the system operators can use in investment calculations for grid investments, with the ultimate aim of reducing CO_2 emissions. System operators initially sought to reach mutual agreement on using a price of 50 euros (it was later raised to 100 euros) per ton of CO_2 in purchase and investment decisions. The ACM found that the agreement would stimulate investment leading to CO_2 emission reductions. The ACM concluded that even with this higher price for CO_2, at first glance, the benefits clearly outweighed the potential costs. Moreover, consumers are allowed a fair share of the benefits, the collaboration is necessary for reaping the benefits, and sufficient competition will remain in the market.

38. In June 2022, the ACM allowed competitors Shell and TotalEnergies to collaborate in the storage of CO_2 in empty natural-gas fields in the North Sea.[24] By transporting CO_2 through pipes and storing it in old gas fields, this initiative aims to prevent greenhouse gases from being released into the atmosphere and so helps to realise climate objectives. As cooperation is necessary for getting this initiative off the ground and for realising the climate benefits, the limited restriction of competition between Shell and TotalEnergies is considered to be outweighed by the benefits for customers of both companies and for society as a whole. In order to get the project off the ground, Shell and TotalEnergies need temporarily to offer the CO_2 storage together and, therefore, jointly set the price in order to put the first ±20% of the trunkline's capacity into operation. For the remaining 80%, no collective agreements will be made.

39. In July 2022, the ACM published a press release indicating that it looked favourably towards a joint agreement between soft-drink suppliers and supermarket chains on the discontinuation of plastic handles on all

19 *See* Van Dijk, *supra* note 12.

20 Policy rule of the Minister of Economic Affairs of 30 September 2016, No. WJZ/16145098, for the application by the ACM of Section 6(3) DCA in the case of anti-competitive agreements made for the purpose of sustainability, Dutch Government Gazette 2016, No. 52945, 2 October 2016.

21 *See* ACM Legal Memo, What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?, 27 September 2021, in which the ACM contends that the interpretation of Article 101(3) TFEU in *GlaxoSmithKline* and *MasterCard* allow for out-of-market benefits to be relevant and that full compensation of directly affected consumers in the relevant market is not required in all cases, provided there is a conferral of an appreciable objective advantage.

22 ACM, press release, ACM favors collaborations between businesses promoting sustainability in the energy sector, 28 February 2022.

23 ACM, Press release, System operators can collaborate in order to reduce CO2 emissions, 28 February 2022.

24 ACM, Press release, No action letter agreement Shell and TotalEnergies regarding storage of CO2 Northsea, 27 June 2022.

soft drinks and water multipacks.[25] The ACM assessed their plans and applied its draft Guidelines. Soft-drink multipacks consist of, for example, six bottles of soda wrapped in plastic with a plastic handle on top. By removing the handles on these multipacks, they become more recyclable, and less plastic is needed. With this joint agreement, over 70% of multipacks will no longer have handles. There was no evidence that the arrangements could negatively affect a competition parameter. Each participant decides for themselves when and how they discontinue adding handles to their multipacks. The ACM therefore believed it plausible that the arrangements did not restrict competition.

40. In September 2022, the ACM approved a collective arrangement by a number of garden centres to combat the use of illegal pesticides. Previous private initiatives to stop such use by means of certification labels, for example, were unsuccessful. Growers using illegal pesticides incur fewer costs and disrupt the competitive process with their illegal activities. The participating retailers do not wish to sell any plants that have been treated with illegal pesticides. In the event that growers supply such plants, supply may be suspended and then resumed under strict conditions. The retailers do not exchange any competition-sensitive information. ACM emphasised that such arrangements must be open and transparent, and that any decision regarding the exclusion of suppliers must be taken strictly in accordance with the rules set out in the arrangement. ACM did not conduct an assessment regarding the necessity of the agreement because, absent this initiative, the counterfactual is that illegal pesticides would continue to be used in the competition process. It is not the aim of competition law to protect that type of illicit competition. The correct counterfactual in this case assumes full compliance with the law, and in that context, there is no restriction of competition.

41. These cases reveal that the draft Guidelines can assist companies in their assessment of sustainability agreements. Businesses can join forces in an effective manner while, at the same time, helping realise sustainability objectives, without violating competition rules.

V. Justification for the draft Guidelines

42. In ACM's experience, sustainability agreements frequently have no negative effect on any competition parameter. In fact, where they are solely aimed at promoting product quality, product diversity, innovation or market introductions of new products, such agreements will, in most cases, actually promote competition. However, they cannot be allowed to exclude other market participants and products.

43. There is a strong welfare rationale for looking at out-of-market benefits as proposed in the draft Guidelines. If the authority were to look at in-the-market benefits only, a legitimate proposed welfare-enhancing agreement might possibly not benefit from the exemption. The draft Guidelines also address the "polluter pays" principle, because the negative environmental effects caused by the production of certain products are not usually reflected in the prices that consumers pay for the products.

44. There are, of course, counter-arguments.[26] The "slippery slope" argument is that if the ACM agrees to this exception, it will be under pressure as an authority to agree to other exceptions. The "crowding out" argument is that allowing such private agreements will lead to government inaction. Another argument is that it is too difficult for smaller NCAs to conduct difficult economic assessments on a case-by-case basis. Some maintain that more sustainability will be achieved through competition than through cooperation.[27] Some economists are against the proposals and see them as "*fundamentally at odds with the purpose and nature of competition policy*."[28]

45. However, the ACM holds that these arguments are not persuasive. The adoption of these or similar guidelines at the European level does not have to create a slippery slope. The European Commission could make it quite clear that this exception would be used for negative externalities leading to environmental damage and not for other goals. Such an approach is not uncommon in European competition policy, where there are separate rules for R&D and specialisation agreements, for example.

46. The argument that sustainability can only be achieved through regulation is not realistic in light of what is politically feasible. Calls for legislation to reduce pollution frequently fall by the wayside in the face of political differences. Future generations are underrepresented in the political process, and they will ultimately bear the bulk of the costs of climate change.[29] Legislation is very slow, and it is not always possible for regulation to keep apace with technological development. Competition law should not be in the way of undertakings that want to take complementary initiatives in these areas in which they are most competent.

47. As explained in the draft Guidelines, the calculations involved are not overly complicated, and the ACM has developed together with the Greek authority an overview for the valuation of sustainability benefits.[30]

25 ACM, press release, ACM is favorable to joint agreement between soft-drink suppliers about discontinuation of plastic handles, 26 July 2022.

26 *See* the summary of counter-arguments in M. Snoep, Speech at GCR Connect Sustainability and Cooperation, 28 April 2021.

27 *See* for example, M. P. Schinkel and L. Treuren, Green Antitrust: Friendly Fire in the Fight Against Climate Change, in S. Holmes, D. Middelschulte and M. Snoep (eds.), above, pp. 69–88.

28 *See* for example, L. Peeperkorn, Competition Policy is not a Stopgap!, *Journal of European Competition Law & Practice*, Vol. 12, Issue 6, 2021, pp. 415–418.

29 *See* M. Snoep, What is fair and efficient in the face of climate change?, Speech at the Pros and Cons conference, Sweden, 30 May 2022.

30 *See* ACM and HCC, Technical Report on Sustainability and Competition, January 2021.

48. However, most importantly, the draft Guidelines are being put forward in order not only to provide an economic solution but also to address an institutional gap. The ACM is simply applying the competition laws, including the legal exception in Section 6 DCA, in a way that is aligned with the government's sustainability objectives. As these recent cases show, the "fair share" issue is not necessarily the greatest hurdle in approving cooperative agreements to reduce environmental impact. Arguably, the requirements of proportionality and necessity may be harder to meet. However, the authority regularly conducts assessments weighing the advantages and disadvantages of standardisation and assessing the consequences for innovation, also taking on board the views of third parties, including NGOs. The same can be said of the decision on whether the standard is necessary.

49. The dangers that, if they work together, the companies have increased shared interests, the risk that the parties engage in more cooperation than is strictly necessary, or that the standard is lower than it might otherwise be, these risks remain. From a policy perspective, they should, however, be balanced against the risks of adverse effects on the environment if companies do not change their behaviour. As Holmes has stated, "*Just because competition law cannot do everything, it does not mean that it cannot do anything*." [31]

50. There is an ongoing discussion of these sustainability issues at EU level, focusing on the current review of the Horizontal Block Exemption Regulations (R&D and specialisation) and the Commission Guidelines on Horizontal Cooperation. The Commission's Evaluation report, of May 2021 acknowledges that the Horizontal Block Exemption Regulations and the Horizontal Guidelines offer limited guidance with regard to market developments that have taken place over the last ten years, notably digitalisation and the pursuit of sustainability objectives through horizontal agreements.[32] The Commission is to be congratulated on the lengths to which it has gone to consult on these revised rules, as it leads to good ideas coming forward for modernisation and improvement.

51. However, it seems that the ACM proposal for the interpretation of "fair share" in agreements to combat environmental damage may go too far for the Commission to accept at this point in time. The commissioner continues to emphasise that the benefits that accrue to the user should accrue specifically to the same users that pay the higher price. In speeches, Commissioner Vestager has referred specifically to "*the principle that restricting competition for a product can only be justified if the consumers of that product are not worse off on balance*."[33]

31 Holmes, *supra* note 13.

32 Eur. Comm., DG Comp, Competition Policy in Support of Europe's Green Ambition, *Competition Policy Brief* 2021-01, September 2021.

33 Executive Vice-President Vestager's keynote speech at the 25th IBA Competition Conference, delivered by Inge Bernaerts, Director, DG Competition, 10 September 2021.

52. The ultimate aim would be a harmonised approach in Europe. The ACM draft Guidelines may be updated further as the cases develop, with a final version being published once sufficient experience has been gained and the Commission has issued its own guidelines.

VI. Other ways in which sustainability is addressed by the ACM

53. Sustainability is part of the ACM's mission to ensure that markets work well for people and businesses, now and in the future. The ACM's initiatives in the stimulation of sustainability are not confined to competition law. On consumer protection, in January 2021, the ACM published Guidelines for sustainability claims containing rules and practical guidelines to help companies draw up sustainability claims.[34] In September 2022, the ACM issued commitment decisions in which retailers, Decathlon and H&M agreed to adjust or refrain from using sustainability claims on their websites to avoid misleading consumers.[35] Similar decisions were issued in October 2022 to the energy companies Vattenfall and Greenchoice.[36]

54. In energy regulation, in March 2022, the ACM published its initiative to examine the extent to which system operators may choose to give priority to projects that contribute positively to the energy transition.[37] Also, as a member and chair of BEREC (Body of European Regulators of Electronic Communication) during 2022, ACM has seen the adoption of BEREC's first Report on Sustainability assessing BEREC's contribution to limiting the impact of the digital sector on the environment.[38]

55. This selection of initiatives in adjacent sectors of ACM competence may indirectly affect competition enforcement, but I refer to them here to emphasise the authority's holistic approach to this issue and to acknowledge that the proposed widening of the interpretation of one of the criteria of Section 6(3) in specific cases is only a small part of the broader goal of promoting sustainability by the ACM.

34 ACM, Draft Guidelines Sustainability Claims, 28 January 2021.

35 ACM, press release, Going forward, Decathlon and H&M will provide better information about sustainability to consumers, 13 September 2022.

36 ACM, press release, Going forward, Greenchoice and Vattenfall will provide better information about sustainability to consumers,10 October 2022.

37 ACM, press release, ACM to explore the opportunities to prioritize sustainable projects, 3 March 2022.

38 BEREC Report on Sustainability Assessing BEREC's contribution to limiting the impact of the digital sector on the environment, BoR (22) 93, 9 June 2022.

VII. Conclusion

56. Under the European Commission's current interpretation of the competition rules, the benefits for users of a particular product must be equal to or greater than the disadvantages for those users. The ACM is proposing that for a narrow category of agreements in specific circumstances, a wider trade-off could be used: the benefits for society as a whole must be equal to or greater than the disadvantages for users.

57. The ACM feels the time is right to consider these types of changes. Sustainability is an important issue for Dutch society and the government. In 2015, the Paris Climate Agreement was signed and seventeen sustainable development goals were set.[39] The year 2019 saw the adoption of the Dutch Climate Act, with specific targets set for the reduction of greenhouse gas emissions (for example, a 49% reduction by 2030).[40] The government needs to effectuate timely and significant measures on sustainability. The Dutch Supreme Court has held (*Urgenda*) that the government has to reduce greenhouse gas emissions.[41] The European Commission has shown that it is open to debate on the topic, and many new ideas have been published.

58. Some argue that including out-of-market public benefits, such as sustainability, in the assessment of cooperative agreements also raises concerns about how this may affect the political influence on an agency's decision-making process. Public interests can be closely related to or even be political interests. The public may justifiably be wary of certain public interests putting even more stress on the decision-making process of an agency. However, the authority is used to assessments, using such a weighing exercise. After all, the promotion of competition is also a public interest that can stir public opinion and strong political interest. And in the case of sustainability, the stakes are too high to consider doing nothing. ■

39 Paris Climate Agreement, 12 December 2015, Treaty Series 2016, No. 162 (to combat man-made climate change). The 2030 Agenda for Sustainable Development A/RES/70/01, United Nations.

40 Act of 2 July 2019, establishing a framework for the development of policy aimed at reducing irreversibly and progressively the Dutch greenhouse gas emissions in order to limit global warming and climate change, Bulletin of Acts and Decrees, 2019, at 253.

41 *See State of the Netherlands v. Urgenda Foundation*, *supra* note 17.

Austrian competition law goes green: The Austrian “sustainability exemption” and its interpretation by the FCA*
Challenges and developments of the legislative first mover on sustainability exemptions

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I. Background and context

1. In late 2019, the European Commission (EC) presented the European Green Deal to enable Europe to become the first climate-neutral continent. Even though competition law may not be considered the ultimate tool to tackle climate change at first sight, a high number of academics as well as practitioners have uttered their willingness to contribute substantially to a sustainable and climate-neutral economy by reinterpreting or amending Article 101 of the Treaty on the Functioning of the European Union (TFEU) as well as national competition laws. At the same time, there was a lot of scepticism towards changing and thereby weakening established European and national competition law principles with the risk of greenwashing cartels.

2. In 2020, EC’s Directorate General for Competition launched public consultations to collect opinions from all interest groups and published the first ideas in its *Policy Brief* in September 2021. Meanwhile, national competition authorities and competition forums across Europe and all around the globe have formed their positions on how to intertwine green policy objectives and competition law (mostly based on theoretical considerations rather than empirical evidence). Hereby, one of the main obstacles to sustainability agreements appeared to be Article 101(3) TFEU and its criteria for exempting agreements under current EU competition law, which serves as a role model for the interpretation of exemption criteria in EU Member States and the corresponding national competition acts.

3. The applicability of this exemption requires, inter alia, that consumers receive a fair share of the resulting benefit(s), the agreement is indispensable to the attainment of the objective(s) in question, and does not eliminate competition. This seems to be particularly relevant in the context of environmental sustainability, as achieving the aim of the EU Green Deal is considered to be (at least partly) dependent on private initiatives, which in turn might require competitors to join forces and cooperate. At the same time, competition authorities must remain vigilant about the problem of greenwashing, i.e. the fear that competitors who are allowed to coordinate their

* This On-Topic strives to provide an overview of the so-called sustainability exemption introduced to Austrian competition law with the latest amendment of the Austrian Cartel Act. We try to convey the main ideas and guiding principles set out by the legislator by giving some background and context to the discussion on the European level, explain the requirements for the national exemption to be fulfilled and expand on the central condition of indispensability.

behaviour might have an incentive to provide minimal sustainability benefits for maximum price increases or other drawbacks on consumers.

4. As a result of the discussions on sustainability agreements outlined above as well as the EU Green Deal, the Green Movement in general and particularly in Austria, the Austrian legislator decided to become a first mover by adding an explicit sustainability exemption to Article 2(1) Austrian Cartel Act.

5. In the explanatory note[2], the legislator outlines that the Austrian government programme 2020–2024 supports the efforts and targets of the EU Green Deal and holds that a sustainable economy will be a competitive economy in the future. In particular, it refers to the European "Do No Significant Harm" principle as well as to European documents, such as the EC's Horizontal Guidelines (2011/C 11/01) or the communication from the Commission on Next steps for a sustainable European future (COM/2016/0739 final). However, the legislator concludes that the discussions at European level do take too long, and consequently undertakings would refrain from engaging in sustainability initiatives due to a lack of legal certainty, which is contrary to the identified urgent need for action.

6. Consequently, by amending the criteria for cartel exemptions under Article 2(1) Austrian Cartel Act, the national legislator created a currently unique national provision explicitly targeting sustainability cooperation. By introducing explicitly that—from September 2021 onwards—even out-of-market efficiencies may suffice to fulfil the criteria for the national sustainability exemption, the Austrian legislator entered uncharted territory. Thereby, the legislator placed Austria and the Austrian Federal Competition Authority (FCA) in pole position in integrating sustainability considerations into competition law assessments as the first European country to lay down a sustainability exemption in statutory law.

7. In the explanatory note, the Austrian legislator provides examples of fields of potential sustainability cooperation:

– climate protection

– climate change adaptation

– transition to a circular economy

– reduction of pollution

– prevention of harm to the environment

– protection and/or restoration of biodiversity and ecosystems

– support for the sustainable use and protection of marine and water resources.

8. More in detail, the legislator outlined, inter alia, that cooperation regarding the transition to a circular economy may benefit if it improves a product's durability, repairability, reusability or recyclability. Equally, a contribution to pollution prevention and control may benefit, in particular, if emissions into the air, water or land are prevented or reduced. Regarding the protection and restoration of biodiversity and ecosystems, the legislator mentions the example of sustainable forestry management. Another example is cooperation for joint distribution to cut transport movements and therefore CO_2 emissions, which contribute to climate protection.

9. Importantly, the legislator underlined that cooperation which resembles mere price-fixing or market-allocation agreements is not capable of profiting from the sustainability exemption, even though it might lead to reduced production of certain goods and thereby achieve a positive effect on the environment.

10. In addition to the amendment of Article 2(1) Austrian Cartel Act, the legislator held that a complementary soft law instrument, such as guidelines issued by the FCA, on how the national competition authority will evaluate potential sustainability cooperation in practice would be useful and appreciated. Therefore, the FCA started a fact-finding mission and the drafting process for the Sustainability Guidelines in the autumn of 2021.

11. The finalisation and publication of the FCA Sustainability Guidelines[3] following a broad public consultation that took place in early summer 2022 may be considered an important step to create transparency and legal certainty about the FCA's interpretation of the new provisions and enhance their practical relevance. As the Sustainability Guidelines are intended to be a living document, further experience on the topic gained in practice will be incorporated into future versions.

II. Content, scope and requirements of the exemption

12. Unlike Union law, in which the competition rules are anchored directly in the primary law of the TFEU and are, therefore, hardly amenable to revision, the rules of national law can be adapted more easily to new challenges and changes in political objectives. The Austrian legislator has made use of this circumstance and created a possibility of wider consideration of sustainability effects that emanate from cooperation between undertakings that otherwise restrict competition by integrating those rules into the existing regulations on the exemption of agreements in the Austrian Cartel Act. Specifically,

2 For the explanatory note, *see* 951 d.B. (XXVII. GP) - Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021 – KaWeRÄG 2021, Parlament Österreich, https://www.parlament.gv.at/PAKT/VHG/XXVII/I/I_00951/index.shtml.

3 For the FCA's Sustainability Guidelines, *see* Leitlinien zur Anwendung von § 2 Abs 1 KartG auf Nachhaltigkeitskooperationen (Nachhaltigkeits-LL), https://www.bwb.gv.at/fileadmin/user_upload/Leitlinien_zur_Anwendung_von____2_Abs_1_KartG_auf_Nachhaltigkeitskooperationen__Nachhaltigkeits-LL__Stand_9_2022.pdf.

