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EU Competition Law and Sustainability

The Need for an Approach Focused on the Objectives of Sustainability Agreements

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Abstract

EU competition law potentially has a role to play in the pursuit of sustainability goals and the fight against climate change. The need to interpret the EU competition law provisions in a manner consistent with the sustainability objectives that the EU is committed to – the sustainable development goals (SDGs), and the EU Green Deal and derived policies – is emphasised in this article. While agreements between competitors are generally prohibited by Article 101 TFEU, cooperation agreements among market actors pursuing sustainability objectives (sustainability agreements) might in certain situations fall under the cartel exception of Article 101(3) TFEU. In recent years, there have been numerous calls to clarify conditions under which sustainability agreements can be allowed under EU competition law, especially under Article 101(3) TFEU, and there is a heated debate among academics, national competition authorities (NCAs) and the European Commission. After questioning whether the objectives and measures of the agreements are being properly assessed with the current trends (for example, with the willingness-to-pay method), this article will add to the debate another possibility involving a broad interpretation of Article 101(3) TFEU under which the pursuit of sustainability agreements will be facilitated. Such a possibility will largely depend on the objectives of the agreements themselves and may allow a proper consideration of the objectives of a sustainability agreement for certain cases, by focusing on agreements that pursue pre-established objectives derived from international or national standards or concrete policy objectives that are not previously mandatory for the companies involved.

Keywords: EU competition law, sustainability agreements, efficiency gains, sustainability objectives, qualitative assessment.

1 Introduction

EU competition law can contribute to the enhancement of sustainability and the fight against climate change. While some have submitted that there are better and more effective ways to tackle these challenges, such as regulation or taxation, competition law also has a role to play. Indeed, facing climate change requires efforts from all legal fields, from public and private actors, and while other regulatory initiatives might be slowed down by political or budgetary difficulties, competition law can facilitate those efforts.

While it is generally considered that competition law enforcement contributes to sustainable development by ensuring effective competition (leading to innovation and increased quality and choices, as well as an effective allocation of resources and reduction of production costs), it is also true that sometimes individual production or consumption decisions have negative effects on society, the environment, etc. Although cooperation between competitors is against Article 101 TFEU, there are many situations where, in order to achieve certain sustainability objectives, cooperation between competitors can be the right tool. When a company suddenly wishes to produce 'greener' products or use 'greener' technologies it is likely to have to deal on certain occasions with higher costs ('first mover disadvantage') and is thus not encouraged to take that step. By agreeing with other competitors on such sustainability measure, the 'first mover disadvantage' is avoided or reduced.

Among examples of sustainability agreements, we can find agreements among suppliers to reduce their use of plastics/packaging, or to increase recycling; agreements to reduce car emissions; agreements to improve the efficiency of home appliances; agreements to improve animal welfare conditions, etc. Thus, 'sustainability agreements' are understood as agreements between competitors that pursue one or more sustainability objectives –environmental, economic or social sustainable development goals.[1] However, in many cases, sustainability agreements would be considered anti-competitive according to Article 101(1) TFEU. For example, the sustainable measures agreed might result in a general price

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1 The 2012 UN Resolution 66/288 refers to sustainable development as the development towards 'an economically, socially and environmentally sustainable future for our planet and for present and future generations'. A broad definition is to be followed when referring to 'sustainability agreements' in the competition law context. Among the sustainable objectives of these agreements we may find the protection of the environment, biodiversity and addressing climate change, public health, animal welfare, fair trade, working conditions, etc. This broad definition of 'sustainability agreements' is also supported by the European Commission (European Commission, 'Draft Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements' (2022), paras. 541-43).

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increase of the products available to consumers or end up limiting their options.
During the last few years, there have been several discussions as to whether EU competition law should allow these agreements and, if so, how. Following the heated academic discussion in this context, diverse NCAs and the European Commission have also acknowledged the controversy regarding sustainability agreements and Article 101 TFEU and are working on it.[2] For example, the Commission has issued draft revised Horizontal Guidelines (hereinafter Draft Horizontal Guidelines) in March 2022 with a chapter dedicated to sustainability agreements.[3]
In this context, this article aims to highlight the need to interpret competition law in a manner consistent with the sustainability objectives that the EU is committed to – the SDGs, and the EU Green Deal and derived policies. This article will analyse the current difficulties in doing so and add to the competition law and sustainability debate another possibility involving a broad interpretation of Article 101(3) TFEU, under which the pursuit of sustainability agreements will be facilitated. Such a possibility will depend largely on the objectives of the agreements themselves.
First, a reflection regarding the goals of EU competition law and the concept of consumer welfare, and the existing foundations of the Treaties, will be included so as to support a sustainability-consistent interpretation of EU competition law. Second, the current developments regarding the interpretation of sustainability agreements within EU competition law, with a special emphasis on the modifications proposed by the Draft Horizontal Guidelines, will be described. Third, the potential of sustainability agreements to achieve sustainability objectives, and the adequacy of the current assessment tools, will be analysed. A case example, the 'Chicken of Tomorrow' agreement, which initiated heated debates concerning the assessment of sustainability benefits and the need (or not) for competition law to allow sustainability agreements, will be the starting point of the discussion. Following this case example, focus will be placed on the existing difficulties that arise from the assessment of sustainability benefits under the current interpretations. A different interpretation, under which the pursuit of sustainability agreements is facilitated on the basis of the existence of their pre-established objectives, is suggested.