Article 2(1) Austrian Cartel Act, which is materially identical to Article 101(3) TFEU, was supplemented with the following subparagraph: "*Consumers shall also be deemed to enjoy a fair share of the benefits which result from improvements to the production or distribution of goods or the promotion of technical or economic progress if those benefits contribute substantially to an ecologically sustainable or climate-neutral economy.*"

13. However, this foundation in national law alone is also the first major restriction of applicability of this regulation and needs to be kept in mind: Agreements which, due to their scope, their nature or the size or activities of the companies involved, are likely to affect trade between Member States, may only benefit from a national rule as long as the application of Union law does not lead to a different result (Art. 3(1) Reg. 1/2003). This was explicitly acknowledged by the Austrian legislator in its explanatory note to the law.

14. Conversely, various forms of cooperation between companies in pursuit of sustainability goals are conceivable in a fashion that is unproblematic from the point of view of competition law or can be designed in a competition-neutral manner. The Guidelines do address this issue, very much in line with the relevant section of the draft Horizontal Guidelines.

15. The first experiences gained in the discussion with companies and other stakeholders, as well as the results of the public consultation of the draft Guidelines held by the FCA in early summer 2020, confirm this assessment. So far, not many practical examples of facts could be found that would not either fall outside of the sustainability exemption for their potential to affect trade between Member States or would not have been classified as permissible under antitrust law anyway, without the need to apply the new regulation. In this context, it is symptomatic that two of the examples of possible facts presented in the explanatory note to the bill—a cooperation between (international) manufacturers of detergents to reduce the packaging volume and a cooperation to produce cars that emit less CO_2—would almost certainly fall within the scope of EU law. On the other hand, purely regional cooperation without effects on cross-border trade, such as in the area of improved transport logistics, could often benefit from the *de minimis* rule or could be eligible for exemption based on the cost savings achieved.

16. It should also be noted in advance that the Austrian sustainability exemption, unlike the proposal of the EC in the Horizontal Guidelines, is limited to aspects of ecological sustainability and (due to its special importance as an explicitly mentioned subcategory) climate-neutral economy. This includes contributions to the protection of the climate, the sustainable use and protection of water resources, the transition to a circular economy and the protection and restoration of biodiversity and ecosystems.

17. Other societal goals, for example in the area of social standards or animal welfare (unless these also contribute to ecological sustainability)—though equally legitimate—are not included. However, those may benefit indirectly from the new interpretation of Article 101(3) TFEU.

18. The central regulatory concept of the sustainability exemption relates to a modification of the criterion of consumer participation ("fair share"). As the European discussion shows, this is where the greatest difficulties lie in recognising sustainability effects as relevant efficiencies within the meaning of competition law. If the other conditions are met, the legal fiction of a fair share counters the problem of considering efficiency gains, which actually do not accrue to the consumer group affected by the restriction of competition, but elsewhere, in particular to an unspecified general public ("out-of-market-efficiencies"). In the same way, a time delay with regard to the occurrence of positive effects ("next generations") can also be addressed. In this way, the Austrian exemption certainly allows taking account of sustainability goals in a broader way.

19. However, the efficiencies gained still must substantially outweigh negative externalities, so it does not suffice for a cooperation to create only negligible benefits towards sustainability in order to fulfil the exemption ("criterion of substantiality"—see below).

20. Having said that, the FCA applies the following adapted test scheme for the evaluation of sustainability agreements (note: for reasons of procedural economy, the FCA will examine the fourth requirement—indispensability—before the second).

1. The cooperation produces efficiencies

21. As a basic requirement, the cooperation must lead to an improvement in the production or distribution of goods or the promotion of technical or economic progress. By adhering to this requirement of an "innovative step", anti-competitive forms of cooperation are excluded from the scope of application, even if this leads to a reduction in emissions, for example by restricting the volume of production.

2. Those efficiencies contribute to an ecologically sustainable or climate-neutral economy

22. Efficiency gains stemming from the cooperation in question must result in a contribution to sustainability goals in the areas mentioned above. In practice, questions concerning the quantifiability and demonstrability of these effects will arise. The larger and clearer the contribution towards sustainability goals is, the lower the requirements for their demonstration and documentation will be. Keeping in mind that the scope of the sustainability exemption is limited aforehand (no effect on trade between Member States), these requirements as well as possible positive effects come to factual limits.

3. This contribution to an ecologically sustainable or climate-neutral economy is essential ("criterion of substantiality")

23. The inclusion of this criterion of substantiality is an important mechanism to distinguish true efforts on sustainability from only alleged sustainability arguments ("greenwashing"). At the same time, it can be seen as a substitute for the traditional "full compensation" of the negative effects on competition that would otherwise be required under the "fair share condition." The contribution to a relevant sustainability goal must therefore be suitable for compensating for the distortion of competition. Conceptually, for example, a price increase caused by a cooperation would have to be offset by a sustainability advantage that can be quantified at least as high.

4. Only restrictions that are indispensable to the attainment of this contribution are permissible

24. This requirement is taken unaltered from the "normal" exemption under Article 2 Cartel Act/Article 101(3) TFEU and serves to implement the principle of proportionality. Only the mildest means necessary to achieve the goal are permitted. If companies may also achieve these goals of the sustainability agreement individually, cooperation is not necessary. Likewise, restrictions on competition that do not contribute to the achievement of those objectives are not permitted. This may, in particular, affect the scope or duration of the cooperation.

25. In principle, the FCA intends a strict interpretation of this criterion but is aware of the need to balance effective enforcement of competition rules with the legislator's intention to encourage initiatives in the field of sustainability, thus not setting up a hurdle that can hardly ever be overcome in practice. (For details on the criterion of indispensability, see section III.)

5. The cooperation does not afford the possibility of eliminating competition for a substantial part of the goods or services in question

26. This criterion also remains unchanged. In accordance with the views of the EC, in order to benefit from the exemption, the cooperation must enable residual competition. This is the case, among other things, if a restriction of competition only relates to one of several relevant parameters of competition or only to parts of the market. A restriction of competition limited in time is also permissible if this has no negative effects on long-term market development.

III. In-depth: The role of the reference scenario when assessing indispensability

27. A decisive issue for the competition assessment of sustainability cooperation under the Austrian Cartel Act is the comparison of the competitive conditions under the cooperation in question (scenario under examination) with the competitive conditions that would arise in the absence of the cooperation (reference or counterfactual scenario).

28. A restriction of competition by effect exists if the sustainability cooperation can impair competition to such an extent that, compared to the reference scenario, negative effects on prices, production, innovation or variety and quality in the relevant market can be expected with sufficient probability.[4]

29. Conceptually, in order to determine the true effect of a cooperation on target variables, it is therefore necessary to make two highly uncertain forecasts and to determine the difference between them.

- How do the target variables develop under the cooperation?
- How would the target variables have developed without the cooperation?

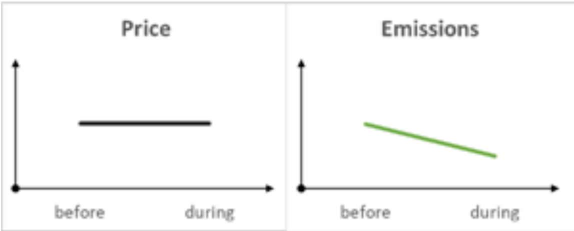
30. Determining the true effect is already highly challenging when it comes to *ex post* evaluation of a cooperation (as is usually the case with cartel enforcement or cartel damage cases). In these cases, the development of the target variables can usually be observed under the cooperation. In the case of a request for an *ex ante* exemption under the sustainability clause, this task becomes even more complicated.

31. Suppose we evaluate a sustainability cooperation based on two parameters: the effect on prices and the effect on priced emissions (or some other dimension of environmental sustainability). In practice, a likely argument by companies that want to enter into a sustainability cooperation and therefore consult the FCA could be: The cooperation will contribute to a reduction in emissions and at the same time not lead to rising

4 Sustainability Guidelines, para. 59.

prices. Figure 1 shows this case, in which, for the sake of simplicity, we assume that the development of the target variables presented by the companies occurs.

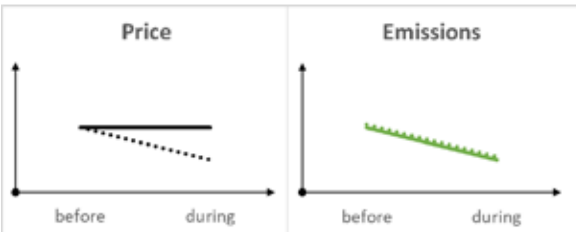
Figure 1. Claimed effect of a proposed agreement



32. With a naive view of the facts, the matter would probably be decided. The FCA also points out in its guidelines that if there is no (appreciable) restriction of competition, a sustainability cooperation does not have to be justified by recourse to the sustainability exception.[5] In order to assess the effect of a cooperation, however, it is usually not sufficient to simply compare the target variables before and (it's predicted value) under the cooperation.

33. Figure 2 shows a scenario in which the consideration of the reference scenario leads to a different assessment. In the first case, prices would have fallen in the absence of the cooperation (keep in mind that the expectation of falling prices can be a trigger for cartelisation), while emissions would have fallen anyway (relevant reference scenarios: dotted lines). Just taking into account the correct counterfactual completely changes the initial assessment: no ecological benefits and price increases for consumers.

Figure 2. Effect of the proposed agreement compared to the relevant reference scenario



34. You can think of several possible scenarios with different implications for the true effect of a sustainability agreement. Clearly, in many cases, taking the status quo as a relevant reference scenario might be sufficient.[6] In other cases, the status quo might be a poor proxy for what would happen in the future. For this reason, the FCA emphasises in its guidelines the crucial importance of thinking thoroughly about the relevant counterfactual and excludes the application of the sustainability exemption in the event of deadweight effects.[7] If there is a sufficient incentive for undertakings to improve the production or distribution of goods or promote technical or economic progress (with connected ecological benefits) in the absence of cooperation, the cooperation is clearly not indispensable for realising the efficiency gains from ecological benefits.

35. The FCA's public consultation of its guidelines highlighted several potentially contentious issues, among them the question of whether sustainability cooperation aiming to fulfil minimum statutory requirements would fall under the new exemption. It was argued that a distinction should be made between regulatory requirements that are aimed at the whole economy, at specific sectors or at individual companies. The implicit argument put forward: The weaker the binding effect of the environmental regulations for the individual companies, the more space should be given to the companies to achieve (true) ecological benefits through sustainability cooperation. It will consequently be necessary to check how binding a target is for the individual undertaking (this, of course, would influence the relevant reference scenario).

36. Furthermore, it was argued that even if companies are directly addressed by regulatory requirements, the application of the sustainability exemption should not be ruled out in principle. In particular, this might be relevant if it would not be possible to achieve the requirements without entering into a cooperation. This is presumably the case, for example, where specifications for reducing carbon dioxide emissions cannot be achieved based on the current state of technology and additional innovations are required. In this context, however, it must be taken into account that, apart from the sustainability exemption, cartel law offers opportunities for research and development cooperations, which are intended to promote innovation activity.

37. Another point raised in the consultation was that temporal aspects should be taken into account with regard to the need to restrict competition in order to achieve sustainability goals. Also in this regard, an appropriate reference scenario covers temporal effects. With regard to the efficiency gains resulting from sustainability cooperation, companies must explain the time horizon in which these can be expected.[8] At the same time, the temporal dimension must also be taken into account for the reference scenario. Figure 3 shows a scenario in which the cooperation leads to an immediate price increase and an immediate emission reduction in period 1. On the other hand, in the relevant reference scenario (dotted line in Figure 3), the price would have remained constant, and emissions would have fallen to the same level even without the cooperation, but with a delay of one period. The potential relevant efficiency gain from ecological benefits is therefore limited to period 1.

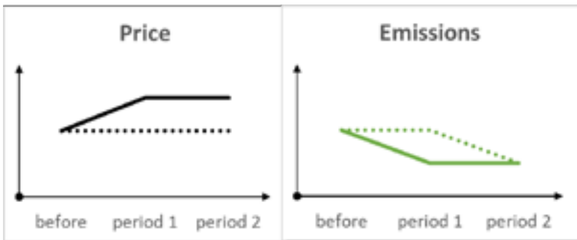
5 Ibid., para. 26.

6 Ibid., para. 54.

7 Ibid., para. 74.

8 Ibid., para. 68.

Figure 3. Temporal effect of a sustainability cooperation



38. Finally, it should be noted that the double forecast (development under and without the cooperation) clearly never will and can never be an exact matter. For competition practitioners, it is, first and foremost, a tool for thinking coherently about the effects of actual cases in order to achieve the legislator's goal of enabling companies to contribute to ecological sustainability and climate neutrality.

IV. Conclusion and outlook

39. The Austrian legislator pioneered with the recognition of certain forms of cooperation as justified under competition law and the FCA chose to provide further guidance at an early stage in the absence of wider practical experience. This can be seen as an attempt to overcome the chicken-or-egg situation by providing some additional legal certainty as well as encouraging undertakings to come forward and discuss their ideas for cooperation with the competition authority. Many positive reactions from stakeholders to the publication of the guidelines and broad interest from other states confirm the existing demand for guidance in this area. It is this exchange that will be considered in future updates of the guidelines and will help to further enhance their benefit. ■

Is competition law an obstacle to the green transition, and, if so, how to overcome it? A response from a competition authority official

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I. Introduction

1. Sustainable development—i.e., development that meets the needs of the present without compromising the ability of future generations to meet their own needs[1]—is one of the major challenges our societies are facing and addressing it is not an option: the climate crisis we have seen so far, although devastating, is only a fraction of what we will face in the next future.

2. The European Commission supports this view by placing the "*twin ecological and digital transition*" at the basis of the European industrial strategy[2] in order to achieve a new economic model that will make the European economy not only more sustainable, but also more competitive and resilient.[3] It is now accepted that everyone will have to "play their part", including, as mentioned by the Executive Vice-President of the European Commission, Margrethe Vestager, competition enforcers.[4] Within the competition community, European agencies, and the Netherlands Authority for Consumers and Markets (ACM) in particular,[5] as well as European academics and practitioners, have taken the lead so far on this topic.[6]

3. There is now a broad consensus that there is no need to alter or even reinterpret the objectives of EU competition law, as far as "positive behaviors" are concerned. Nevertheless, regarding behaviors that have a positive impact on sustainability but may restrict competition, the interplay between sustainability and competition law has led to the emergence of a large array of diverging opinions in Europe: some stakeholders consider that competition law should be clarified and adapted to allow for green collaborations, whereas others think that competition law is already well adapted and that fully integrating externalities into competition analysis will lead to greenwashing of anticompetitive practices and blur the frontiers of competition law.[7]

4. Our understanding is that a medium approach is both possible and desirable. It primarily relies on factual observations that partially contradict the claim that competition law would be too restrictive to

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1 UN, Report of the World Commission on Environment and Development: Our Common Future (Annex to UN document A/42/427 – Development and International Co-operation: Environment) ("Brundtland Report"), 4 August 1987.

2 *See*, for instance, Communication from the Commission, A New Industrial Strategy for Europe, COM (2020) 102 final, 10 March 2020.

3 Eur. Comm., DG Comp, Competition Policy in Support of Europe's Green Ambition, *Competition Policy Brief* 2021-01, September 2021.

4 M. Vestager, The Green Deal and competition policy, Speech, 22 September 2020.

5 ACM, Draft guidelines 'Sustainability Agreements', 9 July 2020; Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law, 26 January 2021.

6 *See*, for instance, the importance of European experts mentioned on the OECD webpage dedicated to Sustainability and competition, https://www.oecd.org/daf/competition/sustainability-and-competition.htm. *See* as well, for instance, the "sustainability map" provided by White & Case, https://www.whitecase.com/map-sustainability.

7 On this question, *see* for example G. Gürkaynak, S. Holmes, S. Martin, U. Berkani and E. Provost, Développement durable : Quel rôle pour la politique de concurrence ? (Demain la concurrence, 3 nov. 2020), *Concurrences* No. 1-2021, art. No. 99283, www.concurrences.com, and the references quoted. For a recent overview of the different positions, *see*, for instance, Swedish Competition Authority, The Pros and Cons of Sustainability Considerations, 30 May 2022.

enable sustainable collaborations (II.). These factual observations neither impede the emergence of sustainable behaviors nor prevent competition authorities from "playing their part". They allow identifying the legitimate needs (III.) and discussing the paths to follow in order to efficiently address these needs (IV.).

II. Discrepancies between the demand for adaptation and the facts

5. In some sectors, market failures are so important that competition cannot bring sustainable outcomes and, as a result, markets cannot move towards sustainability. Regulation is, of course, the right answer to such market failures as it best makes up for them. Nonetheless, regulatory gaps continue to exist, and one cannot only wait for a regulatory move.

6. The following list gives an overview of the behaviors meant to fill these gaps that have been seen in practice in the last months:[8]

- joint production and marketing, for instance, developing common infrastructure in order to reduce the environmental footprint;
- joint purchasing conditions, including those with an extra price to incentivize suppliers to no longer use chemical treatment for their products;
- exchange of information, such as collecting and sharing information on suppliers' methods of production;
- standardization, for example to limit CO_2 emissions;
- collective withdrawal, a good example of which is the exclusion of suppliers that do not respect some animal welfare standards.

7. Competition law is often criticized as being too restrictive to enable collaborations promoting sustainability.[9] In a previous article, we expressed the need for competition authorities to identify the reasons behind this criticism to provide a relevant answer.[10] Two years later, the experience gained by competition authorities and the first collaborations that have been established invite us to moderate the criticism.

8. In order to better understand these limits of competition law and, meanwhile, enable undertakings to implement "positive behaviors" safely, several competition authorities have opened the door to *ex ante* discussions with undertakings.[11] This is the case, in particular, of the ACM,[12] the Hellenic Competition Commission (HCC),[13] the French Competition Authority[14] and the European Commission, which has recently revised its informal guidance for that purpose.[15] So far, two lessons can be learned from such *ex ante* experiences, and the ACM's in particular. The first one is that most cases assessed under *ex ante* individual guidance have been found to be outside the scope of Article 101 of the Treaty on the Functioning of the European Union (TFEU), in particular given the legal and economic context of these cases.[16] Here, the fact that the behavior pursued only a sustainability objective, that it was designed for that purpose only, and, of course, the way it was designed, have been important. The second lesson is that enforcers were only requested to examine a few concrete cases—and much fewer than they expected.[17]

9. In the meantime, despite the criticism that competition law would prevent collaborations between companies promoting sustainable development from being set up, it can be observed that a lot of undertakings have already succeeded in building collaborations, as this is the case, for instance, in the energy sector, but also in the recycling or CO_2 reduction areas.

III. Identification of the legitimate needs

10. Our understanding is that different considerations may have been mixed to construct the above-mentioned criticism. We exclude here what could be subsumed under

8 For a list of concrete examples, *see* in particular, International Chamber of Commerce, White paper, When Chilling Contributes to Warming: How Competition Policy Acts as a Barrier to Climate Action, November 2022, and S. Holmes, Examples of where fear of competition law has inhibited vital action to support net zero and other sustainability goals, 20 December 2021.

9 *See*, for instance, Unilever, Sustainability cooperations between competitors & Art. 101 TFEU, Unilever submission to DG COMP; *see* as well N. Kar, S. Ostrovsky and A. Skarpa, Competition and sustainability: Quantifying the environmental benefits of cooperation, Linklaters, 7 May 2020, https://www.linklaters.com/fr-fr/insights/blogs/linkingcompetition/2020/esg/competition-and-sustainability/quantifying-the-environmental-benefits-of-cooperation, and the contributions in Swedish Competition Authority, The Pros and Cons of Sustainability Considerations, 30 May 2022.

10 S. Martin, U. Berkani and E. Provost, Droit de la concurrence et développement durable : Des opportunités à droit constant, in Développement durable : Quel rôle pour la politique de concurrence ?, *supra* note 7.

11 Other agencies have expertise on sustainable agreements, such as the German Federal Cartel Office (FCO), for instance (*see* in particular cases B2-72/14, B2-87/21 and B2-90/21).

12 ACM, Guidelines on sustainability agreements are ready for further European coordination, 26 January 2021, https://www.acm.nl/en/publications/guidelines-sustainability-agreements-are-ready-further-european-coordination.

13 HCC, Sustainability Sandbox, https://www.epant.gr/en/enimerosi/sandbox.html.

14 *See*, for instance, Fr. NCA, Feuille de route 2022-2023, https://www.autoritedelaconcurrence.fr/sites/default/files/2022-07/feuille-de-route-2_0.pdf.

15 Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters), OJ C 381, 4.10.2022, p. 9.

16 Only one agreement has been considered to fulfill Article 101(3) conditions. *See* ACM, No action letter for the Agreement between Shell and TotalEnergies regarding a joint marketing initiative for CCS services (project Aramis), 27 June 2022.

17 *See*, for instance, M. Snoep, speech, Développement durable et droit de la concurrence, *@Echelle*, 5 December 2022, https://www.autoritedelaconcurrence.fr/fr/article/retrouvez-la-video-du-webinar-echelle-0.

the category of instrumentalization, i.e., situations where competition law is used to justify inaction. The first concern lies in the fact that some undertakings may not fully understand how the existing framework works and how it already allows them to safely adopt sustainable initiatives. This is in particular the case for SMEs but also NGOs that are often requested to participate in, or that are at the origin of, projected collaborations. The second concern encompasses all the situations where undertakings face a real issue as their contemplated behavior presents complex assessments and in particular out-of-market efficiencies that are not fully taken into consideration in competition law so far.

11. In addition, three situations may also explain why only a few projects have been discussed *ex ante* with European agencies so far: (i) some undertakings may have been able to set up collaborations that do not raise issues from a competition law perspective—here, in addition to undertakings that have been able to design cooperations that do not raise any competition issues, we also find undertakings that found a way of circumventing competition law through the state involvement; (ii) some undertakings may be reluctant to discuss with agencies that are also entitled to go after anticompetitive practices, as they are not used to entering into such a relation with them; (iii) some undertakings need a clearer and safer procedural framework to discuss with competition enforcers.

12. To see the whole picture of the topic, it should be mentioned that agencies may legitimately be reluctant to work on "positive behaviors" as this may be outside their traditional competence. Indeed, competition agencies, although willing to support sustainable development, have limited financial and human resources in general, and to invest in *ex ante* discussion on sustainability collaborations in particular. Agencies may also feel they face a twofold legitimacy issue, in terms of expertise, where the analysis requires assessing environmental economics arguments, and with respect to competence, where restrictions of competition need to be balanced with out-of-market efficiencies. Finally, as their involvement in sustainability results from a regulatory gap, competition agencies may also be reluctant to intervene, as it may give a further excuse for public inaction, or because they lack a clear mandate.[18]

18 *See* in particular, J. Tirole, Socially Responsible Agencies, 7 December 2022, https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/by/tirole/socially_responsible_agencies_071222.pdf.

IV. Some thoughts on appropriate responses that could be given

13. Given the legitimate concerns identified above, it seems that three actions could be taken to support undertakings that seek to achieve sustainability objectives: providing clarifications (1.), increasing expertise on complex issues (2.), and providing efficient *ex ante* discussions (3.).

1. The need to clarify what is already possible under competition law

14. In the past few months, several agencies have made significant efforts to explain, in very clear and simple terms, situations where there will be no competition law risk at all, with examples, and to illustrate the most difficult issues in full detail. Here, the work of the ACM must, of course, be mentioned.[19] Chapter 9 of the forthcoming EU Guidelines on horizontal agreements makes it clear that sustainability considerations may fall under competition law, sets out circumstances where cooperation will not raise any competition issues, with easy-to-understand examples,[20] establishes a "soft safe harbor" for standardization agreements, and explicitly states that other guidelines or chapters of the Horizontal Block Exemption Regulations (HBER) are relevant for other types of agreements.[21]

15. This chapter is a very good "first step". Once it is adopted, it will have to be promoted not only by competition authorities but also by the whole competition community to allow everyone to engage in the green transition.

16. While all companies can take initiatives to promote sustainability, in practice they do not need the same support to implement them in a way that complies with competition law. In order to implement this competition law framework efficiently, it will be necessary to target market players and sectors that require priority support from competition authorities. In this respect, the UK Competition and Markets Authority (CMA) underlined, for instance, that it will support SMEs and NGOs active in the field of sustainability.[22] It seems to us that the environmental responsibility teams within companies,

19 ACM, Second draft version, Guidelines on Sustainability Agreements, *supra* note 5.

20 Eur. Comm., Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ("Commission's Draft Guidelines"), C(2022) 1159 final, 1 March 2022, para. 551 *et seq.*

21 Ibid., paras. 547 and 555–558.

22 CMA, Environmental sustainability initiatives and competition law, 27 January 2021.

which are at the center of the green transition but are not experts in competition law, should also be directly targeted. Moreover, the energy sector, the food and the agricultural sectors should also be primarily targeted as these crucial sectors will have to review their production process to enter the green transition.

17. In addition, making public assessment of "real-life" initiatives will contribute to enhancing stakeholders' understanding of what is possible under competition law. It is worth mentioning here that stakeholders can already rely on assessments of fair trade labels,[23] animal welfare conditions,[24] collective purchasing[25] or removal of unnecessary components and collective withdrawal[26] in particular.

2. The need to increase expertise on complex issues

18. At the EU level, the debate on sustainability in competition law has quickly focused on the integration of out-of-market efficiencies into the analysis, and in particular into Article 101(3) TFEU and the "fair share of the resulting benefit for users" criterion.

19. While it is now accepted that a strict position that would require taking into account only in-market gains is no longer desirable, stakeholders disagree on the need for consumers, as such or as citizens, to be fully compensated for the restriction of competition with the efficiency gains.[27]

20. In its forthcoming guidelines, the European Commission provides the clearest analysis of Article 101(3) on that particular point so far: (i) it establishes a clear distinction between in-market efficiency (use and non-use value benefit) and out-of-market efficiency (collective benefit); (ii) it explains that out-of-market efficiencies can only be considered to the extent that they benefit consumers (direct or indirect) in the relevant market; and (iii) it imposes a "full compensation requirement."[28]

21. Interestingly, the European Commission also gives some avenues to explore on quantification or qualitative analyses of such efficiencies[29] and explicitly acknowledges that once further expertise is gained, it will provide more details on such analyses.[30]

22. It is worth mentioning that even though the debate on out-of-market efficiencies is fascinating, situations where true out-of-market efficiencies will be discussed may be rare in practice. Firstly, such situations will only happen when it cannot be established that the sustainability issue is already a competitive parameter, including through quality or reputation, or will be such a competitive parameter in the future—in those cases, if competition among undertakings could be preferable, cooperation will be an appropriate answer in several instances and we should be careful not to impede the adoption of such collaborations with "Type I error" assessments. Secondly, situations with true out-of-market efficiencies will likely be infrequent as undertakings, which are deemed to be rational, that is to say profit maximizers, should ignore pure out-of-market efficiencies in principle.[31] Nonetheless, if it were to happen, and after an assessment of the indispensability criterion, the fair share criterion, whatever its definition, i.e., "full compensation requirement" or other fairness definitions, will have to be assessed.

23. One could then consider that complex issues are not only about integrating out-of-market efficiencies but also, if not more, about the evidence needed to establish that the sustainability issue is (or will be) a competitive parameter and that there is no anticompetitive restriction and, more precisely, about the limits of traditional tools, such as the willingness-to-pay analysis, which does not consider consumers' bias.[32]

3. The need to provide comprehensive *ex ante* discussions

24. Although the draft guidelines are clear and will be promoted to provide more legal certainty to undertakings, parties may wish to have greater legal certainty for complex agreements. To meet this need, no better solution than *ex ante* discussions with competition agencies has been found so far.

23 *See* FCO press release, Achieving sustainability in a competitive environment – Bundeskartellamt concludes examination of sector initiatives, 18 January 2022. See in particular FCO conclusions on living wages in the banana sector (case N°. B2-90/21). *See* as well, Fr. NCA, avis nº 06-A-07 du 22 mars 2006 relatif à l'examen, au regard des règles de concurrence, des modalités de fonctionnement de la filière du commerce équitable en France.

24 *See* in particular FCO press release, Achieving sustainability in a competitive environment – Bundeskartellamt concludes examination of sector initiatives, 18 January 2022. See in particular FCO conclusions on the animal welfare initiative « Initiative Tierwohl » (case N°B2-72/14),and FCO, press release, Increasing animal welfare in milk production – Bundeskartellamt tolerates the introduction of the QM+ programme, 29 March 2022, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/29_03_2022_Milch_Nachhaltigkeit.html.

25 *See* in particular ACM, press release, ACM favors collaborations between businesses promoting sustainability in the energy sector, 28 February 2022.

26 *See* in particular ACM, press release, ACM is favorable to joint agreement between soft-drink suppliers about discontinuation of plastic handles, 26 July 2022; ACM press release, Letter in response to sustainability initiative about reduction of illegal pesticides in garden retail sector, 2 September 2022..

27 On this debate, *see* for instance, M. Snoep, Climate change requires a fresh look on fair and efficient in competition law, speech, 21 June 2022, available at: https://www.acm.nl/en/publications/speech-martijn-snoep-climate-change-requires-fresh-look-fair-and-efficient-competition-law. *See also* the responses to the consultation on the revision of draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines, https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en#contributions-to-the-consultation-on-the-draft-revised-texts.

28 Commission's Draft Guidelines, para. 588.

29 Ibid., para. 589 *et seq*.

30 Ibid., para. 608.

31 *See*, for instance, H. Jenkins, N. Rosenboom, T. Klein and G. Castroviejo, When to give the green light to green agreements, Oxera, 13 September 2021.

32 On such limits, *see*, for instance, Martin, Berkani and Provost, *supra* note 10.

25. Interestingly, it seems that parties do not necessarily need "comfort letter" or equivalent "written detailed position." We already have examples where parties have received guidance in the form of "informal advice" or "press release" only.[33]

26. In the meantime, competition agencies may be very interested in giving such *ex ante* analyses as this will bring them "real-life examples" that are much needed to increase their own expertise. Undertakings should not hesitate to contact agencies to that effect. Moreover, agencies need to make public such guidance to provide examples to third parties.

27. In order to deal with issues arising from sustainability agreements and to provide efficient guidance to undertakings, agencies, which do not have a pre-existing *ex ante* procedure, should consider setting up an ad hoc flexible procedure and prioritizing cases. Otherwise, informal guidance might require substantial agencies' resources, including in order to support the vast majority of agreements that do not raise competition concerns and projects that companies would be able to self-assess. A flexible system that would allow for *ex ante* guidance to targeted sectors and undertakings would be far more efficient.

28. Such a system would address the "trust" issue as well, which is another important question as far as *ex ante* guidance is concerned. Indeed, undertakings may prefer not to contact agencies to discuss sustainability projects to avoid any risk of antitrust investigations. But trust works both ways and agencies may also be reluctant to have a clear open-door policy in order to avoid being instrumentalized. Targeting could help build new and different relationships between agencies and stakeholders.

IV. Conclusion

29. The French competition authority is fully involved in the green transition and has set up sustainability as one of its main priorities[34]. In practice, it has dedicated ressources to investigate cases that may restrict competition and have a negative impact on sustainability. It also regularly provides opinions to the Governement on competition aspects related to green transition regulations. This priority also implies to support undertakings that seek to achieve sustainable objectives. To that extent, promoting what is possible under competition law, increasing expertise on complex issues, and providing *ex ante* discussions with stakeholders when necessary seem to be the ways to follow. ■

33 This is for example the ACM green energy buyer case or the ACM joint agreement between soft-drink suppliers about discontinuation of plastic handles case mentioned above.

34 *See,* for instance, Autorité, Rapport annuel d'activités 2021, July 2022, p. 24 et s.

Economist perspective

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I. Introduction

1. EU climate law has embedded a legal obligation to deliver the EU's climate goal of reducing EU emissions by at least 55% by 2030, with a focus on achieving climate neutrality by 2050.[1] Similarly, the UK aims to reduce emissions by at least 68% by 2030, and reach net zero by 2050.[2] The ongoing imperative to decarbonise is leading to significant investment needs across infrastructure and industry in Europe. In this article, we take the example of investments in energy infrastructure that are required to achieve net zero, and highlight the agility that these require from competition and regulatory authorities. In typically regulated network settings, we observe many instances of how regulators and policymakers are revisiting, and sometimes revising, the traditional boundaries of areas where energy firms compete or collaborate, to facilitate energy transition investments. Similarly, in non-regulated settings, we see that competition authorities are revisiting the extent of cooperation that is desirable in the industry.

II. How to deal with big investments: The role of cooperation in delivering the energy transition

2. The value chain for energy infrastructure is characterised by a high degree of capital intensity. Typically, there is more scope for competition between players in upstream (i.e. generation) and downstream (i.e. energy supply) markets than in network activities. In relation to network activities such as gas and electricity transmission and distribution, the typical market structure in Europe is that of regional natural monopolies. These monopolies are typically subject to regulation by national economic regulators to prevent excessive monopoly prices and/or maintain sufficient quality of service.[3]

3. With the imperative to decarbonise, networks are facing challenging investment needs and a risk of asset stranding (e.g. in the gas sector) in the coming decades. This has led to some tensions in relation to market structure and the design of the energy industry, as overseen by regulators and competition authorities. We see this as arguably leading to a greater need for cooperation in the delivery of energy infrastructure, sometimes at the behest of the regulatory authorities that supervise energy markets. For example:

– more focus by national regulators on the balance between allowing investments to be undertaken as regulated activities by the incumbent networks and opening up the market for competition where possible;[4]

– more competition between networks and other players in the energy market for innovation funding in relation to delivering decarbonisation;[5]

– more focus by policymakers on the scope and incentives for networks and other energy assets to collaborate on delivering decarbonisation via "sector coupling"—such as collaboration between the electricity and gas industries for power-to-gas investments.[6] This recent focus on sector coupling is particularly interesting when contrasted with the historical focus on vertical unbundling in the energy value chain as per the European energy policy architecture.[7]

1 European Council, Fit for 55, 2022, https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition (accessed 18 November 2022).

2 Relative to 1990 levels. Source: HM Government, Net Zero Strategy: Build Back Greener, October 2021, https://www.gov.uk/government/publications/net-zero-strategy (accessed 1 December 2022).

3 *See*, for example, Council of European Energy Regulators, Report on Regulatory Frameworks for European Energy Networks 2021, 31 January 2022, https://www.ceer.eu/documents/104400/-/-/ae4ccaa5-796d-f233-bfa4-37a328e3b2f5 (accessed 18 November 2022).

4 *See*, for example, the discussion on the use of "early-stage" and "late-stage" competition for UK energy network investments in Ofgem, RIIO-ED2 Draft Determinations – Overview Document, 29 June 2022, chapter 10.

5 *See*, for example, Eur. Comm., press release IP/22/6489 of 3 November 2022, Commission invests €3 billion in innovative clean tech projects to deliver on REPowerEU and accelerate Europe's energy independence from Russian fossil fuels, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6489 (accessed 18 November 2022).

6 *See*, for example, Eur. Parl., Sector coupling: how can it be enhanced in the EU to foster grid stability and decarbonise?, study requested by the ITRE committee, November 2018, https://www.europarl.europa.eu/RegData/etudes/STUD/2018/626091/IPOL_STU(2018)626091_EN.pdf (accessed 3 February 2023).

7 *See* Eur. Comm., Third energy package, 2022, https://energy.ec.europa.eu/topics/markets-and-consumers/market-legislation/third-energy-package_en (accessed 18 November 2022).

4. Accordingly, in typically regulated network settings, we observe many instances of regulators and policymakers revisiting and sometimes revising the traditional boundaries of areas where energy firms compete or collaborate, to facilitate energy transition investments. We now examine similar tensions in non-regulated settings, where competition authorities are also revisiting the extent of cooperation that is desirable in the industry. We then focus on a case study in relation to planned collaboration between competing oil and gas conglomerates (Shell and TotalEnergies), in a planned CCS investment project.

5. In non-regulated markets, national competition authorities have also been faced with the question of how to assess the desirability (or otherwise) of collaboration and coordination between competitors. The debate on this has evolved over the past few years and has recently shifted from a question of whether competition law "should" play a role in moving to more sustainable markets, to asking "how" sustainability can be taken into consideration in competition cases.

6. What makes the application of competition law challenging in the context of the energy transition is that it often involves large players in the more traditional markets deciding to enter and develop a new product market. There is a risk that, unless there is a pooling of risks among multiple industry players, or some form of taxpayer support, the necessary investments in decarbonisation will not be undertaken. However, at the same time, there may be a concern about the extent to which incumbent firms are allowed to leverage existing strong market positions in the energy sector to build new segments of the energy value chain—for example, in relation to hydrogen, carbon capture and electrification.

7. We now turn to a recent case study that demonstrates how and why firms seek to coordinate on delivering decarbonisation. The case study, from the Dutch market, relates to the capture, transport and storage of CO_2. It shows how these types of initiatives could be approached from a competition law perspective. The challenges here are the same as those in regulated sectors in that there are high risks due to the substantial levels of investment that are needed in new technology and infrastructure—which firms are hesitant to undertake unilaterally. Furthermore, the case study shows that when this aspect is dealt with under competition law—via a self-assessment of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU)—there are lessons to be learned from regulated sectors in terms of ensuring that an agreement does not eliminate competition in a substantial part of the market in question.

III. Case study: Carbon capture

1. Description of the agreement

8. In June 2022, the ACM published an informal opinion on the proposed collaboration between energy companies Shell and TotalEnergies on the proposed storage of CO_2 in empty North Sea gas fields (Project Aramis).[8]

9. Among other aspects, the agreement involves building a trunkline with a planned capacity of 22 megatons per annum (MTPA) to transport CO_2 and store it in depleted gas fields in the North Sea.[9] The agreement, for which guidance was sought from the ACM, focuses on the first phase for 5 MTPA, and would unlock Project Aramis as a whole, including its subsequent competitive phase (the remaining 17 MTPA). The amount of 5 MTPA that is covered by the first phase is based on the required return on investment as well as the capacity that is available in the short run in the depleted gas fields.

10. In this case study, we discuss two of the four cumulative criteria of the self-assessment under Article 101(3) TFEU: indispensability, and reducing the risk of eliminating competition. The other two criteria concern the benefits of the agreement, and the transfer of a fair share of those benefits to customers. As part of the self-assessment, the ACM considered the fair share criterion and decided that, in this case, a quantitative analysis of cost versus benefits was not applicable. The authority did consider that, "*based on a rough estimate, the sustainability benefits clearly outweigh the costs.*"[10]

2. Indispensability as part of the 101(3) TFEU self-assessment

11. Indispensability is one of the cumulative criteria of Article 101(3) TFEU. In short, this means that the criteria of Article 101(3) are met only if the restrictions that are caused by the agreement are needed (indispensable) in order to achieve the efficiency gains generated by the (green) agreement.[11]

8 ACM, press release, ACM: Shell and TotalEnergies can collaborate in the storage of CO2 in empty North Sea gas fields, 27 June 2022. Oxera has been supporting the parties on this matter. All information on the case that is provided here is available in the public domain.

9 ACM, No action letter for the Agreement between Shell and TotalEnergies regarding a joint marketing initiative for CCS services (project Aramis), 27 June 2022, https://www.acm.nl/system/files/documents/no-action-letter-agreement-shell-and-totalenergies-regarding-storage-of-co2-northsea.pdf (accessed 29 November 2022).