2 Within the academic discussion, among many others, we find: R. Claassen and A. Gerbrandy, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach', 16 *Utrecht Law Review* 1 (2016); A. Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law', 40 *World Competition* 539 (2017); I. Lianos, 'Policentric Competition Law', 4 *CLS Research Paper Series* (2018); J. Blockx, 'The Limits of the 'More Economic' Approach to Antitrust', 42 *World Competition* 475 (2019); S. Holmes, D. Middelschulte & M. Snoep (eds.), *Competition Law, Climate Change & Environmental Sustainability*. Concurrences (2021).

3 European Commission, above n. 1, https://ec.europa.eu/competition-policy/public-consultations/2022-hbers_en.

2 Setting the Foundations for a Sustainability-Consistent Interpretation of EU Competition Law

EU competition law manuals and textbooks often tell us that the 'main' objective of EU competition law is consumer welfare.[4] At the end of the 1990s, the European Commission initiated a process of economisation and modernisation of EU competition law that placed economics and efficiency at the centre of the competition law analysis. The so-called 'more economic' approach has brought different developments in the area, such as a focus on the effects on the market of a specific practice to determine whether it is anti-competitive.[5] Also, 'effects on the market' refer to the economic effects on the market, and. consequently, the resulting approach is based on the concept of consumer welfare focused on economic efficiency. Consumer welfare, narrowly meant as the ability of consumers to benefit from lower prices and higher output, has been placed at the centre of the economic analysis.[6]
The 'more economic' approach is particularly apparent in the interpretation that the Commission made of Article 101(3) TFEU until now.[7] This provision constitutes an exception that can be relied on when benefits offset the anti-competitive effects of an agreement. It seems that it is understood that consumer detriment would consist of higher prices, reduced output, less choice or lower quality of products or less innovation, while consumer benefit would consist of the opposite (lower prices, greater output and choice, etc.). The Draft Horizontal Guidelines, while introducing clarifications concerning sustainability agreements, remain grounded on an economically informed consumer welfare analysis.[8]
Those claiming economic efficiency as the solely goal of competition law consider that competition law should

4 A. Jones, B. Sufrin & N. Dunne, *EU Competition Law* (2019), at 28 et seq.; J.W. van der Gronden and C.S. Rusu, *Competition Law in the EU: Principles, Substance, Enforcement* (2021), at 9-13.

5 *Ibid*., at 28-30; Blockx, above n. 2, at 477.

6 This system was perceived as an improvement that left irrationalities and distortions of 'old' competition law behind, sometimes accused as formalistic and lacking legal certainty. Behind the 'old competition law', which refers to the competition policy developed before the 1990s, is the underlying understanding that competition and the market were directed to achieve social and economic optimal outcomes. Competition law was seen as an instrument to achieve fairness and economic freedom and, at the same time, an instrument for creating and developing the internal market. K.K. Schweitzer and H. Patel, *The Historical Foundations of EU Competition Law* (2013); A. Gerbrandy, 'Rethinking Competition Law within the European Economic Constitution', 57 *Journal of Common Market Studies* 127 (2019).

7 As it can be reflected in: Commission, Guidelines on the application of Art. 81(3) of the Treaty [2004] OJ C101/08; Commission, Guidelines on Vertical Restraints [2010] OJ C131/01; and Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal Cooperation Agreements [2011] OJ C11/1.

8 See discussion below under 2. Also, R. Inderst and S. Thomas, 'Sustainability Agreements in the European Commission's Draft Guidelines', *Journal of Competition Law and Practice* lpac020 (2022).

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deal only with well-defined economic questions and reject employing some value-based or discretionary public interest test.[9] Although this became the dominant approach in the US since the 1970s and the general consensus among the EU since the end of the 1990s, later political and economic developments (i.e. inequality concerns, populism, the rise of big tech power, or the climate emergency) have brought back heated discussions regarding the goals of competition law.

Also, in the EU, the reigning of consumer welfare as economic efficiency has always had another dimension of complexity added to it given the internal market imperative. Internal market integration has been an inherent part of EU competition law, and the single market imperative can be found in many judgments of the Court of Justice of the European Union (CJEU) and Commission decisions.[10]

In addition, in recent years, Commissioner Vestager has emphasised the role of fairness as a guiding principle of EU competition law. It is true that the meaning of fairness can be integrated into a conservative interpretation aligned with the more economic approach, for example when associating 'fair share' of benefits in Article 101(3) TFEU in terms of allocation of efficiency gains and maximisation of overall consumer surplus.[11] However, the new insistence on this concept can be seen as an attempt to reconcile competition law with society and re-legitimise its essential role for the social market economy, giving adequate attention to the social side of the social market economy.[12] The extent to which 'fairness' will guide the progressive development of competition law when it comes to competition enforcement by the Commission and courts remains to be seen.

However, for now, it seems other possible objectives of competition law live under the shadow of the consumer welfare goal. Even when Commissioner Vestager emphasised the need for competition law to contribute to the Green Deal goals,[13] she also claimed that '[c]ompetition policy is not, and cannot be, in the lead when it comes to making Europe green'.[14] The reasoning behind this statement is the idea that competition law ensures effective competition and consumer welfare, which improves innovation, quality of products, efficient allocation of resources, etc. and that this contributes to sustainable development.