10 Ibid.

11 The full text of Article 101 TFEU states that paragraph 1 can be declared inapplicable if (among other factors) the agreement does not "*impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives*" (Art. 101(3) TFEU).

12. There are, broadly speaking, three reasons why an agreement might be considered indispensable (see Figure 1):

– there is a (risk of) first-mover disadvantage;

– there are substantial levels of required investment;

– there are high investment risks.

13. These factors can prevent companies from pursuing sustainability goals unilaterally. In such circumstances, cooperation could reduce these hurdles, in which case the agreement could be assessed as being indispensable.

Figure 1. Reasons for an agreement to be indispensable

Source: Oxera

14. First, in relation to the first-mover disadvantage, the European Commission acknowledges that this may be what makes an agreement indispensable.[12] This point relates to the difficulty of "going it alone." If you are a firm with green ambitions, competition can be an obstacle. By adopting a more environmentally friendly production technology, for instance, you might reduce your greenhouse gas emissions, but you are also likely to increase your costs. If your competitors do not share your green ambitions, you risk ending up at a competitive disadvantage. This could reduce your profitability and perhaps even your long-term financial sustainability if your customers do not recognise and fully value your green solution, such that part of your investment is left "stranded." Note that asset stranding, and the risk of asset stranding, is a common problem in regulated network settings such as those in the telecom industry and in the gas industry. Solutions to network asset stranding have often focused on mechanisms to accelerate the timing of recovery of cash flows (regulated revenues) that networks can include in their tariffs. The aim of this is to recompense investors for past investments that may be stranded before they are fully depreciated.[13]

15. Second, regarding the level of required investment, the parties argue that the investments and risks associated with Project Aramis are significant as they are worth several billion euros, including for the planned high-capacity trunkline. The required investments would be too great for the companies to take on unilaterally.[14] By collaborating, the parties would be able to service the larger combined market through multimodal infrastructure (for both gaseous and cryogenic CO_2), instead of each of them focusing on one form of CO_2 transport and storage, or potentially duplicating infrastructure if each of them sought to separately serve both types of CO_2.

16. The ACM recognised in this case that "[n]*either of the Parties is currently independently able to reach 5 MTPA of storage capacity by relying on additional fields, without adding considerable costs and/or within the required time frame, as the other fields owned by the Parties are either: (i) too far away, (ii) still in gas production, or (iii) more complex to use so the operation would be more costly*."[15]

17. Third, regarding the risks involved in Project Aramis, the parties consider that the agreement is necessary to allow them to "*acquire sufficient production resources and scale in order to create Project Aramis, and the associated sustainability benefits, and to reduce the risks involved in deploying integrated technology for processing gaseous and cryogenic* CO_2 *for the first time* (. . .) *it secures the operational and financial resilience of the project and thereby reduces risks*."[16]

18. The novel nature of the technology involved—the project involves "*deploying integrated technology for processing gaseous and cryogenic* CO_2 *for the first time*"[17]—also brings significant financial risks. By coordinating their plans, the parties are seeking to create some redundancy in the system that reduces these risks, for example in terms of CO_2 leakage.

19. The ACM agrees, and concludes that the agreement "*will create efficiency gains as required by* (...) *Article 101(3) TFEU in terms of costs savings by avoiding infrastructure duplication, offering economies of scale and scope and reducing risk while creating an innovative market for CCS services in the Netherlands*."[18]

20. Based on its assessment of the information provided by the parties, the ACM considered that it was likely that the restrictions of competition as a result of the agreement are indispensable.

3. Reducing the risk of eliminating competition

21. Another criterion in the self-assessment under Article 101(3) TFEU concerns the question of whether the agreement eliminates competition in a substantial part

12 Eur. Comm., Annex to the Communication from the Commission, Approval of the content of a draft for a Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, ("Draft Horizontal Guidelines"), C(2022) 1159 final, 1 March 2022, para. 584.

13 *See*, for example, discussion on asset stranding risk in Ofgem, RIIO-2 Sector Specific Methodology, 18 December 2018, section 7, https://www.ofgem.gov.uk/sites/default/files/docs/2019/01/riio-2_sector_methodology_0.pdf (accessed 24 November 2022)

14 "*The Parties argue that the investments and risks associated with Project Aramis are significant. The investment of several billion Euros in Project Aramis, including the planned high-capacity trunkline* (. . .)"(ACM, No action letter, *supra* note 9.)

15 Ibid.

16 Ibid.

17 Ibid.

18 Ibid.

of the market for the products in question. There is no hard threshold for the minimum level of market share of the remaining players in the market—i.e. those that are not part of the agreement.

22. Accordingly, this section focuses on measures that parties to an agreement, or competition authorities, can consider implementing to ensure that there is sufficient competition left after the agreement. Below we set out three examples of measures to dampen the anticompetitive risk of the agreement. These could be considered in the case of new markets/products that are created as part of the energy transition and decarbonisation.

23. A number of these measures have parallels in regulated settings and could also help to decrease risk in non-regulated contexts. Arguably, agreements that implement one or more of these measures could be seen as self-regulation agreements.

24. One option is to restrict the cooperation (and hence the agreement) to the start-up phase. The first-mover disadvantage, as well as the risks and the investments needed, all materialise at (or rather, just before) this stage. Allowing coordination at this point, therefore, helps to overcome these hurdles, and as such helps to unlock the market and get the product onto the market. This enables parties to understand user or consumer behaviour and acquire an initial base of users or consumers, which will help in further developing the product or building the market. After that period, parties can return to competing on aspects such as pricing or marketing. This limits the reduction in competition to the first period of an investment in new technologies or markets. This period could be expressed in terms of time (e.g. a number of months or years) or in terms of capacity. The latter was the case for the *Shell/TotalEnergies* agreement, which related only to the first 5 MTPA of the total 22 MTPA capacity.

25. During the start-up phase, Shell and TotalEnergies argued that they required certainty about a minimum level of capacity booking of at least 5 MTPA. This was due to investments and risks associated with Project Aramis: "*The joint tariff is offered by the Parties for CCS services until the 5 MTPA is fully booked. It is the Parties' priority to book the Launching Volume of 5 MTPA in order to underpin the investment of Project Aramis as a whole.* (. . .) *In a second phase of Project Aramis the remaining capacity of the trunkline in excess of the Launching Volume of 5 MTPA will be used by the Parties and third parties to supply CCS services in competition with each other*."[19]

26. For this measurement to work, it is important that a system is in place that ensures that the parties involved do not exchange information on costs that could inform their price setting after the start-up phase.

27. A second measure that can help to develop the market into a competitive market once it matures is a system that allows for knowledge-sharing. This approach has been taken in regulatory settings where sharing knowledge is one of the conditions for receiving a portion of the innovation funding allowances for delivering the energy transition. For example, in the UK, Ofgem's Network Innovation Competition has, in recent years, awarded funding to networks based on the criteria that the funded investments "*accelerate the development of a low-carbon energy sector and/or deliver environmental benefits*," as well as "[c]*reate knowledge that can be shared across energy networks in Great Britain (GB) or create opportunities for roll-out across a significant proportion of GB networks*."[20]

28. Related to this, note that the advantages of learning by doing in the context of delivering innovative investments and opening up new markets may accrue to other parties and other geographical markets. This means that other parties that are considering entering the new market can benefit from the new project that is the focus of the agreement. In other words, investments and innovations in decarbonisation can confer positive externalities on the energy system, the wider economy, and society.

29. Depending on the context, the role played by early movers could be important in accelerating the technical learning curve. As such, successful development of a new product or new market would gradually reduce technological risks and boost investor confidence in the sector, which would, in turn, increase the deployment of similar projects. In the long run, this increase in deployment could lead to decreased costs and reduce risk-adjusted return requirements, lowering the costs to all future customers and making such projects more appealing to investors with a lower risk appetite.

30. From past technology-driven sector developments with high initial investment, we know that maturing the technology can considerably reduce the costs of the product. For example, there is evidence of long-term cost reductions resulting from maturing technologies in the solar PV and wind markets. A 2022 IRENA report found that the prices for solar modules and wind turbines fell by up to 93% and 39%, respectively, between 2010 and 2020.[21] The price drop for solar modules was due largely to improved module efficiencies and the use of cheaper materials in innovative designs; the price drop for wind turbines was driven by technological improvements and increases in turbine size with larger swept areas, which led to improved turbine efficiencies.[22] The same study estimates that the levelised cost of electricity for onshore wind has reduced by 56% over the same period, with additional savings coming from balancing costs.[23]

31. In a final example, we move beyond considering the competitive interaction between parties to considering safeguards against anticompetitive behaviour of the

19 Ibid.

20 There are also other criteria for Network Innovation Competition funding, as summarised in National Grid, Network Innovation Competition (NIC), https://www.nationalgrid.com/gas-transmission/insight-and-innovation/transmission-innovation/network-innovation-competition-nic (accessed 24 November 2022).

21 IRENA, *Renewable Technology Innovation Indicators: Mapping progress in costs, patents and standards*, International Renewable Energy Agency, Abu Dhabi, 2022, at 14 and 87.

22 Ibid. at 9 and 85.

23 Ibid. at 85.

parties in relation to their customers. In the case of a new product with high risk and high levels of investment, the price set when entering the market may be high compared with how it might evolve at a later stage (for example, see the point above in relation to decreased costs over time for renewables). Accordingly, customers who sign up for the product at the point of market entry may pay a higher price than customers who sign up later. One way to guarantee that the customers who signed up in the start-up phase are not penalised for helping to unlock the market is to offer them a price reduction in line with future customers. This would mean—via an effective pass-on clause—that parties are prevented from reaping excessive prices from the early customers once market prices decline. Note that this is relevant only for products or services that are purchased as part of a longer-running contract, and not for products that are bought on a one-off basis. We note that this measure was adopted in the *Shell/TotalEnergies* agreement: "*Any resulting subsequent material decrease in tariffs for storage or transport is passed on to the Launching Emitters regarding the first phase, based on a pass-on clause in their contract for CCS with the Parties*."[24]

32. In the case of agreements that involve building or investing in network infrastructure, a measure can be put in place to allow parties that are not part of the initial agreement to benefit from access to the network as well. Relevant network assets for which it may be desirable to ensure that access is not foreclosed include a recycling network, a pipeline for new fuel, and any other type of new infrastructure (such as the CO_2 pipeline in the *Shell/TotalEnergies* case). To allow for competition in the market, once the network is in place, parties can be required to provide access to third parties. In this way, third parties benefit from the spillovers from the agreement and face a level playing field in using the network relative to the parties that formed the agreement. For the parties involved, it may be beneficial to agree to provide network access to future parties if this is a way of resolving the first-mover disadvantage. For instance, this would be the case where the parties involved are vertically integrated and can benefit from using the new network.

33. A good example is the collaboration between Shell and TotalEnergies in Project Aramis. The commitment to provide open access to third parties is part of the agreement, specifically to ensure sufficient competition with other suppliers of CO_2 storage. That means that, after the initial start-up phase with 5 MTPA, "[i]*nterested third parties will obtain regulated access on fair, open and non-discriminatory terms to the infrastructure of Project Aramis based on the Dutch Mining Act*."[25]

34. A second measure that can have the same pro-competitive effect, but can be applied to situations that do not involve access to network infrastructure, relates to a vertically integrated firm or firms that are part of the agreement. To prevent anticompetitive behaviour between the vertically integrated firm and its downstream competitors (which are not part of the agreement), a competition authority could impose equal rights to access or purchase the upstream products. Hence, by ensuring that the vertically integrated firm has no priority rights over the upstream product, the risk of anticompetitive issues downstream reduces.

IV. Conclusion

35. With the imperative to decarbonise, networks will face challenging investment needs and risks of asset stranding in the coming decades. This has led to some tensions in relation to the market structure and design of the energy industry, as overseen by regulators and competition authorities. In some cases, we see this as supporting an increased need for cooperation in the delivery of energy infrastructure.

36. Accordingly, in typically regulated network settings, there are many examples of how regulators and policymakers are revisiting, and sometimes revising, the traditional boundaries of areas where energy firms compete or collaborate, to facilitate energy transition investments. We see similar tensions in non-regulated settings, where competition authorities are also revisiting the extent of cooperation and coordination that is desirable in the industry.

37. As a case study of how and why firms seek to coordinate in delivering decarbonisation, we have discussed the planned cooperation of Shell and TotalEnergies in the Dutch market. This example relates to the capture, transport and storage of CO_2. The same challenges exist here as in regulated sectors, in that there are high risks due to the substantial levels of investment needed in new technology and infrastructure—which firms are hesitant to undertake unilaterally. These risks and required investments were the reason why the cooperation was indispensable in the context of Article 101(3) TFEU. Furthermore, the case study shows that, when this is dealt with under competition law, there are lessons to be learned from regulated sectors to ensure that the agreement does not eliminate competition in respect of a substantial part of the market in question. Examples of measures that could be considered are:

– limiting the scope of the cooperation to the start-up phase;

– putting a system in place to share knowledge;

– adding a pass-on clause when prices decrease when the market matures;

– allowing open access to third parties. ■

24 This is also known as a first-nation clause or most-favoured-nation clause (MFN). ACM, No action letter, *supra* note 9.

25 Ibid.

Sell green downstream: Sustainable dual pricing and competition law

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I. Introduction

1. Recent literature has made a strong case for why sustainability considerations should play a larger role in competition law.[1] Competition authorities' rulemaking has already followed suit in certain instances.[2] At the same time, this development encounters critique that deserves to be taken seriously.[3] On a fundamental level, the—necessary—debate will continue. However, even regarding the existential question of how our societies and economies manage to become more sustainable, the devil can be in the detail. To what extent should competition law pursue a more sustainable approach (MSA) in a particular setting? Do current, detailed rules in secondary and tertiary[4] EU law already allow for such an approach in their respective fields of application? Where does an MSA require adjustments to them? These questions require a granular analysis of individual settings and practices.

2. The present contribution limits its ambitions to such an individual setting, namely, online/offline wholesale price differentiation in vertical distribution. In a prototypical setting, a producer of consumer goods (P) considers selling this good at different prices to its distributor (D) depending on whether resale by this distributor will take place online[5] or offline.[6] The price difference is intended to account for differences in the sustainability of the distributors' respective retail activities. Contractually, and through appropriate auditing, P ensures that goods priced for online distribution are not sold offline, and vice versa, so that inter-channel arbitrage does not level the price difference.

3. At first sight, it seems not evident why suppliers should engage in sustainability-oriented dual pricing at all. However, a more sustainable value chain for the supplier's products as a whole, achieved because dual pricing induces a shift of transactions towards the more sustainable distribution channel(s), can, for instance, help the supplier to fulfil CO_2 reduction goals or similar obligations. Reputational effects, and their positive impact on market success, may come into play as well. Monetary incentives to distribute more sustainably can, to give a final example, be part of a more general strategy to drive "green," but also commercially rational, innovation along the value chain.

1 Cf. e.g. S. Holmes, Climate Change, Sustainability, and Competition Law, *J. Antitrust Enforc.*, Vol. 8, Issue 2, 2020, pp. 354–405; S. Holmes and M. Meagher, A Sustainable Future: How Can Control of Monopoly Power Play a Part?, 2022; ClientEarth and S. Holmes, Horizontal agreements between companies: Revision of EU competition rules, ClientEarth and Simon Holmes' contribution to the Commission's consultation, 2021; K. Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist*, Random House Business Books, New York, 2017; M. Meagher, *Competition is Killing Us: How Big Business is Harming Our Society and Planet – and What To Do About It*, Penguin Business, London, 2020; J. M. Newman, The Output-Welfare Fallacy: A Modern Antitrust Paradox, *Iowa L. Rev.*, Vol. 107, Issue 2, 2022, pp. 563–619; T. Philippon, *The Great Reversal: How America Gave Up on Free Markets*, Harvard University Press, 2019; M. C. Iacovides and C. Vrettos, Falling through the cracks no more? Article 102 TFEU and sustainability: the relation between dominance, environmental degradation, and social injustice, *J. Antitrust Enforc.*, Vol. 10, Issue 1, 2022, pp. 32–62.

2 ACM, Draft guidelines 'Sustainability Agreements', 9 July 2020; Eur. Comm., Draft guidelines on the applicability of Article 101 of the Treaty on the Functioning of the EU to horizontal cooperation agreements (2022); ACM and HCC, Technical Report on Sustainability and Competition, January 2021; OECD, Sustainability and Competition – Note by Greece, DAF/COMP/WD(2020)64, 3 November 2020; CMA, Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government, Correspondence, 14 March 2022; Bundeswettbewerbsbehörde, Leitlinien zur Anwendung von § 2 Abs 1 KartG auf Nachhaltigkeitskooperationen (Nachhaltigkeits-LL), September 2022. Further *also* P. Jansen, S. J. Beeston and L. Van Acker, The sustainability guidelines of the Netherlands Authority for Consumers and Markets: an impetus for a modern EU approach to sustainability and competition policy reflecting the principle that the polluter pays?, *ECJ*, Vol. 18, Issue 2, 2022, pp. 287–327.

3 Cf. M. P. Schinkel and Y. Spiegel, Can Collusion Promote Sustainable Consumption and Production?, *International Journal of Industrial Organization*, Vol. 53, 2017, pp. 371–398, at 374ff.; L. Hancher and P. Lugard, Honey, I Shrunk the Article! A Critical Assessment of the Commission's Notice on Article 81(3) of the EC Treaty, *ECLR*, Vol. 25, Issue 7, 2004, pp. 410–420; G. Piscitelli and Gerbrandy, The Sustainability Dilemma in Competition Law, *ecdpm Great Insights*, Vol. 8, Issue 1, 2018/19, pp. 19–21, at 19ff.

4 "Secondary law" is used here to designate binding EU competition law outside the treaties, such as the Vertical Block Exemption Regulation. "Tertiary law" designates guidance that the EU Commission has published on its application of EU competition law, without such guidance being—technically, notwithstanding its factual importance—binding on undertakings, e.g. the Commission's Vertical or Horizontal Guidelines.

5 Meaning that the distributor sells the goods to its customers via an online shop and subsequently has the goods delivered to their location.

6 Meaning that the distributor sells the goods to its customers in a brick-and-mortar shop, with or without subsequent home delivery.

4. Given that it may, for these reasons, become a rational choice that suppliers increasingly take, part II of this contribution assesses how such a pricing scheme would fare under current EU competition law. Part III summarizes the results of this conduct-specific MSA feasibility test and briefly reflects on how supplier market dominance may alter it.

5. In spite of its bounded starting point, the reader must bear with certain further limitations of this exercise. In particular, it focuses on the environmental damage[7] component of sustainability (with the carbon footprint being an important parameter) and refers—for delineation attempts regarding this fuzzy concept—to previous literature.[8] EU competition law forms the framework of reference, with only selective looks at Member State laws and disregard of competition rules outside the European Union.

II. Sustainability-oriented dual pricing absent market dominance

1. Dual pricing under the (recast) EU vertical distribution rules

6. "Dual pricing" is the label most frequently used in EU competition law terminology for settings in which a supplier prices its products differently depending on whether the distributor intends to sell them online or offline to downstream customers.[9] According to its vertical distribution rules in force until June 2022, EU competition law was very critical towards such arrangements. The Vertical Guidelines[10] even regarded them as hardcore restrictions on passive resales[11] since they attributed to them the capacity "*to limit the distributor's access to a greater number and variety of customers*."[12] This negative assessment also extended to more indirect distinctions in distributors' input prices, such as rebates granted only for transactions in either of the distribution channels.[13] The Commission accepted, however, fixed fees a supplier would pay to support its distributor's sales efforts via a particular channel.[14]

7. A key reason for this restrictive approach was the Commission's concern that dual pricing (and certain other vertical arrangements)[15] could serve to deliberately hamper online distribution and weaken its competitive potential, especially in order to protect territorial sales restrictions on distributors.[16] Fact-finding in preparation for the 2022 V-BER and V-Guidelines, and possibly also the critique levelled by scholars and practitioners against its rigid position,[17] convinced the Commission, however, "*that online sales have developed into a well-functioning sales channel that no longer requires special protection relative to offline sales channels.*"[18]

8. Nonetheless, the 2022 V-BER[19] and V-Guidelines[20] (jointly hereinafter "V-Rules") give no carte blanche for dual pricing, which is convincing because the practice does affect the downstream price competition between (distributors in) different sales channels.[21] However, the V-Rules treat dual pricing no longer as a hardcore restriction. Under certain conditions, the practice can—if the parties' market shares are below the V-BER thresholds (Art. 3 V-BER)—now profit from the block exemption (Art. 2(1) V-BER) "*as it may incentivise or reward an appropriate level of investments in online or offline sales channels.*"[22] "*However, where the difference in the wholesale price has the object of preventing the effective use of the*

7 ACM, Guidelines on Sustainability Agreements, 2021, para. 8, define environmental damage as "*damage to the environment in the production and consumption of goods or services*," resulting, for instance, "*from the emission of harmful air pollutants and greenhouse gases, and from the waste of raw materials.*"

8 UN, Report of the World Commission on Environment and Development: Our Common Future (Annex to UN document A/42/427 – Development and International Co-operation: Environment) ("Brundtland Report"), 4 August 1987, chapter 2, 37; J. H. Spangenberg, Economic sustainability of the economy: concepts and indicators, *International Journal of Sustainable Development*, Vol. 8, Issue 1–2, 2005, pp. 47–64, at 48ff.; S. E. Shmelev, *Ecological Economics: Sustainability in Practice*, Springer, Berlin, 2012, at 5ff.; P. E. Hardisty, *Environmental and Economic Sustainability*, Routledge, New York, 2019, 10ff., 17ff.; OECD, *Guidance on Sustainability Impact Assessment*, OECD Publishing, Paris, 2010; OECD, OECD work on Sustainable Development, February 2011; RNE, Nachhaltiges Wirtschaften und Sustainable Finance; L. Münch, Ökonomische Nachhaltigkeit: Warum alle darüber reden!, 5 February 2020.

9 *See*, for instance, Eur. Comm., Explanatory note on the new VBER and Vertical Guidelines, at 4.

10 Eur. Comm., Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1 (hereinafter "2010 V-Guidelines").

11 Ibid., para. 52(d).

12 Ibid., para. 52.

13 MüKoEuWettbR/Wagner-von Papp GWB § 1 Rn. 434.

14 2010 V-Guidelines, para. 52.

15 Cf. ibid., para. 52(a)–(c).

16 S. Pautke and J. Billinger, Doppelpreissysteme: Ausgewählte Rechts- und Anwendungsfragen zur Entscheidungspraxis des Bundeskartellamtes, *ZWeR* 2016, pp. 40–65, at 43, also regarding the potential of certain dual pricing arrangements to effectuate resale price maintenance.

17 Ibid., 48ff.; A. Rinne and K. Kolb, Beschränkung des Internet-Vertriebs durch Funktionsrabatte?, *NZKart* 2015, pp. 377–382, at 378ff.; ACM, Contribution to the public consultation on the review of the competition rules applicable to vertical agreements, 28 September 2009, at 3; ACM, ACM's strategy and enforcement priorities with regard to vertical agreements, 20 April 2015; Opinion AG Wahl, 27 March 2014, *Groupement des cartes bancaires (CB) v. European Commission*, case C-67/13 P, EU:C:2014:1958, para. 56; EuroCommerce, Contribution to the Commission roadmap on the revision of the Vertical Block Exemption Regulation, 6 December 2018; European Distribution Lawyers, Evaluation of the VBER 330/2010, 4 December 2018; Eur. Comm., Evaluation of the Vertical Block Exemption Regulation, 8 September 2020, at 100ff.

18 Eur. Comm., Explanatory note on the new VBER and Vertical Guidelines, at 4.

19 Commission Regulation (EU) 2022/720 of 10 May 2022 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, OJ L 134, 11.5.2022, p. 4 (hereinafter "V-BER").

20 Communication from the Commission, Commission Notice, Guidelines on vertical restraints, OJ C 248, 30.6.2022, p. 1 (hereinafter "2022 V-Guidelines").

21 For this reason, it would also not be wise to see sustainability-oriented dual pricing entirely outside the scope of Article 101 TFEU, cf. ACM, Guidelines on Sustainability Agreements, para. 18 *et seq*.

22 2022 V-Guidelines, para. 209.

internet by the buyer to sell the contract goods or services to particular territories or customers, it is a hardcore restriction within the meaning of [Art. 4(e) V-BER]. *This would, in particular, be the case where the difference in the wholesale price makes selling online unprofitable or financially unsustainable, or where dual pricing is used to limit the quantity of products made available to the buyer for sale online. Conversely, dual pricing can benefit from the exemption provided by* [Art. 2(1) V-BER] *where the difference in the wholesale price is reasonably related to differences in the investments and costs incurred by the buyer to make sales in each channel.*"[23]

9. The language of the 2022 V-Guidelines can be understood to put dual pricing in favour of online or offline sales on an equal footing. A supplier may, accordingly, "*incentivise or reward*" either online or offline sales. A contextual interpretation of the Guidelines, their legislative history, and a look at their 2010 predecessor show, however, that their main focus lies on dual pricing which may (unduly) disfavour online sales, i.e. lower prices or higher rebates for goods intended for offline sales.

2. Web shops save the climate (?)

10. A sustainability perspective forces us to question many cherished convictions. The esteem for local brick-and-mortar shops may be one of them. In fact, several recent studies indicate that online distribution tends to be "greener"—especially regarding its carbon footprint—than offline sales. The core reason seems to be that online distribution avoids emissions created by the on-site shop and by customers' journeys to and from that shop,[24] while using relatively efficient, and thus sustainable, transport methods[25] from the distribution base to the customers (last-mile delivery).[26] However, researchers also underline that such comparative analyses are highly fact-sensitive and that they fluctuate over time.[27] Indeed, factors like product characteristics, the way storage at the distribution base and shipping to the customer are organized, packaging and return rates, or changing mobility habits of brick-and-mortar customers, can lead to settings in which offline beats online distribution regarding the sustainability score.[28]

11. Of course, judgments on the preferability of online or offline distribution become much more complicated when they also consider other sustainability aspects, or broader notions of public interest, such as the disadvantages (certain members of) communities suffer from losing their local shopping infrastructure. The present contribution neither lobbies for online sales platforms nor denies all the qualifications and counterarguments that the above findings engender. However, these findings permit us to continue our legal discussion based on the assumption that a supplier may be justified to pursue a pro-sustainability strategy of fostering online instead of offline distribution. Do EU competition law's dual pricing rules leave room for such a strategy?

3. Sustainability as a dual pricing criterion

12. As said, the wording of the V-Guidelines permits, in principle, price distinction in favour of either online or offline sales. Consequently, a different—namely lower—"*wholesale price for products sold online than for products sold offline* (. . .) *can benefit from the* [block exemption]."[29] Sustainability pricing does not, in and of itself, have "*the object of restricting sales to particular territories or customers*," thus steering clear of the prohibitions in Article 4(b)–(d) V-BER, para. 209 (1) V-Guidelines. Evidently, pro-online pricing complies, rather than conflicts, with the V-Rules' traditional focus of protecting online distribution against attempts to prevent "the effective use of the internet" (Art. 4(e) V-BER, para. 209 (2), (3) V-Guidelines).

13. Even absent objectives scorned by Article 4(b)–(e) V-BER, suppliers are not at liberty now to favourably price goods for online resale. The V-Guidelines stipulate that the justification for dual pricing lies in incentivizing or rewarding the distributor's "*appropriate level of investments*" in the respective sales channel (para. 209 (1) V-Guidelines) and that dual pricing can benefit from a block exemption "*where the difference in the wholesale price is reasonably related to differences in the investments and costs incurred*" to make sales in the respective channel (para. 209 (4) V-Guidelines). The V-Guidelines fail to clarify whether the—as it were—appropriate investment criterion in para. 209 (1) V-Guidelines and the reasonable relation criterion in para. 209 (4) V-Guidelines constitute strict requirements that a dual pricing must meet in order to enjoy block exemption or whether they rather exemplify settings in which the block exemption seems appropriate. In any case, a supplier sailing for the V-BER's safe harbour seems well advised to navigate towards these two landmarks.

14. In their primary, traditional meaning, both criteria aim at a correlation between distribution investments and input prices. Offline distribution can, for instance, require higher investments in well-located premises, trained sales personnel, or an attractive presentation of

23 Ibid. (references omitted).

24 E.g. T. Zimmermann, R. Memelink, L. Rödig, A. Reitz, N. Pelke, R. John and U. Eberle, *Die Ökologisierung des Onlinehandels: Neue Herausforderungen für die umweltpolitische Förderung eines nachhaltigen Konsumsi*, Teilbericht I, Umweltbundesamt (German Federal Environment Agency), 2020, at 26ff.

25 Cf. N. Kampffmeyer and C. Gensch, Nachhaltiger Konsum durch Digitalisierung?, Öko-Institut Working Paper 4/2019, at 16; D. Schöder, F. Ding and J. K. Campos, The Impact of E-Commerce Development on Urban Logistics Sustainability, *Open J. Soc. Sci.*, Vol. 4 No. 3, 2016, at 3.

26 Cf. J. B. Edwards, A. C. McKinnon and S. L. Cullinane, Comparative analysis of the carbon footprints of conventional and online retailing: A "last mile" perspective, *Int. J. Phys. Distrib. Logist. Manag.*, Vol. 40, No. 1/2, 2010, pp. 103–123.

27 E.g. Zimmermann et al., *supra* note 24, at 26–40; Schöder et al., *supra* note 25, at 5.

28 Ibid.

29 2022 V-Guidelines, para. 209 (1).

on-shelf goods. The V-Rules permit compensation for this investment cost delta (vis-à-vis online distribution) through, e.g. rebates on goods for offline sales.[30] Lower prices for online resale goods, reflecting the sales channel's preferable environmental footprint, do not readily square with this logic. "Appropriate investments" is a broad term, arguably amenable to an MSA reading that considers investments appropriate, and thus worthy of compensation, where they enhance sustainability. However, in prototypical settings, the distributor's actual investments necessary for online resale tend to be lower than those necessary for offline distribution. Supplier prices reflecting this delta would, hence, have to be higher, or in any case not lower for online than for offline resale goods. A figuring in of negative externalities, as suggested for sustainability-oriented price-cost calculations,[31] would aggravate the problem, if and because offline distribution generates stronger externalities and would, thus, become even more costly, relative to online distribution.

15. It seems, therefore, that an MSA to dual pricing would have to overcome a traditional reading of the reasonable relation criterion in para. 209 (4) V-Guidelines—if understood as a strict requirement—or at least complement it with a criterion that permits sustainability-oriented incentivisation. The fact that sustainability considerations are codified in the EU treaties and the Charter of Fundamental Rights,[32] i.e. on a level way above the non-binding V-Guidelines in the hierarchy of EU law, would support such modifications. The Commission itself acknowledges, in its Draft Horizontal Guidelines,[33] sustainable development as a core principle and priority objective for EU policies and its own practice.[34] Nonetheless, the Commission would not be free to deviate at once from its V-Guidelines, which do not bind third parties but do have a self-binding effect on the Commission's application of the V-BER.[35] Given how important the V-Rules are as a guidance for lawful vertical distribution, a clear modification of their dual pricing language would, in any case, seem preferable over a mere reinterpretation, while also allowing for modified Commission practice.

4. Dual pricing modalities

16. If it turns—in particular through an explicit amendment of the V-Rules—sustainable dual pricing into a reliably permissible business option, the law must take precautions to ensure that such a step reaches its intended goals. Two of these precautions concern the verification of a distribution channel's sustainability and a recast version of the V-Guidelines' reasonable relation—one could also call it proportionality—criterion.

4.1 Verifying sustainability

17. Determining and comparing the "true" environmental footprint of business activities is a highly fact-sensitive, complex, possibly even daunting task.[36] With their current setup, competition authorities are in no position to competently evaluate distribution channels for their sustainability. Nor does it seem feasible or efficient to inflate them into a combination of competition and environmental agencies. Nonetheless, competition law must avoid false negatives resulting from the non-enforcement of its V-Rules against dual pricing arrangements that use sustainability as a mere smokescreen that hides their true anti-competitive objectives. A sort of collaborative sustainability onus seems to be promising in this respect. It would oblige the supplier to establish—and show to courts and authorities in case of proceedings[37]—which sustainability achievements justify the dual pricing preference given to a particular distribution channel. In many cases, the supplier will not be able to make such assessments in-house, for lack of resources (skilled staff, specific software, etc.) and data on a distributor's environmental performance. It can, however, contractually oblige the distributor to submit the necessary data to a specialized service provider that evaluates the distributor's sustainability.[38] As a welcome side effect, this triangular structure, in combination with a nondisclosure obligation on the service provider, may help avoid risks to competition resulting from a direct exchange of sensitive business information between the supplier and the distributor.[39] Where the sustainability assessment condenses into a score or label,[40] it has the potential to permit swift identification and comparison of distribution activities that deserve, to varying degrees, preferential pricing. Sustainability-related scores or labels do already

30 A. C. Wegner, B. Schwenker and S. Altdorf, Die neue Vertikal-Gruppenfreistellungsverordnung (EU) 2022/720 nebst Vertikal-Leitlinien – Kontinuität und Umbruch in der Vertriebspraxis, *ZWeR* 3/2022, pp. 243–283, at 273ff.

31 Holmes and Meagher, *supra* note 1, at 7; Holmes, *supra* note 1, at 399.

32 Cf. Iacovides and Vrettos, *supra* note 1, at 40, on Articles 11, 191 TFEU, Article 37 Charter of Fundamental Rights; Draft Horizontal Guidelines, para. 542, on Article 3 TEU.

33 Draft Horizontal Guidelines.

34 Ibid., para. 542, also with reference to the UN sustainable development goals and the European Green Deal.

35 Wegner et al., *supra* note 30, at 248; For more regarding the self-binding effect of soft law in EU competition law, *see* A. Kallmayer, Die Bindungwirkungen von Kommissionsmitteilungen im EU-Wettbewerbsrecht - Mehr Sicherheit durch Soft Law? in *Herausforderungen an Staat und Verfassung*, C. Calliess (ed.), Nomos Verlagsgesellschaft, 2015, pp. 662–681, at 664; S. Thomas, EuR 3/2009, 423, at 424.

36 M. Zimek and R. J. Baumgartner, Sustainability Assessment and Reporting of Companies, (2020) 2 *et seq.*

37 On the burden of proving pro-sustainability, cf. ACM, Guidelines on Sustainability Agreements, para. 32. On how to fulfil the substantiation requirement, *see* ibid., para. 39 *et seq.*

38 On the use of studies prepared by knowledge institutions for general use or by the parties for their individual case, *see also* ibid, para. 35. On the setting of sustainability standards, a company's compliance with which can then be assessed and certified, *see*, e.g. the ISO Guidelines for addressing sustainability in standards (ISO Guide 82:2019), https://www.din.de/de/wdc-beuth:din21:333003475.

39 On risks to competition and competition law rules regarding information exchange in vertical distribution relationships, *see* L. Aberle, Informationsaustausch im dualen Vertrieb – Alle Unklarheiten beseitigt?, *NZKart* 2022, pp. 504–509; M. Schöner and D. Schlimpert, in *Handbuch Vertriebskartellrecht*, M. Bauer, D. Rahlmeyer and M. Schöner (eds.), C. H. Beck, Munich, 2020, section 2, para. 22 *et seq.*

40 On the conditions for competition law-compliant standards, scores or labels that express the sustainability of market activities, *see*, e.g. ACM, Guidelines on Sustainability Agreements, para. 24.

exist.[41] Their adaptation (where necessary) to and use for the dual pricing context should be feasible. Furthermore, the Draft Horizontal Guidelines expressly exempt from Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) "*agreements on the creation of a database containing information about* (. . .) *distributors selling products in a sustainable manner, without requiring the parties to* (. . .) *sell to those distributors.*"[42] The Guidelines permit, thus, even collaborative efforts by suppliers to determine and record the sustainability of their distribution channels.

18. These suggestions do not intend to negate the inherent flaws and uncertainties in the sustainability assessment of complex business processes.[43] In spite of them, however, such assessments seem one of the better ways to establish an objective basis for sustainability-oriented pricing.

4.2 "Reasonable relation" revisited

19. Detailed sustainability assessments also help to fulfil an adapted reasonable relation requirement. It would demand that the dual pricing reflect the sustainability delta (measured as best possible in financial terms) between the distribution channels at issue. As indicated by para. 209 (4) V-Guidelines, such a requirement seems, on the one hand, mandatory for fulfilling the necessity test under Article 101(3) TFEU and helpful in mitigating a price-based engineering of distribution structures that uses sustainability as a mere cover-up. On the other hand, a nexus between the degree of sustainability achievements and input price reductions incentivizes further efforts to improve a distributor's sustainability score, as well as efforts to maintain the score at lower cost through progress in static or dynamic efficiency.

20. Equally, a reasonable relation criterion implies that a distribution channel currently disfavoured by higher input prices must be allowed to catch up on its sustainability score, necessitating the supplier to either level its prices for the various channels or even to price more attractively goods to be resold via the honed channel. Activating, thus, sustainability competition between distribution channels, as well as the pursuit of static and dynamic efficiencies within a channel,[44] is crucial for employing market forces in the interest of sustainability and for squaring "green prices" with the fundamental rationale of competition law.

21. To the extent dual pricing arrangements drive sustainable distribution, they qualify as sustainability agreements in the sense of, for instance, the pertinent Dutch Guidelines.[45] The same is true for agreements that flank the dual pricing arrangement and specify a sustainable performance that justifies the favourable pricing for the respective distribution channel. Such agreements on sustainable distribution performance should even, as a rule, be considered a necessary element of corresponding, competition law-compliant dual pricing arrangements. To the extent they reflect corporate social responsibility covenants or similar standards accepted by the law, the sustainable distribution performance agreements may qualify as per se acceptable under competition law.[46]

22. An intricate element in the reasonable relation assessment is the degree to which the sustainability performance of a distribution channel and the dual pricing's effect on it need to be quantified. The Dutch Sustainability Guidelines dispense with a quantification requirement (in monetary terms)[47] if (i) the parties have a limited combined market share and (ii) the "*harm to competition is, based on a rough estimate, evidently smaller than the benefits of the agreement.*"[48] As to the first of these two criteria, a combined market share of no more than 30% constitutes the threshold.[49] However, this threshold addresses horizontal cooperation agreements. As a general rule, competition law tends to treat vertical agreements in a more lenient manner than horizontal agreements because they are not concluded between competitors and, therefore, usually generate a lower risk to competition in a given market.[50] This rule extends to the market share thresholds in the Block Exemption Regulations.[51] It also suggests a higher threshold for vertical sustainability agreements than for horizontal ones. Aligning the mark with the V-BER threshold would increase practicability and the safe harbour effect of the BER, even though further economic research seems necessary to show that the downsides—especially in the form of false negatives—of such a pragmatic approach remain bearable. In any case, and wherever the threshold eventually comes to lie, it seems reasonable to exempt vertical sustainability agreements from a full-fledged quantification requirement where the market shares of the parties are low.