The pursuit of more specific public objectives beyond the purely economic understanding of consumer welfare has been discussed by many scholars in recent years.[15] This has been specifically, but not limited to, within the context of sustainability objectives and the climate crisis. A narrow reading of the consumer welfare goal makes it difficult to consider sustainability agreements under the exception of Article 101(3) TFEU, since a restrictive reading and an only economics-informed quantification of benefits and offsets would make 'non-market' interests difficult to take into account, as well as benefits involving a different group of consumers that the ones consuming the products involved.[16] Indeed, such an approach has been qualified by many as inadequate and outdated.[17]

The TFEU articles concerning competition law (in this case, Article 101 and, especially, Article 101(3) TFEU) are drafted broadly and are able to adapt to the changing realities in view of the interpretations of the Commission and CJEU. A narrow consumer welfare understanding, simplified as lower prices (i.e. prices of a specific product affecting the consumers within that product market) equalling better consumer welfare is not found in the wording of those articles. EU courts have also not strictly adhered to such an approach. Also, the NCAs have not followed such a strict approach and, even before the Commission took action regarding the concerns of competition law and sustainability, some NCAs had already established their divergent approach as to the previous Commission guidelines.[18]

Deep and insightful discussions on formulating the goals of EU competition law are important and necessary for the foundations and evolution of the subject, and thus it is extensively and endlessly discussed in the literature. In recent years we have witnessed an extensive debate on the goals of EU competition law and the pursuit of sustainability and other public interests. However, without getting deeper into the debate, which falls outside the scope of this article, I will join many colleagues on the call for urgency on the matter in light of the climate crisis and the need for immediate action.[19]

9 Jones et al., above n. 4, at 35.

10 For example, as to the General Court and Court of Justice: Case T-168/01, GlaxoSmithKline Services EU:T:2006:265, at para. 11 and paras. 59-62; Case C-126/97, *Eco Swiss China Time Ltd* v. *Benetton International NV*, EU:C (1999), 269, para. 36; Case C-453/99, *Courage Ltd* v. *Crehan EU*, C (2001), 465, at para. 20. As to the Commission: COMP/39.351, Swedish Interconnectors [2010] OJ C142/28 (settled with a commitments decision); Guidance on the Commission's Enforcement Priorities in Applying Art. 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/2 (the Guidance Paper), at para. 7.

11 N. Dunne, 'Fairness and the Challenge of Making Markets Work Better', 84 *Modern Law Review* 230, at 246 (2021).

12 *Ibid*., at 256-263.

13 For example, in a conference in Brussels on competition law and sustainability in October 2019 (the 'Brussels Sustainability Conference'), Commissioner Vestager claimed that 'every one of us-including competition enforcers-will be called on to make a contribution to that change'.

14 M. Vestager, 'The Green Deal and Competition Policy', *Renew Webinar* (22 September 2020).

15 N. Dunne, 'Public Interest and EU Competition Law', 65 *The Antitrust Bulletin* 256 (2020); Gerbrandy 2019, above n. 6; Lianos, above n. 2; B.G. Norton, *Sustainability as the Multigenerational Public Interest* (2018); M.J.V. Abrenica, 'Balancing Consumer Welfare and Public Interest in Competition Law', 13 *Asian Journal of WTO & International Health Law and Policy* 443 (2018).

16 Gerbrandy 2019, above n. 6.

17 Dunne 2020, above n. 15, at 257; T. Wu, 'After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice' *Columbia Pub. L. Research, Working Paper No. 14-608* 2018; Lianos, above n. 2; Gerbrandy 2019, above n. 6.

18 J. Malinauskaite, 'Competition Law and Sustainability: EU and National Perspectives', *Journal of Competition Law and Practice* lpac003 (2022); O. Brook, 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities', 56 *Common Market Law Review* 121 (2019). Also, see Section 2.

19 Among others: S. Holmes, 'Climate Change, Sustainability and Competition Law', 8 *Journal of Antitrust Enforcement* 354 (2020); Gerbrandy 2019, above n. 6; G. Monti, 'Four Options for a Greener Competition Law', 22 *Journal of European Competition Law and Practice* 124 (2020).

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Competition law should make use of all the available tools in this regard, and, given the increasing power of private actors, sustainability agreements should be an important tool. A consistent interpretation of the 'constitutional' provisions of the Treaties would require it to be so.

The Treaties (Treaty on the European Union (TEU) and Treaty on the Functioning of the European Union (TFEU)), as well as the EU Charter of Fundamental Rights of the EU, consider sustainability among the main objectives of EU law.[20] First, Article 37 of the Charter provides that environmental protection and the quality of the environment are to be integrated into the EU policies and guaranteed in accordance with the principle of sustainable development. Then, Article 3(3) TEU emphasises that the Union shall work for the sustainable development of Europe, while Article 3(5) TEU says that 'it shall contribute to … the sustainable development of the earth' and to 'free and fair trade'. When it comes to implementation, Article 7 TFEU says that 'the Union shall ensure consistency between its policies and activities, taking all of its objectives into account', while Article 9 TFEU provides that 'in defining and implementing its policies and activities, the Union shall take into account … the protection of human health', and Article 11 TFEU claims that 'environmental protection requirements must be integrated into the definition and interpretation of the Union policies and activities, in particular with a view to promoting sustainable development'. Regardless of the consideration of sustainability or other public interests as goals of EU competition law, it is a given that sustainability considerations (even more particularly environmental considerations) must be taken into account in applying the Treaties, and, as such, in applying Article 101 TFEU, even more given the emergency that climate change poses.