23. The treatment of the second non-quantification requirement (benefits evidently outweigh harm) remains somewhat vague as the Dutch Guidelines mainly emphasize its fact sensitivity and provoke doubts on whether this requirement really applies cumulatively with the market share threshold or whether it can also

41 E.g. "Blauer Engel – Das Umweltzeichen" for last mile delivery, https://www.blauer-engel.de/de/zertifizierung/vergabekriterien; Österreichisches Umweltzeichen; ISO, ISO 14001:2015, https://www.iso.org/standard/60857.html; *see also* TÜV Süd, https://www.tuvsud.com/de-de/dienstleistungen/auditierung-und-zertifizierung/umwelt-und-nachhaltigkeit/iso-14001; LEED (Leadership in Energy and Environmental Design); Energy Star, https://www.energystar.gov/about/about_energy_efficiency.

42 Draft Horizontal Guidelines, para. 553.

43 Zimek and Baumgartner, *supra* note 36, at 3; M. Kumar and M. Mani, Sustainability Assessment in Manufacturing for Effectiveness: Challenges and Opportunities, Frontiers in Sustainability 2022/3, at 9ff.

44 Cf. ACM, Guidelines on Sustainability Agreements, para. 37.

45 Ibid., para. 17.

46 Cf. category five of per se lawful agreements, ibid., para. 27 *et seq*.

47 Cf. on this quantification concept, including the determination of environmental prices (or shadow prices) that permit monetary quantification of pro-sustainability effects, ibid., para. 57 *et seq*.

48 Ibid., para. 54.

49 Ibid., para. 55.

50 Cf. 2022 V-Guidelines, para. 10; F. Wagner-von Papp in *Münchener Kommentar zum Wettbewerbsrecht*, C.H. Beck, Munich, 2022, GWB § 1 N 224, at 390ff.; F. Uebele, Kartellrecht, Einführung in das Rechtsgebiet, unter Berücksichtigung der Änderungen durch die 10. GWB-Novelle (Teil1), *JURA* 2022/6, pp. 706–716, at 713.

51 Cf., for instance, the 30% market share per party threshold in Article 3(1) V-BER versus the 20% joint market share threshold in Article 3 of the Specialisation BER.

justify non-quantification on its own.[52] In the present author's view, a low market share of the parties to a vertical agreement cannot, in combination with their mere allegation that the agreement promotes sustainability, remove per se the need to quantify sustainability effects. The necessity to fight anti-competitive agreements that use sustainability as a mere disguise suggests an approach that always requires the parties to substantiate, to a certain degree, that the pro-sustainability effects of their agreement outweigh its competitive harm. Below the threshold discussed above, however, the substantiation of qualitative aspects should, in principle, suffice. The frailer such a qualitative reasoning becomes, the more it should be corroborated with quantitative elements.

5. Test under Article 101(3) TFEU

24. If a distribution agreement containing a dual-pricing mechanism falls outside the V-BER, in particular because the parties' market shares are above the thresholds defined in Article 3 V-BER, the agreement must pass muster with the four criteria stipulated by Article 101(3) TFEU.[53] As applied traditionally, these criteria require the agreement (i) to contribute to improving the production or distribution of goods or to promoting technical or economic progress; (ii) to allow consumers a fair share of the resulting benefit; (iii) to not impose restrictions unnecessary for these objectives; and (iv) to not allow for the elimination of competition regarding a substantial part of the goods in question. If pro-sustainability effects are, in light of the EU treaties and the Charter, considered as improvements and progress in the sense of Article 101(3) TFEU,[54] this qualification also extends to such effects realized by dual pricing. In consequence of the above reflections on the burden of proof, it is—under Article 101(3) TFEU as well—on the parties to show sustainability effects and their genuine objective to pursue such effects.[55]

25. The Dutch Sustainability Guidelines endorse a broad interpretation of the fair share for consumers, which includes future and indirect customers, as well as long-term effects on them.[56] For agreements (called "environmental-damage agreements" by the authority) that fight environmental damage by helping, in an efficient manner, to "*comply with an international or national standard, or* [to] *realize a concrete policy goal (to prevent such damage)*," they even take into account benefits for society as a whole[57] and reject the traditional rule that the "fair share" consumers receive must at least fully compensate them for the harm suffered from the anti-competitive effects of the respective agreement.[58] Part of the dual pricing arrangements discussed here could fall in the category of "environmental-damage agreements," for instance if a price reduction for goods distributed online helped the distributor to increase the online component of its overall distribution activity and, thereby, to achieve a CO_2 reduction goal set by the government.[59] Even though the Dutch Sustainability Guidelines focus on horizontal agreements, there is no good reason why the vertical nature of an agreement should exclude it from the "environmental-damage agreement" category. At least for dual pricing agreements that foster sustainability in an evident and substantial manner, it seems preferable, and in line with the Dutch Sustainability Guidelines' concept for environmental-damage agreements, to not require that the resale prices in a distribution channel fully pass on the input price reductions received for that channel under the dual pricing. Its possibility to retain part of the reduction as additional profit incentivizes the distributor to shift activity to the more sustainable distribution channel and may enable it to even invest in increasing that channel's sustainability. In view of the latter effect, competition authorities should look favourably at agreements that complement dual distribution by an obligation on the distributor to invest part of its resulting additional profits into improving the sustainability of its business.

26. The reasonable relation criterion looms large in an Article 101(3) TFEU assessment as well since it ties into the provision's necessity requirement, helping to prevent excessive distortions of competition between distribution channels by way of price distinctions that go beyond their sustainability delta. Assuming that their market shares above the V-BER thresholds require parties to quantify the positive and negative effects of an agreement, a certain percentage of genuine sustainability-oriented dual pricing agreements would likely not survive the necessity test under Article 101(3) TFEU, simply because of the difficulties in expressing effects in monetary terms. This may suggest a sort of sliding scale, according to which stronger qualitative indications that an agreement is beneficial on balance can outweigh certain weaknesses in quantification. Even if this sliding scale flexibility were introduced, it would remain challenging to show "*that (i) no alternative measure is possible that is less anticompetitive than the agreement, and (ii) that all anticompetitive elements of the agreements are essential to the realization of the objective.*"[60] Case law, including *ex ante* guidance letters (cf. 6. below), should aim at developing parameters allowing parties to gauge whether their agreement would pass this test.[61]

52 ACM, Guidelines on Sustainability Agreements, para. 56:"*A second category of agreements that lend themselves for a quantitative assessment are the cases in which, at first glance, it is already evident that the benefits offset (or more than offset) the harm.*"Does the"second category"imply a first category of agreements that are exempt from quantification solely because of parties' low market shares? And would it really have to be"qualitative"in the sentence quoted here?

53 As dual pricing arrangements affect prices, a particularly important competition parameter, a sustainability rationale cannot prevent them being caught by Article 101(1) TFEU, cf. Draft Horizontal Guidelines, para. 551 and—*e contrario*—the examples of agreements outside Article 101(1) TFEU in para. 552 *et seq*.

54 Cf. Holmes, *supra* note 1, at 372ff.; *XXVth Report on Competition Policy*, Office for Official Publications of the European Communities, Luxembourg, 1996, para. 85 at 40; H. Schweitzer, Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art. 81, *Working Papers EUI LAW* 2007/30, at 6ff.; for a critical opinion, *see* cf. O. Brook, Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities, *Common Mark. Law Rev.*, Vol. 56, Issue 1, 2019, pp. 121–156.

55 Draft Horizontal Guidelines, para. 560.

56 ACM, Guidelines on Sustainability Agreements, para. 43 *et seq*.

57 Ibid., para. 52.

58 Ibid., para. 45 *et seq*.

59 Cf. also the CO_2 reduction goal example, ibid., para. 48.

60 Ibid., para. 65.

61 The general rule that the necessity of non-binding standards for sustainable production is usually clearer than the necessity of such standards in combination with an obligation to only produce as per the standard provides—regardless of whether one fully subscribes to it—an example of such parameters, though not one very specific to dual pricing; cf. ibid., para. 66.

6. MSA as a consultative enterprise

27. Even if a "green recast" of the V-Rules provided some guidance, concrete projects for sustainability-related dual pricing would have to venture into unexplored competition law territories. Under the self-assessment regime introduced by Regulation 1/2003,[62] this could result in considerable infringement risks and a corresponding deterrence effect. It comes in handy, therefore, that a recent Notice[63] indicates the EU Commission's increased readiness to provide *ex ante* guidance letters[64] on the competition law compliance of specific business practices.

28. An issue qualifies for a guidance letter, in particular, if it presents "*novel* (. . .) *questions for the application of Articles 101 or 102 TFEU*"[65] that are not yet sufficiently clarified through existing Union (case) law.[66] This would certainly be the case for the dual pricing schemes discussed here. The same goes for the "*interest in providing guidance*" and "*added value with respect to legal certainty*" which the Notice requires.[67] Among the listed parameters for identifying such interest and added value,[68] at least relevance "*for the achievement of the Commission's priorities or Union interest*" and the potential for "*more widely spread usage in the Union*" would be present. Whilst the Commission has discretion on whether it issues a guidance letter,[69] one could say that the sustainability-oriented policy demands in the Treaty and Charter weigh in favour of a guidance-friendly exercise of this discretion.

29. Since a request needs to substantiate (including comprehensive factual information) not only why it qualifies for a guidance letter but also how the applicant perceives EU competition law to apply to their (intended) practice,[70] it can serve as a catalyst for the thorough legal and factual assessment of an intended dual pricing scheme by its participants. Upon publication,[71] the guidance letter instructs not only the applicants but also further potential implementers of sustainability pricing.

30. The legal assessment in a guidance letter has a binding effect neither on EU courts, Member State courts, Member State competition authorities, nor even—in a strict sense—on the issuing EU Commission itself.[72] However, the Commission assures to take the guidance letter "into account" in case of a subsequent examination of the addressed conduct,[73] and it invites Member State authorities to do the same.[74] More robustly, the Commission—as the Dutch watchdog in similar settings[75]—will, in principle, "*not impose any fines on applicant(s), with respect to any action taken by the applicant(s) relying in good faith on the Commission's guidance letter*."[76] In all likelihood, the EU and Member State courts will heed Commission guidance letters as well, at least as an indication of the bona fides of the parties to conduct those courts consider to be anti-competitive, in spite of a diverging guidance letter. All in all, such letters do, therefore, provide a considerable level of reliable guidance and protection for green pricing pioneers.

III. Conclusions

1. Insights on Article 101 TFEU

31. When it comes to sustainability agreements, a horizontal focus certainly makes sense. The present contribution tried to show, however, that vertical agreements should not be overlooked either. Its finding that there is already some room for pro-sustainability drafting, but also much room for a clearer and more favourable legal basis, likely applies to a range of further vertical settings, too.

32. In horizontal and vertical settings alike, the determination and quantification of sustainability parameters will remain a core problem. Competition watchdogs are not in a good position to assess them; they should rely on a stakeholder-based approach.

33. Even assuming the existence of more statutory guidance and stakeholder-based sustainability verification, considerable uncertainty will remain at least until some case law has developed. During that initial phase, it would seem adequate not to fine parties that err in their bona fide attempt to promote sustainability.

34. Essentially, the dual pricing discussed here is a way to internalize negative externalities at the distributors' level. Other mechanisms for achieving such internalization may well be superior. It matters, however, also whether they are actually put into practice. Comprehensive taxation of gains resulting from the exploitation of negative externalities, for instance, will, at best, take some further time and may remain a pipe dream. One may read the Draft Horizontal Guidelines in the sense that private sustainability agreements only pass the necessity test if

62 Cf., for instance, Communication from the Commission, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM/2014/0453 final, para. 6.

63 Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters), OJ C 381, 4.10.2022, p. 9 (hereinafter "Guidance Letter Notice").

64 Ibid., para. 4.

65 Ibid.

66 Ibid., para. 7.

67 Ibid.

68 Ibid.

69 Ibid., para. 4.

70 Ibid., para. 12.

71 Ibid., para. 22.

72 Ibid., para. 24 *et seq.*

73 Ibid., para. 24.

74 Ibid., para. 27.

75 ACM, Guidelines on Sustainability Agreements, at 2.

76 Guidance Letter Notice, para. 25.

there is a market failure adverse to sustainability and which public policies or regulations do not sufficiently address.[77] However, even such a restrictive interpretation would not exclude necessity for many settings, given the pertinent shortcomings in the current legal framework.

2. A sideway glance at Article 102 TFEU

35. Where a company holds a dominant market position or—in jurisdictions knowing this concept[78]—relative market power, competition law subjects it to specific conduct obligations, including obligations regarding pricing conduct. In particular, the undertaking must not engage in unjustified price discrimination among its customers. Article 102(c) TFEU prohibits the application of "*dissimilar conditions to equivalent transactions*" that would place trading partners "*at a competitive disadvantage*." Consequently, assuming dominance, the application of differing prices for distribution channels with differing sustainability scores engages non-discrimination rules under Article 102 TFEU. On the one hand, such pricing could constitute an unjustified discrimination against the distribution channel facing higher prices. Higher input prices constitute, in principle and if the delta is material,[79] a competitive disadvantage vis-à-vis competitors.[80] On the other hand, one may argue that the price distinction is even necessary because homogeneous prices would disregard the sustainability gap and, thus, discriminate against the more sustainable channel. After all, Article 102 TFEU prohibits unjustified discrimination in the form not only of different treatment of similar settings, but also of similar treatment for different settings.

36. The present contribution discusses a rather narrow setting. In particular, this setting assumes equal costs for catering to either distribution channel; it disregards horizontal side effects, including primary line economic harm to competitors; there is no geographical or customer group-related distinction that could create barriers to trade within the EU internal market; and the supplier runs no downstream business, competing with its distributors, which could insert an element of self-preferencing into its price distinction. Absent all these elements, Article 102(c) TFEU is not (enforced as) a rigid provision against all sorts of dissimilar downstream trading conditions.[81] Practicability issues aside, this reticence is largely due to the fact that vertical discrimination in prices and terms does not necessarily harm consumer welfare.[82] A comprehensive concept of consumer welfare, which includes sustainability considerations, suggests that pro-sustainability price distinctions do not automatically inflict consumer harm, even if they result in higher consumer prices in a certain distribution channel or in the removal of certain distribution features (e.g. design or location features of brick-and-mortar shops) that consumers appreciated but which had a negative effect on the distribution channel's sustainability. Furthermore, understanding different levels of negative externalities generated by distribution channels as differences in their respective true costs could link sustainability-oriented price distinctions back to costs as an, in principle, acknowledged reason for charging trading partners different prices.

37. As to the negative effects of (price) discrimination on output, economic theory holds that there is no output reduction risk where transaction details can be established in direct negotiations with the customers because the supplier will be ready to negotiate the supply of additional goods at any price above marginal cost.[83] It seems questionable whether this finding applies to our setting as our supplier does, by definition, not accept prices above marginal cost but below the price level set by adding, as it were, the unsustainability surcharge to the marginal cost. However, a resulting output reduction risk is, in the end, the consequence of internalizing negative externalities, not the consequence of an anticompetitive stratagem by the dominant undertaking. On a more fundamental level, one can question the equation that higher output means greater consumer or overall welfare and, hence, constitutes a result to be protected per se by competition law. Such reflections are, however, beyond the scope of this contribution.

38. All in all, even with regard to more established efficiency considerations, the law on discriminatory pricing leaves room for greater sophistication. Hence, developing a justification from differences in the trading partners' sustainability is, all the more, pioneer work. It seems, however, worthwhile to undertake this work as the above thoughts indicate that there is room for considering this factor. ■

77 Draft Horizontal Guidelines, para. 546.

78 *See*, e.g., Section 20 of the German Act Against Restraints of Competition.

79 Article 102(c) TFEU requires a significant competitive disadvantage, cf. J. Temple Lang, Anticompetitive Non-Pricing Abuses Under European and National Antitrust Law, in *International Antitrust Law & Policy: Fordham Corporate Law*, B. Hawk (ed.), Juris Publishing, New York 2004, pp. 235–340, at 248.

80 Cf. on the requirements for a sufficient competitive disadvantage to exist, in particular, CJEU, 19 April 2018, *MEO*, case C-525/16, EU:C:2017:1020.

81 O'Donoghue/Padilla, 958.

82 For further details, *see* ibid. at 958ff.

83 Ibid. at 964.

Competition law as an agent towards achieving sustainability*

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I. Introduction

1. India is a major greenhouse gas emitter and also one of the most vulnerable states in the world to the impacts of climate change. The adverse indicators of climate change cannot be any more evident in the country with increasing water stress, heat waves and drought, severe storms and flooding. In 2022, the national capital Delhi recorded temperatures above 49°C and Assam recorded flash floods.[1] These calamitous impacts, in turn, have catastrophic effects on health and livelihood throughout the agrarian country.

2. Environment-specific regulations to combat climate change have been in place in the country since the 1970s. However, the current status of the environment shows that they have failed to adequately fulfil their purpose. As a developing country, the focus of the government has been to favour businesses over environmental regulations to accelerate economic growth.[2] The ineptness of sector-specific regulations hints at the need to take a holistic approach to battle climate change that can address both the environment and the growth of businesses in the market.

3. Moreover, given the urgency of the threat, an all-hands-on-deck approach is required. According to the Sustainable Development Goals Report 2022,[3] many goals are unlikely to be met at the current rate of progress. As per the report, the climate crisis, COVID-19 and the war in Ukraine threaten to further stall progress on several key environmental targets under the SDGs.

4. International experience shows that the Competition Commission of India (CCI) can step in to do its part. However, there has been little to no conversation by the Indian government or the CCI on the subject of incorporating sustainability in competition law.

5. Certainly, the government and the parliament are suitable bodies to incorporate the use of competition regime in the larger climate change policy and perhaps explicitly include sustainability in the competition law. However, until that happens, the CCI can implicitly integrate sustainability in the competition law and regulations in the background of the Indian government's unwavering commitment to sustainable development, which manifests in its legal framework.

6. It is in the context of not only its international obligation towards sustainability but also its own commitment to environmental protection that India should start seeing climate change and environmental degradation for the emergency that it is and employ competition law as an agent in addressing the problem.

7. For clarity, this paper has been divided into three major sections. The first part of the paper (II.) deals with the global approach to factoring sustainability in competition law. The second part (III.) looks at India's commitment to sustainability to analyse whether sustainability can be integrated into competition law—a non-environment-specific law which is rather economic in nature. In the

* Authored under the guidance of Shri Manish Mohan Govil, adviser (law) at the Competition Commission of India. The recent visible impacts of climate change have triggered a global discussion on the potential of using competition policy as an ancillary instrument in the urgent and critical fight for a sustainable future. This has prompted steps towards legislative reforms or endeavours to accommodate sustainability in the existing antitrust law in green countries. In India, however, there has been little to no discussion on the matter. The concept of sustainability finds no mention in the Competition Act, 2002 or the precedents. In view of the fact that India is one of the biggest contributors to climate change and is also one of the most vulnerable to its adverse impacts, this paper argues for and explains why and how Indian competition law should incorporate the concept of sustainability.

1 S. Biswas, 49 degrees in Delhi, flash floods in some regions. Experts warn of climate change, *Mint*, 16 May 2022, https://www.livemint.com/news/india/49-degrees-in-delhi-flash-floods-in-some-region-experts-warn-of-climate-change-11652690214125.html (accessed 20 October 2022).

2 T. Sanghera and D. Shetty, India is Ripping Apart its Environment for Business, *article 14*, 2 May 2020, https://article-14.com/post/how-india-is-ripping-apart-its-environment-for-business (accessed 20 October 2022).

3 UN, The Sustainable Development Goals Report 2022 ("SDG Report 2022").

third part (IV.), I have analysed the need for such incorporation, the possible extent of intervention by competition law towards achieving sustainability, and lastly, I have examined how India can incorporate sustainability in its standing competition law.