Thus, the pursuit of sustainability should not be pitted against the pursuit of consumer welfare. The problem may very well lie in a narrow understanding of the concept of 'consumer welfare' as a single measuring rod.[21] We should reconsider the reason for the narrow approach to consumer welfare. While in practice (short-term) price effects are indeed easier to measure, they should not be given excessive weight to what is easily measurable and thus understood as more predictable. If consumer welfare is the goal of competition law, then it should be embedded in a progressive economic and legal thinking and not detached from reality.[22]

3 Article 101(3) TFEU and Sustainability Agreements: Current Understanding in the EU

The most feasible and generally supported manner for sustainability agreements to be allowed under EU competition law is through Article 101(3) TFEU. Article 101(3) TFEU states that agreements, decisions or concerted practices declared anti-competitive according to Article 101(1) TFEU might be exempted if they: 1. contribute to improving the production or distribution of goods or to promoting technical or economic progress (efficiency gains); 2. allow consumers a fair share of the resulting benefit; 3. their conditions are indispensable to the attainment of these objectives; 4. sufficient competition remains on the market. In the context of sustainability agreements, most of the questions arise regarding the first two conditions, i.e. efficiency gains and fair share: should 'non-economic' benefits (sustainability benefits) be taken into account to calculate efficiency gains? If so, how can they be measured? What is considered a 'fair share' to consumers? Does it allow consideration of benefits that are directed to most of society at large or that affect a group different from the consumers suffering loss of consumer welfare, or benefits that will occur in a much longer term? This section describes the approach of the European Commission regarding these questions during recent years and the changes that the Draft Horizontal Guidelines propose.

The European Commission, in line with the previous discussion regarding the goals of competition law and the emphasis on consumer welfare and economic efficiency in the last couple of decades, seemed to adhere to a narrow interpretation of Article 101(3) in relation to sustainability agreements. Following the guidelines issued by the Commission (particularly the 2004 Exemption Guidelines and the 2010 Horizontal Guidelines),[23] in the measurement of efficiency gains, losses and gains to consumer welfare are calculated, and, if costs are greater than benefits, the agreement is generally considered contrary to EU competition law. As discussed in the previous section, when considering the anti-competitiveness of an agreement or conduct, competition law relies on economic efficiency and ignores (or considers only to a marginal extent) non-economic objectives. Regarding the 'fair share' requirement, while it seems that the European Commission stipulates that users should be seen as a group for each relevant market, and full compensation of the users on the relevant market is necessary, it also requires that society benefit as a whole in certain situations (para. 85 Exemption Guidelines 2004). In the *CECED* (Conseil Européen de la

20 For an interesting reflection in this regard: A. Gerbrandy, 'Changing Competition Law in a Changing European Union: The Constitutional Challenges of Competition Law', 14 *The Competition Law Review* 33 (2019); A. Sikora, *Constitutionalisation of Environmental Protection in EU Law* (2020); M. Humphreys, *Sustainable Development in the European Union: A General Principle* (2017).

21 Gerbrandy 2019, above n. 6, at 131-32.

22 See in this regard: Holmes above n. 19, at 362-65.

23 See above n. 7.

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Construction d'Appareils Domestiques) case,[24] concerning the agreement between washing machine manufacturers to stop the production of the least energy-efficient washing machines, the Commission assessed the individual economic benefits for washing machine users but also analysed the collective environmental benefits for society as a whole. Still, the conclusion was based on the decision that users of the relevant market were fully compensated. If a narrow interpretation of this requirement is followed, and full compensation of affected users is required, the room for allowing self-regulation agreements with sustainability objectives is very much reduced.

During the last decade, there has been a growing debate regarding sustainability and competition law and calls for clarity in sustainability agreements and Article 101 TFEU. Doubts regarding whether agreements of this type are anti-competitive or not can be a deterrent for companies to enter into such agreements. Both NCAs and the Commission have taken notice and are currently clarifying their interpretation of sustainability agreements under Article 101(3) TFEU.

Some NCAs took action before the Commission did. The Dutch competition authority (ACM) has been leading this debate. The Dutch ACM has had a long experience regarding sustainability agreements (e.g. Energieakkoord (2013),[25] Chicken of Tomorrow (2015)[26]). In its revised Draft Guidelines concerning sustainability agreements published on 26 January 2021,[27] the Dutch ACM recognises that agreements between undertakings can contribute to achieving public sustainability objectives and takes a practical and comparatively progressive approach to the interpretation of Article 101(3) TFEU.[28] Similarly, the Hellenic Competition Commission (HCC) has also been active in this debate and has published a staff discussion paper concerning sustainable development and competition law. Taking a different route, Austria has even incorporated a new sustainability exception into its legislation in a recent competition law amendment of September 2021.[29]

At the EU level, the Commission has reviewed and evaluated the Horizontal Guidelines and issued the new Draft Horizontal Guidelines, which will enter into force in January 2023. These new guidelines contain a specific chapter on sustainability agreements and provide an answer to some of the questions regarding these agreements and Article 101(3) TFEU:

Chapter 9 of the Draft Horizontal Guidelines is dedicated to sustainability agreements, with Section 9.4 focusing on its assessment under Article 101(3) TFEU. Efficiency gains must be substantiated, objectively concrete and verifiable (paras 577-579). Emphasis is placed on the indispensability condition (the third condition of Article 101(3)): parties need to demonstrate that the agreement is reasonably necessary for the claimed sustainability benefits (paras 580-587). When regard to the measurement of efficiency gains and a fair share to consumers, unless it is obvious, there is a need for a detailed assessment. Here the Draft Guidelines distinguish among 'individual use value benefits' and 'individual non-use value benefits'. The former is the same type of benefits that may result from other agreements (price, quality etc.) that, in this case, also happen to bring positive externalities. The latter are defined by the Commission as indirect benefits, which result from the consumers' appreciation of the impact of their sustainable consumption on others, and are therefore to be measured by a willingness-to-pay method. For instance, example 4 introduced in the guidelines, referring to an agreement between furniture producers to introduce a 'green tree label' for furniture made of sustainable grown wood, requires a willingness-to-pay assessment since the possible efficiencies come in the form of improved sustainability in the growing and harvesting of wood.

Finally, the Draft Guidelines refer to 'collective benefits', which, irrespectively of consumers' individual appreciation, are benefits that affect a larger group of society. Where two markets are related, efficiencies achieved on separate markets can be taken into account, provided that the group of consumers affected by the restriction and benefiting from the efficiency gains is substantially the same (para 602). For example, when considering an agreement concerning sustainable cotton that reduces chemicals and water use where it is cultivated, the benefits would not be considered collective because there is no overlap between clothing consumers and those living in the area where the cotton is cultivated. According to the Draft Guidelines, these benefits would fall in the category of 'individual non-use value benefits' and can only be considered to the extent that consumers are willing to pay for them (para 604). In addition, there are specific conditions for collective benefits in para 606, and evidence based on public authorities' reports or on the reports prepared by recognised academic organisations would be of particular value.

24 Commission Decision of 24 January 1999 relating to a proceeding under Art. 81 of the EC Treaty and Art. 53 of the EEA Agreement (Case IV.F.1/36.718. *CECED*).

25 Netherlands Authority for Consumers and Markets, *Notitie ACM Over Sluiting 5 Kolencentrales in SER Energieakkoord* (2013).

26 Netherlands Authority for Consumers and Markets, *ACM's Analysis of the Sustainability Arrangements Concerning the 'Chicken of Tomorrow'*, Case No. 13.0195.66 (2015).

27 Netherlands Authority for Consumers and Markets (ACM), *Draft Guidelines on Sustainability Agreements* (2021).

28 M. Campo Comba, 'EU Competition Law and Sustainability: Key Aspects from the Dutch ACM Draft Guidelines Towards a Unified EU Approach', in *EU Antitrust: Hot Topics and Next Steps. Proceedings of international conference held in Prague on January 24-25, 2022* (2022): https://rozkotova.cld.bz/EU-ANTITRUST-2022/166/.

29 The Austrian exemption provision for anti-competitive agreement, equivalent to Art. 101(3) can be found in § 2 para 1 Cartel Act. The new amendment added a sentence to the provision stating that '[c]onsumers shall also be considered to be allowed a fair share of the resulting benefit if the improvement of the production or distribution of goods or the promotion of technical or economic progress significantly contributes to an ecologically sustainable or climate-neutral economy'. V.H.S.E Robertson, 'Sustainability: A World-First Green Exemption in Austrian Competition Law', *Journal of European Competition Law & Practice* lpab092 (2022).

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The last two situations concerning the benefits classified as non-value use benefits and collective benefits are, in general, the problematic sustainability agreements, which are a subject of discussion regarding their efficiency gains and fair share to consumers. Many sustainability agreements are considered to be outside the exception of Article 101(3) TFEU according to the new revised guidelines, unless a willingness-to-pay study can show that those benefits are given enough value by the consumers to compensate the harm from competition. The next section will consider whether such an approach is adequate in order to ensure the potential of sustainability agreements to achieve sustainability objectives.

4 Achieving Sustainability Objectives through Sustainability Agreements in EU Competition Law

4.1 The Potential of Sustainability Agreements to Achieve Sustainability Objectives: Re-analysing the 'Chicken from Tomorrow' Example

In order to explore the potential of sustainability agreements in achieving sustainability objectives, this section uses as a starting point the controversial *Chicken of Tomorrow* case,[30] which initiated heated debates on the necessity of competition law to allow (or not) these type of agreements and the way in which the 'sustainability benefits' of these agreements should be assessed.

The *Chicken of Tomorrow* ('Kip van Morgen') case involved a self-regulation agreement that the Dutch competition authority (ACM) understood as anti-competitive in 2014. The ACM's analysis of the *Chicken of Tomorrow* case determined that the measures to improve chicken welfare were not 'enough', and thus the agreement did not fall under the national equivalent exception of Article 101(3) TFEU. This specific case of 2014 is still of special interest for our discussion for two main reasons. First, because in 2020 the ACM compared the specific animal welfare measures proposed by the agreement with the improvements achieved by other private initiatives that do not clash with competition law in order to check whether the same objectives were achieved through different means. Secondly, the revised Draft Horizontal Guidelines make it seem like the Commission would nowadays follow a similar interpretation in order to declare such an agreement anti-competitive. The assessment conducted by the ACM is analysed further on, as well as the later Memorandum published in 2020, where the ACM finds that chicken welfare was better improved by other private initiatives, and thus confirmed that the 'anti-competitive' agreement was not necessary.

The ACM concluded in 2014 that the sustainability agreement entered into between producers and retailers with the primary purpose of improving chicken welfare was anti-competitive, according to Section 6, paragraph 3 of the Dutch Competition Act, the Dutch national equivalent of Article 101(3) TFEU. With the main focus on the first two conditions (efficiency gains and fair share), the analysis of the ACM used a willingness-to-pay study to measure whether the benefits of the agreement offset the harm caused by the restriction of competition. The willingness-to-pay test showed that consumers were unwilling to pay the increased price for the proposed improvements, and, as a result, the ACM concluded that the sustainability arrangements, as currently designed, did not generate any net benefits for consumers and were therefore anti-competitive. From the current Draft Horizontal Guidelines, it would appear that the Commission would now follow a similar reasoning. The chicken welfare measures would most likely be seen as indirect benefits, comparable to the example of a 'green tree label' for furniture made of sustainable wood according to the guidelines referred to in the previous section. For these cases, the Commission also refers to the willingness-to-pay assessment as the only way to assess whether the benefits from such an agreement would outweigh the anti-competitive consequences according to the consumers.