8. However, it is imperative to acquaint ourselves with the concept of sustainability before proceeding. This paper, following an approach similar to the literature in the sphere, has used "sustainability" as synonymous with "sustainable development." The common understanding of sustainability comes from the Brundtland Report of 1987, wherein "sustainable" has been defined as that which "*meets the needs of the present without compromising the ability of future generations to meet their own needs*."[4] The notion of sustainability is recognised to have three pillars—social, economic, and environmental.[5] Most literature has limited the discussion to the environmental aspect of sustainability with an explanation that environmental development is inextricably connected with social and economic development. The reasons for an emphasis on the environmental aspect could probably be driven by the factors that the original conception of sustainability[6] had an environmental core and that climate change is increasingly being acknowledged and prioritised as an emergency. In this paper as well, sustainability has been significantly looked at through the lens of its environmental dimension to align my research with existing treatment[7] on the matter.

II. Global approach to factoring sustainability in competition law

9. There is a renewed global discussion on sustainability in light of climate change and COVID-19.[8] The environment-specific regulations that came as soon as the early 1970s have proved to be inept in inculcating long-term sustainable practices.

10. Recently, since the European Green Deal,[9] the European Commission has instigated debates on greening competition law and policy,[10] mainly regarding how competition policy can support the EU's focus on climate neutrality by 2050.

11. The Organisation for Economic Co-operation and Development (OECD) explored the relationship between competition and environmental protection in detail in three roundtables in 1995, 2010 and 2015. More recently, it examined various aspects of sustainability and competition in 2020.[11] And in 2021, the discussions explored how to integrate economic and non-economic environmental effects into the competitive assessment from a legal and economic perspective.[12]

12. The competition enforcers have already started deliberations on the inclusion of sustainability in the competition policy. The European Union and the national jurisdictions of the Netherlands and Greece are notably making commendable development in this regard. While the European Union is looking at accommodating sustainability in the existent competition regime, the Netherlands and Greece are moving towards legislative reforms. Markedly, the countries leading these discussions are considerably high on the Environmental Performance Index.[13] In most relevant jurisdictions, the dialogue on sustainability is restricted to its relation with horizontal agreements; there has not been enough focus in the context of vertical agreements or abuse of dominance.

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4 UN, Report of the World Commission on Environment and Development: Our Common Future (Annex to UN document A/42/427 – Development and International Co-operation: Environment) ("Brundtland Report"), 4 August 1987.

5 B. Purvis, Y. Mao and D. Robinson, Three Pillars of Sustainability: In Search of Conceptual Origins, *Sustainability Science*, Vol. 14, 2019, pp. 681–695.

6 The concept of sustainability stems from the UN Conference on the Human Environment in Stockholm in 1972, which discussed the impact of human society on the environment and attempts for a reconciliation between economic development and environmental preservation. Here, the central aspect of sustainability was seen as the environment.

7 *See* M. Vestager, Competition policy in support of the Green Deal, speech, 25th IBA Competition Conference, 10 September 2021, https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en (accessed 23 October 2022); OECD, Sustainability and Competition, *OECD Competition Committee Discussion Paper*, section II, 2020, https://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf (accessed 20 October 2022); ACM, Draft Guidelines on Sustainability Agreements, 9 July 2020, para. 4, https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf (accessed 20 October 2022); HCC, Draft Staff Discussion Paper on Sustainability Issues and Competition Law, January 2021, paras. 3–4, https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf (accessed 20 October 2022) ("HCC Draft Paper").

8 T. Y. Foredelone, J. Xia and P. Tortora, Recovering from COVID-19: How to enhance domestic revenue mobilisation in small island developing states, OECD, October 2022, https://www.oecd.org/coronavirus/policy-responses/recovering-from-covid-19-how-to-enhance-domestic-revenue-mobilisation-in-small-island-developing-states-45f29680 (accessed 23 October 2022).

9 The European Green Deal, launched in December 2019, aims at making Europe the first climate-neutral continent by 2050, setting an agenda for sustainable economic growth in light of environmental and social policy priorities, decarbonising not just electricity but also buildings and transport, agriculture and industry.

10 *See* S. Kingston, *Greening EU Competition Law and Policy*, Cambridge University Press, 2011.

11 OECD, Sustainability and Competition Law, https://www.oecd.org/daf/competition/sustainability-and-competition.htm (accessed 20 October 2022).

12 OECD, Environmental Considerations in Competition Enforcement, https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement.htm (accessed 20 October 2022).

13 Yale Center for Environmental Law & Policy, 2022 EPI Results, https://epi.yale.edu/epi-results/2022/component/epi (accessed 20 October 2022).

13. A European Commission draft,[14] open to consultation since March 2022, covers sustainability agreements as a separate chapter. These horizontal rules and guidelines enter into force on 1 January 2023. They have defined "sustainability agreements" as any type of horizontal cooperation agreement that genuinely pursues one or more sustainability objectives, regardless of the form of cooperation.[15] The chapter clarifies that such agreements, when they do not affect the parameters of competition such as price, quality, quantity, choice or innovation, will normally not raise any competition concerns and should therefore not be caught under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).[16] The draft provides a "soft safe harbour" to sustainability standardisation agreements to exclude them from the scope of Article 101(1) TFEU.[17]

14. The Dutch Competition Authority (Netherlands' Authority for Consumers and Markets—ACM) was one of the first to issue elaborate guidelines on the application of competition law to sustainability agreements.[18] The guidelines issued by the ACM in 2020, with a further revision in 2021, arguably represent the most concrete analysis of how sustainability benefits can be incorporated into the competition assessment of cooperative agreements.[19]

15. The Competition Commission of Greece (Hellenic Competition Commission—HCC) followed in the footsteps of the Netherlands and put out a working paper in 2020 promising new guidelines on sustainability collaboration arrangements between businesses.[20] The draft Staff Discussion Paper on Sustainability Issues and Competition Law published by the HCC discusses areas of convergence and clashes between sustainable development and competition law.[21] The HCC has also conceptualised the setting up of a Sustainability Sandbox,[22] a *sui generis* development in the area.[23]

16. The Technical Report on Sustainability and Competition,[24] jointly commissioned by the HCC and the ACM, was published in January 2021 to clarify the procedural issues raised by the introduction of indicators of sustainability.

17. The Competition and Markets Authority (CMA) of the United Kingdom (UK) has also published guidelines on the application of competition law to sustainability agreements to aid businesses to engage in collaborative agreements in the context of sustainability in a competition-compliant manner.[25] This is to overcome the "*chilling effect*" that the CMA has recognised a lack of clarity can cause, inhibiting cooperation agreements that might improve environmental sustainability.[26] Similar to the European Commission's approach, the CMA is positioning sustainability agreements within the existing antitrust framework without modifying the law. Nonetheless, the CMA has established a cross-organisational Sustainability Taskforce for leading engagement with relevant stakeholders and to keep under review whether there is a case for legislative change.[27] Significantly, the CMA had looked at sustainability both from the perspective of anti-competitive agreements and merger control through separate guidance.[28]

18. China already incorporates the concept of sustainability into its competition law,[29] although it is the only country in the APAC to do so. However, to date, there have been no published cases applying regarding the sustainability exemption and no additional guidance is available.[30]

19. Austria, in contrast to the soft approaches initiated by the previously mentioned jurisdictions, took the legislative route and became the first EU Member State to

14 Eur. Comm., Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, C(2022) 1159 final, 1 March 2022 ("Draft Horizontal Guideline").

15 Ibid. at 132.

16 Ibid. at 133. *See also* CJEC, 21 September 1999, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, case C-67/96, EU:C:1999:430.

17 This is subject to meeting seven criteria—(i) transparency; (ii) voluntary participation; (iii) freedom to adopt higher standards; (iv) no exchange of sensitive information, (v) effective and non-discriminatory access to the outcome of the standardisation procedure; (vi) no significant increase in price/significant reduction in the choice of products; and (vii) a monitoring mechanism to ensure compliance.

18 *See* ACM, Draft Guidelines Sustainability Claims, 28 January 2021.

19 J. Modrall, Sustainability, antitrust and the EU Green Deal, Norton Rose Fulbright, January 2021, https://www.nortonrosefulbright.com/en/knowledge/publications/4d7ef55a/sustainability-antitrust-and-the-eu-green-deal (accessed 20 October 2022).

20 HCC, Competition Law and Sustainability, https://www.epant.gr/en/enimerosi/competition-law-sustainability.html (accessed 20 October 2022).

21 HCC Draft Paper, *supra* note 7.

22 HCC, Sustainability Sandbox, https://www.epant.gr/en/enimerosi/sandbox.html (accessed 20 October 2022).

23 Through this, businesses will be provided with a supervised environment where they can experiment with innovative products, services, business models, and delivery mechanisms that contribute significantly to sustainability goals, without the fear of immediately incurring all the normal regulatory consequences of engaging in such activity.

24 ACM and HCC, Technical Report on Sustainability and Competition, January 2021, https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf.

25 CMA, Environmental Sustainability and the Competition and Consumer Law Regimes: Advice to the Secretary of State for Business, Energy and Industrial Strategy, CMA148con, 29 September 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021364/CFI_-_sustainability_advice_.pdf (accessed 20 October 2022) ("CMA 2021 Advice").

26 CMA, Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government, Correspondence, 14 March 2022, 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 (accessed 20 October 2022).

27 Ibid.

28 CMA, Environmental sustainability agreements and competition law, Guidance, 27 January 2021, https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law (accessed 20 October 2022); CMA, Merger Assessment Guidelines, Guidance, CMA129, 18 March 2021.

29 Article 15 of the Anti-Monopoly Law sets out a list of potential exemptions to Articles 13 and 14 of the Act, which prohibits anti-competitive agreements known as monopoly agreements. There is an exemption for agreements or collaborations that serves public interests in energy conservation, environmental protection, or disaster relief, provided they do not substantially restrict competition in the relevant market and that consumers get the benefits derived therefrom.

30 S. Black et al., Competition Law and Sustainability, *Thomson Reuters Practical Law*, 2022, http://uk.practicallaw.tr.com/w-035-2035 (accessed 20 October 2022).

incorporate sustainability.[31] It has introduced an explicit sustainability exemption from the general prohibition on cartels by the inclusion of an explicit condition of "*ecologically sustainable or climate-neutral*" aspects to its national equivalent of Article 101(3) of TFEU.

20. However, not everyone engaged in the discourse agrees on incorporating sustainability in their competition policy. Australia and New Zealand are not completely willing to employ competition authorities in securing sustainability goals; they believe that competition legislation should remain focused on protecting the competitive process by applying a consumer welfare standard and that the policy measures and regulations are better equipped to achieve sustainability goals without undermining the efficacy of competition law. Their contributory note to the 2020 OECD Roundtable[32] indicates that they wish to restrict competition law's role to the shield approach.

III. Scope for India to join the competition law-sustainability discourse

21. The Indian government has acknowledged that as a populous, tropical developing country, India faces a greater challenge in coping with the consequences of climate change than most other countries.[33] Indian laws, which are in alignment with its international commitments, show that the country is concerned towards the health of its environment and that in the background of the state's statutory obligation towards the environment, there is scope for incorporating sustainability in competition law as well.

1. India as part of the global village

22. India is very much a part of the global ecosystem and is not alien to the consequences of the global phenomenon that climate change is. India has from the beginning been a part of international actions on sustainability. In fact, India was part of the 1972 Stockholm Conference on the Environment—the first world conference to make the environment a major issue. India is also a party to the Rio Declaration on Environment and Development, 1992. These declarations significantly prompted various domestic legislations in the country enacted under Article 253. More recently, in 2021, India announced ambitious targets to be achieved by 2030 to enable further reduction in emissions in its national statement delivered at the 26th Conference of the Parties (COP26).[34]

23. Clearly, India has respected its constitutional duty under Article 51 of its Constitution to respect and uphold international treaty obligations and continues to do so. Experience shows India has kept itself closely knit to the global community and incorporated valuable international advancements in its own law.

24. Regardless of the end decision to incorporate sustainability in competition law, it is time for India to at least join the global discussion and start viewing sustainability from the lens of competition regulation. India should embrace competition law's integration into sustainability action given its value and effectiveness.

2. India's commitment to sustainability in its domestic legal framework

25. The commitment to sustainability is visible in the Constitution of India itself. The right to a healthy environment is read under the fundamental right to life and liberty (Art. 21) of the Constitution.[35] Further, Article 48A puts the duty of the state to protect and promote the environment, forests and wildlife, and Article 51A(g) makes it a fundamental duty of all citizens to protect the environment. The government has been entrusted with the role of a public trustee and citizens with the status of environmental stewards.

26. In line with its international obligations, India has robust sector-specific legislations for sustainability as well, including the Wildlife (Protection) Act of 1972; the Water (Prevention and Control of Pollution) Act of 1974; the Forest Conservation Act of 1980; the Air (Prevention and Control of Pollution) Act of 1981; the Energy Conservation Act of 2001; the Biological Diversity Act of 2002; the Public Liability Insurance Act of 1991; and the National Green Tribunal Act of 2010.

27. The parent legislation on the matter is the Environment (Protection) Act (EPA), which was enacted in 1986. The scope of this Act is very wide and operates on the principle of arresting pollution at the source, polluter pays and also focuses on the involvement of the public in decision-making. There is also provision for environmental impact assessment under the Act.

31 V. H. S. E. Robertson, Sustainability: A World-First Green Exemption in Austrian Competition Law, *Journal of European Competition Law & Practice*, Vol. 13, Issue 6, 2022, pp. 426–434, https://doi.org/10.1093/jeclap/lpab092 (accessed 20 October 2022).

32 OECD, Sustainability and Competition – Note by Australia and New Zealand (Contribution to 2020 OECD Roundtable), DAF/COMP/WD(2020)62, 6 November 2020, https://one.oecd.org/document/DAF/COMP/WD(2020)62/en/pdf (accessed 20 October 2022).

33 S. Saran (former Foreign Secretary of India), India's Climate Change Policy: Towards a Better Future, Ministry of External Affairs, Government of India, 8 November 2019, https://mea.gov.in/articles-in-indian-media.htm?dtl/32018/Indias_Climate_Change_Policy_Towards_a_Better_Future (accessed 20 October 2022).

34 Ministry of Environment, Forest and Climate Change, India's Stand at COP-26, 3 February 2022, https://pib.gov.in/PressReleasePage.aspx?PRID=1795071#:~:text=50%20per%20cent%20of%20its,net%20zero%20emissions%20by%202070 (accessed 24 October 2022).

35 *Rural Litigation and Entitlement Kendra v. State*, AIR 1988 SC 2187; *MC Mehta v. Union of India*, AIR 1987 SC 1086 (known as the *Taj Trapezium* case); *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420.

Further, several rules have been framed under the EPA to specifically handle the issues of pollution and waste management.[36]

28. The courts have played a great role in embracing the concept of sustainable development as well, in order to align economic development with environmental protection.[37] Indian judiciary has regularly applied the public trust doctrine, the precautionary principle, the polluter-pays principle, the doctrine of strict and absolute liability, the exemplary damages principle, the pollution fine principle and the intergenerational equity principle, in addition to the statutory law.

29. Certain laws show India's move towards an integrated approach to tackling environmental issues. For instance, there are provisions pertaining to the prevention of pollution in the Motor Vehicles Act. The Electricity Act of 2003 has tried to ensure better development in the power sector and also emphasises the use of renewable energy. The Patents (Amendment) Act of 2005 has a provision to prevent the misappropriation of indigenous knowledge of communities by making it non-patentable. The Geographical Indications of Goods (Registration and Protection) Act of 1999 facilitates the protection of the collective rights of rural and indigenous communities in their unique products. The rights of traditional forest dwellers have been codified in the Forest Rights Act, 2006.

30. India also mandates corporate social responsibility reporting and expenditure under the Companies (Corporate Social Responsibility Policy) Rules of 2014 and the Companies Act of 2013. It holds certain businesses—with a certain net worth, turnover, or net profit—to sustainability reporting standards.

31. The extensive legislation in India pertaining to sustainable development ascertains India's commitment to the cause and establishes a base for CCI's role. Particularly, the Directive Principles of State Policy entrusting certain sustainability goals as a duty on the "State" also extend to the CCI.[38] This gives scope for the CCI to contribute to sustainability until any parliamentary reform in this regard.

3. Why use competition law to achieve sustainability?

32. Competition law deals with the supervision and regulation of markets. Traditionally, the focus of competition law is on economic goals.[39] However, another major objective of competition law is also consumer welfare. The preamble of the Competition Act, 2002 provides that along with ensuring the promotion and sustenance of competition in markets, and the freedom of trade, the legislation also focuses on protecting the interests of consumers.

33. The simplistic perspective that environmental and economic concerns are contradictory then leads to the segregation of sustainability and competition law. This restricted evaluation is, however, myopic at best.

34. The reading in of sustainability in competition law seems the most natural when we consider that economic and environmental considerations are very closely tied. Recent times have shown that environmentally unsustainable practices have far-reaching economic and social ramifications around the world. As endorsed in the Brundtland Report, to effectively pursue sustainability, environmental and social considerations should be taken into account while making economic decisions.

35. Integration is a cornerstone principle of sustainability.[40] As a policy decision, looking at sustainability from the lens of competition law can help us move in the direction of integration. The inclusion of antitrust agencies in the fight for sustainability becomes suitable due to their role as market regulators. Corporations regularly circumvent regulations and harm the local and global environment.[41] As regulators, they can closely monitor entities whose unsustainable practices escape the purview of primary environmental regulations.

36. The antitrust agencies of green countries have initiated deliberations on the use of competition policy as a tool to achieve sustainability in recognition of the fact that to tackle climate emergency, an "all hands on deck" approach is required.[42] The incorporation of sustainability considerations in competition law also seems natural due

36 These include—Recycled Plastics Manufacture and Usage Rules, 1999; Municipal Solid Wastes (Management and Handling) Rules, 2000; Manufacture, Storage and Import of Hazardous Chemical (Amendment) Rules, 2000; Ozone Depleting Substances (Regulation and Control) Rules, 2000; The Noise Pollution (Regulation and Control) Rules, 2000 and the Batteries (Management and Handling) Rules, 2001.

37 *Vellore Citizens Welfare Forum v. Union of India & Ors*, AIR 1996 SC 2715; *Taj Trapezium* case, *supra* note 35.

38 As per *Rajasthan State Electricity Board, Jaipur v. Mohan Lal and Ors.*, AIR 1967 SC 1857 and other precedents of the Supreme Court, statutory authorities exercising the sovereign power of the state are "*State*" as under Article 12 of the Indian Constitution. CCI also fulfils the test laid down under *RD Shetty v. International Airport Authority of India & Ors.*, (1979) 3 SCC 489, which laid down that if a body is a government agency or instrumentality, it can be an authority under Article 12 regardless of whether it is a statutory corporation, a government company, or a registered society.

39 J. Malinauskaite, Competition Law and Sustainability: EU and National Perspectives, *Journal of European Competition Law & Practice*, Vol. 13, Issue 5, 2022, pp. 336–348.

40 Brundtland Report, *supra* note 4.

41 *See* D. P. Davies, M. P. Hernandez and T. Wyatt, Economy Versus Environment: How Corporate Actors Harm Both, *Crit. Crim.*, Vol. 27, 2019, pp. 85–99, https://doi.org/10.1007/s10612-019-09433-z (accessed 20 October 2022).

42 Malinauskaite, *supra* note 39.

to change in the behaviour of the stakeholders.[43] There is no doubt that there exist mechanisms to push corporations to do more for the environment. But given the urgency of the climate change crisis, all help—including that of competition enforcers—should be put to use.[44]

37. Traditional regulations aimed at environmental protection are often considered inefficient.[45] Additionally, regulations also suffer from concerns pertaining to their effectiveness or feasibility. This might result from inadequate implementation, arising administrative burdens, political compromise on the national or international plane, or geographical limitations of such regulation.[46] It is particularly in the background of inefficient regulations that green initiatives by the private sector have gained prominence. These initiatives can be protected through the application of competition law.