Years later, the ACM evaluated the case in a Memorandum published in 2020.[31] In this report, the ACM looked at the developments regarding the welfare of chicken sold at the supermarkets and concludes that the current standards go beyond those required by the Chicken of Tomorrow agreement. The study suggests that the anti-competitive agreement was not necessary to achieve the established animal welfare objectives. The Memo compares the animal welfare features laid down in the Chicken of Tomorrow agreement with the features of the situation in 2020. It compares the chicken welfare conditions of the Chicken of Tomorrow with those from other non-anti-competitive private regulation initiatives: market-wide certification labels (the Better Life Label – 1, 2 or 3 BLK stars; Organic chicken label) and chicken welfare initiatives of individual supermarkets (ah chicken from Albert Heijn, Nieuwe Standaard Kip from Jumbo, etc.). The ACM concludes that, with some exceptions, these initiatives meet or exceed the requirements of the Chicken from Tomorrow. However, several relevant remarks should be made. There is unknown data regarding several points (see life span or continuous darkness of some supermarket initiatives), and some assumptions are made.[32] Moreover, the analysis seems to ignore the fact that this is only some of the chicken offered by the supermarkets, while the Chicken of Tomorrow initiative involved all the chicken products offered by the participating supermarkets (high market

30 Netherlands Authority for Consumers and Markets above n. 26.

31 Netherlands Authority for Consumers and Markets (ACM) above n. 27.

32 *Ibid.*, at 7.

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share), which, besides the Chicken of Tomorrow standards, could have also participated in the higher standards initiatives at the same time (meaning that a better animal welfare can still be part of the competition strategy of a company). In addition, as the ACM also recognises, it is not possible to make an estimate of the hypothetical scenario in which the agreement would have been given the green light, nor can it be ruled out that chicken welfare could have improved more or sooner than it did. Furthermore, the possible deterrent effect that the ACM's decision had on the animal welfare strategies of the companies involved cannot be ruled out. In this respect, the deterrent effect could also be extended to other companies that could have liked to follow a similar strategy regarding other sustainability objectives. Moreover, numerous factors could have influenced the situation that led to the improvement of the measures proposed in the agreement, such as the growing awareness regarding animal welfare concerns among society, or sustainability as a powerful marketing tool.

While private initiatives such as voluntary market labels or individual initiatives can bring about improvements, as shown by the ACM in this study, the existence of such initiatives does not preclude the existence of sustainability agreements. Sustainability agreements are a different tool with a different reach that can bring other advantages and results. The mandatory nature of self-regulation agreements and the big reach in the industry concerned have the potential to lead to wider results and create a bigger impact in the market, since they impose mandatory minimum requirements for all. For example, as mentioned, the Chicken of Tomorrow initiative affected all the chicken products offered by the participating supermarkets, which, at the same time, held a big market share on the market. Also, such an agreement did not preclude participants from participating in voluntary initiatives with higher standards.

Finally, the Chicken of Tomorrow case generated an intense debate on the inclusion of sustainability agreements under Article 101(3) TFEU, which has continued until today.[33] When assessing the efficiency gains of the agreement, the ACM concluded that the specific objectives of the agreement were not enough, since, when evaluating it with a willingness-to-pay analysis, it was concluded that consumers were willing to pay only a small amount for the measures provided in the agreement and that the additional costs exceed that amount. The key element is the specific measures and objectives contained in the agreement. The manner in which the Commission and NCAs decide to assess whether those objectives are enough is crucial, and it is necessary to inquire whether the current interpretations of the rules take the importance of the objectives of sustainability agreements sufficiently into account.

4.2 Ensuring the Potential of Sustainability Agreements within the Current Competition Law Rules

The question of whether those objectives are 'enough' to achieve the public interest objective behind them is answered in competition law terms by assessing whether the sustainability benefits to consumers offset the harm that the restriction of competition has caused to them.

Focus is placed on the agreements that are considered to be outside the exception of Article 101(3) TFEU unless a willingness-to-pay study can show that those benefits are given enough value by the consumers to compensate the competition harm, and the sustainability agreements with collective benefits (normally, environmental damage agreements, since they aim to compensate the market failure consisting of non-sustainable consumption producing negative externalities on others). There are traditionally two fundamental difficulties when applying Article 101(3) TFEU:

– First, there are multiple setbacks when assessing sustainability benefits to ascertain efficiency gains: By using a direct evaluation method (a technique that asks consumers which value they ascribe to a product) such as the willingness-to-pay method used by the ACM in the *Chicken of Tomorrow* case and the one chosen by the Commission to assess 'non-value use benefits' or 'indirect benefits', it is possible to assess goods that would otherwise be difficult to value. However, such a method comes with difficulties. For instance, results may be influenced by the chosen structure of the survey or wording of questions. Moreover, it has been shown that the actual willingness-to-pay frequently differs from the stated willingness-to-pay (bounded rationality of consumers).[34] Potential biases or lack of knowledge may arise both when considering future benefits against immediate costs and when assessing the preferences of consumers for a balancing of effects.[35] Even the Draft Horizontal Guidelines from the Commission recognise that such a method comes with difficulties (para 598).

  There are multiple evaluation methods that can be used. However, it has been pointed out that the relationship between the avoidance costs and the utility

33 Among others, Gerbrandy above n. 2; G. Monti and J. Mulder, 'Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives', 42 *European Law Review* 635 (2017); J. Bos, H. van den Belt & P. Feindt, 'Animal Welfare, Consumer Welfare, and Competition Law: The Dutch Debate on the Chicken of Tomorrow', 8 *Animal Frontiers* 20 (2018); M. Gassler, 'Sustainability, the Green Deal and Art 101 TFEU: Where We Are and Where We Could Go', 12 *Journal of European Competition Law & Practice* 430 (2021); P. Jansen, S. Beeston & 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?', 12 *European Competition Journal* 287 (2022).

34 OECD Directorate for Financial and Enterprise Affairs Competition Committee, 'Sustainability and Competition – Note by Germany', at 16-17 (2020); K. White, D. Hardisty & R. Habib, 'The Elusive Green Consumer', July-August 2019 *Harvard Business Review* (2019); C. Volpin, 'Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)', July 2020 *CPI Antitrust Chronicle*, at 3-4 (2020).

35 R. Inderst and S. Thomas, 'Integrating Benefits from Sustainability into the Competitive Assessment—How Can We Measure Them?', 12 *Journal of European Competition Law & Practice* 705 (2021).

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loss caused by externalities is not very strong and that the actual damage might differ from avoidance costs.[36]

On top of the disadvantages of a method itself, the existence of a plurality of methods becomes a practical problem since different evaluation methods can be used for different improvements regarding sustainability objectives. When the results vary depending on the method chosen, uncertainties arise, which makes the assessment vulnerable.[37] More importantly, it is not always possible to economically quantify all aspects of sustainability goals (e.g. valuing intergenerational equity).[38] The need to take into account the 'constitutional' requirements to incorporate sustainability policies into the implementation of EU policies is important in this measurement, and the principle of proportionality to weight the values involved should be of relevance. Thus, a quantitative assessment of benefits deriving from sustainability agreements is indeed not an easy task, and the uncertainties around it might prevent businesses from entering into this type of agreement. The revised Draft Horizontal Guidelines provide for specific requirements in order to ensure the accuracy of the willingness-to-pay studies presented by the undertakings involved. However, given the uncertainties around it, we could wonder whether this is an adequate tool in order to properly harness the potential of these agreements to achieve certain objectives.

- Second, the next prerequisite for the application of the exception of Article 101(3) TFEU requires that product users must receive a fair share of the benefits resulting from the agreement. In other words, consumers should be compensated for the harm caused by the restriction of competition (e.g. increase in prices, limitation of products, etc.).

  There have been innumerable doubts and discussions as to whether the requirement only refers to benefits for users of the relevant market of the product and a full compensation for them is necessary or whether the scope can be broader. This issue is fundamental in the context of sustainability agreements, since the negative externalities that a sustainability agreement may aim to avoid, or the benefits that it aims to seek, will generally affect society as a whole (e.g. less pollution, health, etc.). In the *CECED* case, concerning the agreement between washing machine manufacturers to stop the production of the least energy-efficient washing machines, the Commission assessed the individual economic benefits for washing machine users but also analysed the collective environmental benefits for society as a whole. Still, the conclusion was based on the decision that users of the relevant market were fully compensated. After years when it seemed that the Commission's more economic approach would follow a narrow approach, the new revised Draft Guidelines take back the view of the *CECED* case. Collective benefits will be taken into account when parties provide evidence of the claimed benefits, define the beneficiaries, show that the consumers in the relevant market substantially overlap with the beneficiaries, and demonstrate what part of the collective benefits outside of the relevant markets accrue to the consumers of the product in the relevant market. Evidence based on public authorities' reports or on the reports prepared by recognised academic organisations will have particular weight (paras 606 and 607). The example used by the Commission in the revised Draft Horizontal Guidelines (example 5, para 621) resembles the facts and findings on the *CECED* case.

  In the same line of reasoning, the Dutch ACM, in the Draft Guidelines on Sustainability Agreements (second draft version, January 2021), also believes, only regarding environmental damage agreements, that benefits for people other than the users should be taken into account since, in those cases, it is the demand for the products in question, the one creating the problem, that affects society, and it can be fair not to fully compensate users for the harm that the agreement causes. The ACM also mentions that these users enjoy the same benefits as society. For this more extensive interpretation regarding environmental damage agreements to be applicable, the ACM requires in the Draft Guidelines that the agreement contribute efficiently towards the fulfilment of an international or national standard or concrete policy objective.

  Following these interpretations, it seems that out-of-market benefits can be taken into account as long as users of the relevant market receive at least some substantial part of those benefits, but only regarding environmental damage agreements. This is not the case when it comes to the other type of sustainability agreements, such as those considered by the Commission as bringing 'indirect benefits' (individual non-use value benefits), since the willingness-to-pay analysis is based on the consumers of the specific product, and the assessment is generally limited to the consumers in the relevant market. However, we consider that such an approach can be extended to sustainability agreements in general. Even the ACM, when justifying the approach for environmental damage agreements, refers to the obligation to apply the competition rules in a manner consistent with the objectives of the Treaty. These arguments do not require a distinction between environmental damage agreements and other agreements but could support the application of the broad 'fair share' interpretation for both cases.

Taking this into account, in addition to the difficulties deriving from the quantitative assessment of sustaina-

36 OECD Directorate for Financial and Enterprise Affairs Competition Committee, above n. 34, at 16-17.

37 Gassler, above n. 33, at 103.

38 Gerbrandy 2019, above n. 6, at 116.

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bility benefits (especially regarding the difficulties and discussed 'adequacy' of the willingness-to-pay approach), a broader use of the qualitative assessment can be explored. More emphasis could be placed on the fact that certain agreements aim to pursue pre-established objectives, derived from international or national standards, or concrete policy objectives, which are not mandatory for the companies involved. While benefits deriving from the agreement are required to be objective and based on existing studies, greater focus can also be placed on the objectives of the agreement. For example, the sustainability objectives that our society is aiming for are specified, in general, in the SDGs and Paris Agreement and its related strategies, and, even more locally, in the EU Green Deal and its derived strategies. When the agreement pursues pre-established public objectives, whose benefits can also be objectively substantiated, a broader use of a qualitative assessment could be promoted.