IV. Way forward: Incorporating sustainability in the Indian competition law

38. While it has been shown that competition law should integrate sustainability, the best authority to actualise this change is undoubtedly the parliament. Nonetheless, until that change is actualised, the CCI can take a sustainability-friendly interpretation of the law in its usual practice. The extent of this interpretation, however, is contentious. To avoid confrontation with existent authorities dealing with sustainability-related issues, the CCI should ideally exercise a limited intervention.

1. The extent of CCI's role: Limited role to avoid jurisdictional conflicts

39. Competition law is not the primary instrument to fight climate change and ensure sustainability. Sector-specific regulations, taxation and investment by the state to overcome "first-mover disadvantages" are the main tools to facilitate the transition to a sustainable future. However, competition law can surely complement regulation to tackle the climate emergency; isolated ad hoc sustainability-related exceptions are no longer an option.[47]

40. The role of the CCI has to be limited to avoid possible conflicts with the jurisdictions of sector-specific regulatory authorities. The jurisdiction of the CCI has been challenged several times in the past due to the presence of a sector regulator in the area of dispute.[48] In the case pertaining to electricity tariffs, where the CCI was initially looking into unfair prices, the Competition Appellate Tribunal (COMPAT) held the Electricity Act, 2003 was comprehensive legislation which provided the appropriate regulatory electricity commission and that the Electricity Act, 2003 had an overriding effect over the Competition Act, 2002.[49] This argument can be extended by regulatory authorities established under the EPA in cases of jurisdictional overlap since the EPA, as a parent regulation, makes it the overriding law in aspects of environmental regulations.[50]

41. The Supreme Court, in the case of *Competition Commission of India v. Bharti Airtel Limited and Others*,[51] while dismissing the appeals, addressed the long debated tussle for supremacy between the overarching fair-market watchdog—the CCI—and the sector-specific regulators (in this case, the Telecom Regulatory Authority of India). Here, the Court postponed scrutiny by the CCI into any possible collusion between the existing telecom players and emphasised the need for use of Section 21A of the Competition Act, which makes it mandatory for the CCI to obtain the opinion of the sector regulator on sector-specific issues first. It was seen that the market regulator's jurisdiction is not ousted solely for the reason that the sectoral regulator is seized of the matter; it only entails the sectoral regulator conduct its investigation prior to the market regulator.

42. The line of precedents indicates that the market regulator can still look into anti-competitive practices in cases of jurisdictional overlap with other sectoral regulators, especially because the sectoral regulator may

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43 Consumers and private players alike are increasingly becoming cognisant of their responsibility, leading to a shift towards a preference for sustainable products and green innovations. The business community has shown greater recognition that climate change presents an existential crisis and is willing to contribute to the larger aim of fighting climate change because of its social and moral responsibility. Even unwilling companies are being forced to move towards sustainability. The corporations have started complying with environmental, social, and governance (ESG) standards in the interest of investments. Corporations also have a statutory duty to give back to society through corporate social responsibility. The recent focus on sustainability has also transformed consumer choices as they are now moving towards cleaner and greener products. This necessitates an improved understanding of consumer preferences from the perspective of sustainability—a non-monetary notion.

44 Vestager, *supra* note 7.

45 D. H. Cole and P. Grossman, When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection, *Wis. Law Rev.*, 1999, pp. 887–938.

46 P. Pacheco, G. Schoneveld, A. Dermawan, H. Komarudin and M. Djama, Governing sustainable palm oil supply: Disconnects, complementarities, and antagonisms between state regulations and private standards, *Regulation & Governance*, Vol. 14, Issue 3, 2020, pp. 568–598, https://doi.org/10.1111/rego.12220 (accessed 20 October 2022).

47 Malinauskaite, *supra* note 39.

48 *Super Cassettes Industries Ltd. v. Union of India & Ors.*, W.P.(C) 1119/2012; *Telefonaktiebolaget LM Ericsson (Ericsson) v. CCI and Anr.*, W.P. (C) 464/2014.

49 *Anand Prakash Agrawal v. Dakshin Haryana Bijli Vitram Nigam and Ors.*, case No. 1 of 2016.

50 The Environment (Protection) Act 1986, Section 24.

51 (2019) 2 SCC 521.

not have an overall view of the economy as a whole, which the CCI can fathom.[52]

43. Yet, to avoid confrontation, the CCI should exercise limited control. Largely, the CCI can come in conflict with the Ministry of Environment, Forest, and Climate Change, the Central Pollution Control Board, or any of the State Pollution Control Boards.

2. Reading sustainability in Competition Act, 2002

44. Under the current competition regime in India, there are neither provisions on abuse of a dominant position, restrictive agreements/concerted practices, or merger control rules nor accompanied soft law which explicitly address sustainability concerns.

45. Nonetheless, if a policy decision in this direction is made, there is enough scope to read sustainability into the current law and issue guidance as soft law to clarify issues arising out of such integration.

2.1 Horizontal agreements

46. The Competition Act, 2002 creates a presumption of "appreciable adverse effect on competition" (AAEC) in cases of horizontal agreements.[53] However, it is a rebuttable presumption and factors under Section 19(3) of the Act can be used by the opposite party to defend itself.[54]

47. The current provision under Section 3 of the Competition Act, 2002 prevents any attempt at stabilisation of the market, ensuring there that competition is maintained. This fair competition in the market, in turn, encourages businesses to generally produce their products at the lowest cost and to efficiently utilise limited resources. Fair competition also leads to the innovation of more energy-efficient and green technologies. On the other hand, cartelisation kills the incentive to innovate or prevents the free use of green innovations. Therefore, in this manner, routine or ordinary application of the provision on anti-competitive agreements can potentially contribute to environmental and climate policies in cases of green cartels. This would be classified as the "sword application."[55]

48. An instance of such application is the 2021 *German Carmakers* case, where the European Commission imposed a heavy fine on Daimler, BMW and Volkswagen Group for colluding on technical development in the area of nitrogen oxide cleaning.[56] In this case, the car manufacturers colluded to avoid competition on cleaning better than what is required by law despite the relevant technology being available.[57] Significantly, this case was the first of its kind in which the Commission concluded that collusion on technical development amounts to a cartel.

49. In the Indian Competition Act, 2002, such cases can be caught under the ambit of Section 3(3)(b), by virtue of which cartelisation leading to limiting/controlling of "technical development" leads to a presumption of AAEC. Various anti-competitive cartels hiding behind "green" initiatives will be captured by such a "sword" approach.

50. The other side of the coin shows how necessary collaboration on green initiatives is stopped by the imposition of penalties by competition regulators. Firms that help transition to a greener market through their innovations have to incur the "first-mover disadvantages" with high investment costs. This is eased by cooperation on sustainability initiatives between firms, based on goodwill and their corporate responsibility. Collaboration also incentivises green innovations due to the prospect of risk sharing and saving costs. However, this can lead to tensions with competition law.

51. In such cases, competition law can be used as a shield[58] to allow measures directed at achieving sustainability to counterbalance any anti-competitive effects.[59] Inspiration can be drawn from the ACM guidelines, under which five categories of sustainability agreements are allowed, which:[60] (i) incentivise undertakings to contribute to sustainability goals without being binding on other individual undertakings; (ii) promote consciousness in terms of environment and climate through codes of conduct; (iii) serve for the purpose of increasing product quality while halting the production of less sustainable products; (iv) create initiatives for the creation of new products/markets through making sufficient production resources available like know-how; and (v) determine specific laws of the countries where undertakings' suppliers or distributors do business.

52. Under the Indian Competition Act, 2002, this similar balancing can happen through reliance on Section 19(3) factors. Akin to the European Commission approach,

52 Ibid.

53 The Competition Act 2002, Section 3(3).

54 *In Re: Alleged anti-competitive conduct by various bidders in supply and installation of signages at specified locations of State Bank of India across India*, Suo Motu case No. 02 of 2020.

55 In the "sword" paradigm, the competition law is used as a sword to achieve sustainability where the provisions are usually applied or interpreted so that measures harmful from a sustainability point of view are prevented or prohibited.

56 Eur. Comm., decision C(2021) 4955 final of 8 July 2021, *Car Emissions*, case AT.40178, https://ec.europa.eu/competition/antitrust/cases1/202146/AT_40178_8022289_3048_5.pdf (accessed 20 October 2022).

57 Ibid.

58 The "shield" approach is used to support sustainable endeavours by businesses through the practice of balancing or providing exemptions. Here, competition law is used to allow measures directed at achieving sustainability to counterbalance any anti-competitive effects, otherwise, allowing measures focused on supporting sustainability to be shielded from competition law prohibitions. However, such balancing is not a "wild balancing" exercise that occurs abstractly, but rather takes place within the confines of competition provision.

59 S. Holmes, Climate Change, Sustainability, and Competition Law, *J. Antitrust Enforc.*, Vol. 8, Issue 2, 2020, pp. 354–405, https://doi.org/10.1093/jaenfo/jnaa006 (accessed 20 October 2022).

60 Draft Guidelines on Sustainability Agreements, *supra* note 7, paras. 19–23.

sustainability benefits can be read under Section 19(3) (f) as "*promotion of technical, scientific and economic development*." Further, sustainability benefits can also be read as the mitigating factor of "*accrual of benefits to consumers*" (S. 19(3)(d)) if a broad interpretation of the term is taken wherein impacts on quality, variety, and innovation are taken into account rather than sticking to the short-term effects of low prices. In any case, quantifying sustainability benefits within the framework of competition law will turn out to be a puzzling and challenging task.

53. It should be reiterated that the "real purpose" of such initiatives should be closely scrutinised while considering it as a mitigation factor. A Lithuanian case[61] comes as a cautionary tale in this regard. In this case, the Lithuanian Guild of Breweries had adopted the Brewers' Code of Ethics which provided that members of the Lithuanian Guild of Breweries would not produce very strong beer having more than a certain percentage of alcohol. This, they argued, was done to contribute to the national policy objective of fighting excessive consumption of alcohol; additionally, relying on the European Commission's *CECED* case,[62] it was argued that it promoted "*technical and economic progress*" under Article 101(3) TFEU. However, the Competition Council dismissed this argument and found them violating Article 101(1) since the evidence showed that the protection of public health was not the real purpose of the agreement but only a veil covering the intention to collectively refrain from the less profitable business.

54. These sustainability agreements have a tendency to take the shape of anti-competitive cartels since they provide a platform for different firms to share information. Perhaps such agreements can be regularly surveyed by the competition commission to ensure they do not take the shape of a dishonest cartel.

55. Lastly, in case of a clear policy decision to integrate sustainability, the CCI can issue guidance akin to the one issued on cooperation during COVID-19.[63] This is because it is important that businesses are aware of the opportunities they have to work together for sustainability. Therefore, the CCI can build bridges to encourage sustainability agreements by giving clear and concrete guidance on the acceptable parameters of collaboration in the sustainability field.[64]

2.2 Abuse of dominance

56. Dominance by itself is not condemned in the Competition Act, 2002, but the abuse of dominant position does invite penalties under Section 4 read with Section 27 of the Act. Section 19(3) factors are considered by the CCI while determining whether the business is in a dominant position.

57. The current framework can integrate sustainability by expanding the interpretation of "abuse." On one hand, sustainability can be considered as a justifying factor for exclusionary abuses if it is sufficiently shown that no other less restrictive to competition alternatives were available. For instance, a dominant business can be justified in "excessively" increasing the price of its green product to cover environmental and broader sustainability costs or in order to reinvest in environmental protection.[65]

58. On the other hand, the interpretation of "abuse" can be extended to catch unsustainable business practices. As per research, undertakings with high market power are able to engage in unsustainable business practices despite scrutiny and irrespective of the willingness of customers to pay for sustainable alternatives.[66] For making higher profits, they pay low wages, create environmental externalities and do not compensate for them, and do not provide safe working conditions for workers, among other unsustainable practices. Because of its position and reach, a dominant firm's conduct of indulging in such unsustainable practices has a greater impact on the market than if the same conduct were pursued by a non-dominant firm.[67] Further, dominant firms owe a greater social responsibility for their conduct.

59. Because of the reduced costs consequent from indulging in unsustainable business practices, a dominant firm gains a competitive advantage over competitors that do not engage in them, especially competitors that bear costs for taking to sustainable practices.[68] This imposition of unfair prices leads to anti-competitive entry barriers. Further, unsustainable business practices may disincentive innovations, as an undertaking engaging in such practices does not need to stay on top of the game in order to maintain or enlarge its market power.

60. However, such expansion of "abuse" raises complications concerning the understanding of "fair" prices and "true costs" of production by the competition authorities and courts.[69]

61 Competition Council of the Republic of Lithuania, 4 March 2014, *Lithuanian Association of Breweries*, case No. 2S-1/2014.

62 Comm. CE, decision 2000/475/EC of 24 January 1999, *CECED*, case IV.F.1/36.718, OJ L 187, 26.7.2000, p. 47.

63 CCI, Advisory to Businesses in Time of COVID-19, 19 April 2020 ("CCI COVID-19 Advisory"), https://www.cci.gov.in/images/publicnotices/en/advisorytobusiness1652118552.pdf.

64 ICC, Competition Policy and Environmental Sustainability, 26 November 2020, ICC 2020-comppolicyandenvironmsustainnability.pdf (accessed 23 October 2022).

65 OECD, Sustainability and Competition – Note by Greece, DAF/COMP/WD(2020)64, 3 November 2020, https://one.oecd.org/document/DAF/COMP/WD(2020)64/en/pdf (accessed 20 October 2022).

66 M. C. Iacovides and C. Vrettos, Falling through the cracks no more? Article 102 TFEU and sustainability: the relation between dominance, environmental degradation, and social injustice, *J. Antitrust Enforc.*, Vol. 10, Issue 1, 2022, pp. 32–62, https://doi.org/10.1093/jaenfo/jnab010 (accessed 20 October 2022).

67 Ibid.

68 M. C. Iacovides and C. Vrettos, Radical for Whom? Unsustainable Business Practices as Abuses of Dominance, in *Competition Law, Climate Change & Environmental Sustainability*, S. Holmes, D. Middelschulte and M. Snoep (eds.), Concurrences, New York, 2021, pp. 91–103, at 101.

69 Note by Greece, *supra* note 65.

2.3 Combination (merger control)

61. The Competition Act, 2002 requires that mergers which exceed a certain threshold shall be notified to the CCI,[70] although there are *de minimis* exemptions.[71] The Act prescribes thresholds based on assets or turnover on crossing which the merger notification requirement is triggered. After the transaction is notified, the CCI examines the merger to determine if it is likely to cause an AAEC through Section 20(4) factors. Based on its findings, the CCI may approve the merger unconditionally, provide a conditional approval subject to certain modifications (structural or behavioural) or completely reject the merger.

62. There is limited scope for modifying merger control to promote sustainability goals. However, that lens should be incorporated in the existent assessment of combination transactions to safeguard sustainability. This can happen by (i) reading efficiencies under Section 20(4) and (ii) using the theory of harm for green innovations.

63. As for "green efficiencies"[72] in merger control, the competition authorities are hesitant to incorporate them in their assessment.[73] It is risky to approve combination transactions merely based on claimed environmental efficiencies since the irreversible structural changes resulting from them can significantly impact the market and should not be overshadowed by claims that may not materialise.

64. However, as a supplementary mitigating factor, green efficiencies can be read under Section 20(4)(n) (benefits of the combination outweigh AAEC) since these can benefit consumers in the long run.[74] This would require a non-conventional quantification where wider benefits, including those across markets and generations, over a long span of time, are considered. This will bring to the fore issues pertaining to the feasibility or accuracy of such quantification.

65. Alternatively, depending on the facts of certain cases, sustainability benefits can be read as rivalry-enhancing benefits (S. 20(4)(f)—extent of effective competition likely to sustain in a market). Rivalry-enhancing efficiencies change the incentives of the merging firms and induce them to act as stronger competitors to their rivals as a result of the merger.[75] Sustainability benefits could be potentially considered as rivalry-enhancing efficiencies in appropriate cases and be used as a mitigating factor while assessing AAEC.

66. Secondly, the CCI can look at sustainability using innovation theories of harm,[76] wherein it can appropriately analyse transactions that impact R&D or reduce the incentive to innovate on environment-friendly technologies.

67. Therefore, in about every area, sustainability can be integrated into the Competition Act, 2002 by interpretation and application until a clear policy decision is made in this regard.

3. Issuing consultation papers and advisory

68. Any proper reform requires due consultation with the stakeholders. Although the CCI does not have legislative sanction, it can, however, akin to the competition authorities of foreign jurisdictions explored under Part III, initiate consultations as to how the existing competition enforcement can integrate the idea of sustainability.

69. Further, the CCI can issue advisory or guidance for businesses to clarify the scope of cooperation permitted to pursue sustainability goals.[77] This shall bring clarity and ward off the concerns of penalty-fearing businesses that are deterred from working together towards sustainability goals. The CCI has in the past issued an advisory—Advisory to Businesses in Time of COVID-19.[78] Through this, the CCI clarified that for businesses coordinating certain activities in light of COVID-19 that resulted in increasing efficiencies, the Competition Act has in-built safeguards to protect such coordinated conduct. The CCI ensured that it would consider these safeguards provided that the principles of necessity and proportionality are complied with. A similar step could be taken in the domain of sustainability initiatives.

V. Conclusion

70. It has been decades since environmental regulations were put in place in India. And despite the revision of environmental commitments every few years, a sole legislation-based approach is proving to be inadequate. Moving towards sustainability goals demands for environmental and social aspects to be considered while making economic decisions. The use of competition law to address environmental concerns achieves exactly that since businesses—important stakeholders in the fight against environmental degradation—are forced to be accountable in a non-illusory sense and further

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70 The Competition Act 2002, Section 5.

71 Ministry of Corporate Affairs, Statutory Order 989(E) (issued on 27 March 2017); Ministry of Corporate Affairs, Statutory Order 1192(E) (issued on 16 March 2022).

72 "Green efficiencies" are efficiencies leading to a reduction in environmental damage.

73 F. Marini Balestra, What about sustainability aspects in merger control?, Bird & Bird, 20 September 2022, https://www.twobirds.com/en/insights/2022/italy/what-about-sustainability-aspects-in-merger-control (accessed 20 October 2022); E. Johnston, D. Long, P. McDonald and L. Tolley, Global trends in merger control enforcement, Allen & Ovary, March 2022, https://www.allenovery.com/en-gb/global/news-and-insights/global-trends-in-merger-control-enforcement (accessed 23 October 2022).

74 *See* Holmes, *supra* note 59.

75 CMA 2021 Advice, *supra* note 25.

76 Eur. Comm., DG Comp, Competition Policy in Support of Europe's Green Ambition, *Competition Policy Brief* 2021-01, September 2021, https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF (accessed 23 October 2022).

77 Section 49(3) of the Competition Act, 2002 empowers the CCI to "*take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.*"

78 CCI COVID-19 Advisory, *supra* note 63.

encouraged to work together on green standards and green innovations. Certain European countries have already recognised this and are putting competition provisions to limited and supplementary application for achieving sustainability goals.

71. India can take inspiration from foreign progress in the direction and start consultations as to how sustainability can be incorporated into its competition regime. Given the far-sighted flexibility provided in the Competition Act, 2002, there is sufficient scope for reading in sustainability considerations in the assessment of AAEC of anti-competitive agreements and combinations, and the abuse of dominance. There is also ample scope for providing guidance to businesses. What is required is a policy decision on including sustainability in the competition regime.

72. While the prospect of integrating a critical and ethical concept within the competition law seems promising, we cannot lose sight of the problems specific to India and the general difficulties that can be anticipated by the competition regulators. As a developing country zealously striving towards economic development, India is not yet at a stage as advanced as the green European countries to have a holistic, sustainable view. Even countries that already have integrated, or are considering integration of, sustainability in their competition regime have some uncertainties when it comes to enforcement. They foresee absurd results in the quantification of sustainability benefits, difficulties faced by competition regulators in staying abreast of the changes and closely monitoring sustainability agreements lest they snowball into anti-competitive agreements. ■

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