This approach could prove especially useful when those pre-established objectives (and the measures needed to reach them) are not going to be reached in the near future by public regulation. For example, the European Commission has said, following a European Citizens' Initiative (ECI), that it will work towards phasing out, and finally prohibiting, caged animal farming.[39] As part of the farm to fork strategy, the Commission will revise the existing animal welfare legislation, aiming to enter into force by 2027. The European Food Safety Authority will complement the existing scientific evidence to determine the conditions necessary to phase out and prohibit cages, and the socio-economic and environmental implications of the measures to be taken, as well as the benefits to animal welfare, are to be considered by the Commission in an impact assessment. The financial challenges of such a transition to farmers are important. In this case, a sustainability agreement could constitute an option to start raising the animal welfare standards now and agreeing on phasing out the cage systems for one of the considered animals, following those pre-established objectives, and using the upcoming studies to justify those measures and their consequences to the consumers (such as a price increase). Such initiatives may contribute to creating awareness among consumers and even preparing the market in some cases for potential public regulation (which may or may not enter into force in the near future). Another example is found in the ACM's Draft Guidelines on sustainability agreements when considering a similar option in the case of environmental damage agreements and refers to the concrete policy objective of the government's policy aimed at reducing CO_2 emissions on Dutch soil by year X by Y%.[40] It is well established that private actors can have an important role in complementing regulatory efforts.[41]

Thus, creating an exception for those agreements that aim to pursue pre-established objectives (derived from international or national standards, or concrete policy objectives, which are not mandatory for the companies involved) and to ensure objective benefits, can help achieve the potential that self-regulation agreements have within the competition law context. An assessment by the Commission or NCAs would still be required but can be of a qualitative nature rather than a stricter and more complicated quantitative assessment of efficiency gains.

5 Conclusion

EU competition law should take into account sustainability considerations as much as possible and has the potential to do so. Despite the discussions regarding the goals of competition law, it is clear that the Treaty foundations require that EU policies take into account sustainability considerations, and if consumer welfare is the main goal of competition law, then this concept should be interpreted under a progressive economic and legal thinking not disconnected from reality. Thus, efforts are required in order to use the available tools that competition law has to enhance sustainability. Sustainability agreements are one of those tools.

Article 101(3) TFEU seems to be the most feasible route nowadays in order to allow sustainability agreements under EU competition law. After years of academic discussions and numerous calls for clarifications, the actions of the NCAs and the Commission in order to clarify whether and, if so, when sustainability agreements can fit within the exception of Article 101(3) TFEU are welcome. Indeed, legal certainty in this regard was very much called for in order not to discourage undertakings from entering into these agreements. The Draft Horizontal Guidelines allow agreements that contain those considered as indirect or non-value use benefits, but as long as there is a willingness-to-pay study that shows that the consumers give enough value to those benefits in order to compensate the competition harm. They also allow agreements containing collective benefits, as long as certain conditions are fulfilled.

The 'Chicken of Tomorrow' case from the Dutch ACM also used a willingness-to-pay study that showed that consumers did not value the animal welfare measures derived from the agreement and were unwilling to pay the price increase that those measures would bring. Thus, the Dutch ACM considered that the measures and objectives pursued by that sustainability agreement were not 'enough' to fall under the exception of Article 101(3) TFEU. This case raised a lot of doubts about

39 European Commission Press release 30 June 2021, 'Commission to propose phasing out of cages for farm animals' at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3297.

40 Netherlands Authority for Consumers and Markets (ACM), *Draft Guidelines on Sustainability Agreements* (2021), para. 48.

41 A.G. Scherer, G. Palazzo & D. Matten, 'The Business Firm as a Political Actor: A New Theory of the Firm for a Globalized World' (2014) 53 *Business & Society* 143.

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the interpretation of Article 101(3) and whether the willingness-to-pay method was adequate to measure the benefits of such agreements. In 2020, the Dutch ACM published a Memo highlighting the improvements brought forward by other private initiatives such as voluntary market labels or individual initiatives. However, the potential big market reach of sustainability agreements and the imposition of mandatory minimum requirements on all the participants would likely create a bigger impact in the industry and lead to wider results. Substantively, the key lies in the objectives and measures imposed by the agreement. However, it has been questioned whether the objectives and measures of the agreements are being properly assessed (for example, with the willingness-to-pay method).

While the willingness-to-pay method comes with inherent difficulties, such as those related to consumer behavioural science, it is not always possible to economically quantify all aspects of sustainability goals. Even the quantitative measure of the benefits of environmental damage agreements through environmental damage prices does not come without problems. The uncertainties around the quantitative assessment of benefits from sustainability agreements might create a deterrent effect for businesses that want to enter into this type of agreements. The reach or scope of the benefits is also a subject of discussion. It seems that out-of-market benefits can be taken into account as long as consumers of the relevant market receive at least a substantial part of those benefits, but only in the case of agreements with those classified as ‘collective benefits’ (environmental damage agreements). However, in the case of agreements bringing individual non-use value benefits, the willingness-to-pay analysis is based on the consumers of the specific product, and the assessment is generally limited to the consumers in the relevant market.

In order to overcome these difficulties, this article proposes an approach that may allow a proper consideration of the objectives of a sustainability agreement for certain cases, by focusing on agreements that pursue pre-established objectives derived from international or national standards, or concrete policy objectives that are not previously mandatory for the companies involved. To overcome the difficulties derived from a quantitative assessment, such assessment could be omitted when the agreement at hand pursues pre-established objectives derived from international or national standards or concrete policy objectives, whose benefits are objective and based on existing studies, relying instead on the qualitative assessment. Such an exception may promote these types of agreements as opposed to other sustainability agreements and help achieve the potential that self-regulation agreements have within the competition law context.

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