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Unmuting the environment in EU competition law – Broadening the notion of "fair share to consumers" when assessing sustainable cooperation initiatives

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Unmuting the environment in EU competition law – Broadening the notion of "fair share to consumers" when assessing sustainable cooperation initiatives

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Abstract: Competition policy may in some instances hinder positive cooperation initiatives between competitors in the context of climate change. This "antitrust issue", i.e. the Commission's strict application of the "fair share to consumers" condition under Article 101 TFEU, arguably results in "muting" the environment or future generations as well as stakeholders of global value chains, who are not always the direct consumers of the products concerned. The Commission under the Green Deal revised its applicable guidelines, adding a new chapter on "sustainability agreements", which marks a positive but modest development, as this new instrument does not fully consider collective environmental benefits of such agreements. The paper also analyses national, more ambitious solutions found in the Netherlands, Austria and the United Kingdom as possible alternatives or sources of inspiration. Such broader approach regarding environmental issues is not precluded by the CJEU case-law and may even be required in light of the EU "constitutional" context. Further change might also prove necessary to enable companies to comply with their new obligations to cooperate under the CSDDD.

Introduction

The European Green Deal also impacted EU competition policy. The public debate and consultation process launched by the European Commission ("Commission") in 2019 on how competition policy could best contribute to delivering the Green Deal's objectives resulted in significant changes. One of them is, as one could imagine, the adjustment

of the State aid control policies (both limiting access to State aid funding for fossil fuel producers and allowing for greater aid intensity in green investments)[1]. But the greening of EU competition policy does not stop there, as not only public but also private parties should play their part a.o. through implementing "sustainable cooperations"[2], which may mandate an adjustment of antitrust policies.

This consultation process led, in particular, to the 2023 revision by the Commission of its guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements ("Guidelines")[3]. The importance of this instrument for stakeholders and practitioners should not be underestimated. In a field where the separation line between prohibited concerted practices and authorised cooperations – concepts generally defined by "abstract" CJEU case-law – is often very thin and greatly depends on the discretion bestowed upon competition enforcers, the Guidelines often have almost biblical value for (the counsels) of companies that consider collaborating with the authorities.

The Guidelines now contain a specific chapter concerning "sustainability agreements" between competitors, broadly understood as agreements that pursue (environmental, social or economic) sustainability objectives[4]. This evolution is aimed at responding to critical voices claiming that EU competition law is (or was) not equipped with the right tools to tackle such sustainable cooperation initiatives, notably due to the classical – arguably, "narrow-minded" – interpretation of the condition that cooperations between competitors may only be exempted from the cartel prohibition where they result in a "fair share of the resulting benefits" being passed on to "consumers".

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[1] For a summary overview of the State aid-related reforms launched by the Commission in the context of the Green Deal, see in particular European Commission, "Competition Policy in Support of Europe's Green Ambition", *Competition policy brief*, (September 2021), p. 3-5.

[2] European Commission, "Competition Policy in Support of Europe's Green Ambition", *op. cit.*, p. 1.

[3] See the Communication from the Commission of 21 July 2023, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", 2023/C 259/01.

[4] Hence, "sustainability agreements" may be concerned with addressing climate change (for instance through the reduction of greenhouse gas emissions) and reducing pollution, but also with upholding human rights, facilitating a shift to healthy and nutritious food or ensuring animal welfare: *ibid.*, paras 515-517.

The "antitrust issue" which the Guidelines attempted to solve can be summarised and illustrated as follows.

Sustainability agreements between competitors are sometimes necessary to accommodate the so-called "first-mover disadvantage". Without possible coordination, there is a risk that companies will not undertake a sustainable initiative at all, as the adoption of higher standards of sustainability generally leads to higher costs, which puts proactive companies at a competitive disadvantage compared to their rivals who, for example, continue to use cheaper non-renewable energies. Entering into (individual or sector-wide) agreements with competitors therefore appears necessary, in some instances, to reduce commercial risks and, hence, convince companies willing to act more sustainably to make the leap.

Yet, companies have for long been complaining that sustainable cooperation initiatives would be impeded by the prohibition of cartels and concerted practices under Art. 101 TFEU – in other words, that competition law may sometimes stand in the way of sincere sustainable cooperation initiatives. Indeed, as a rule, agreements between competitors which are restrictive of competition are prohibited under Article 101(1) TFEU, unless they can be exempted under Article 101(3) TFEU. More precisely, the third paragraph of this provision states that Article 101(1) will be held inapplicable in relation to agreements which (i) contribute "to *improving the production or distribution of goods or to promoting technical or economic progress*, (ii) while *allowing consumers a fair share of the resulting benefit*", and without (iii) imposing "restrictions which are *not indispensable* to the attainment of these objectives" or (iv) affording the parties "the possibility of *eliminating competition* in respect of a substantial part of the products in question" (emphasis added)[5]. Competition authorities have a broad margin of appreciation when applying Article 101(3) TFEU and the CJEU appeared rather unwilling to interfere with this leeway[6].

[5] These four conditions are cumulative and the burden of proof rests on the undertakings arguing for an exemption of their agreement: see for instance cases C-43/82 and 63/82, *VBVB and VVVB v Commission*, EU:C:1984:9, para 61; case C-238/05, *Asnef-Equifax v Asociacion de Usuarios de Servicios Bancarios (Ausbanc)*, EU:C:2006:734, para 65.

[6] Case C-26/76, *Metro SB-Grossmärkte GmbH v Commission*, EU:C:1977:167, para. 45 and 50; Case T-7/93, *Langnese-Iglo GmbH v Commission*, EU:T:1995:98, para 178. See D. Bailey, R. Whish, *Competition Law* (Oxford, 2018), p. 173.

Mostly the application of the second condition ("*fair share* of benefits to *consumers*", or "*pass-on*" requirement) in the context of sustainability agreements has been subject to a lively debate in the competition law sphere. More specifically, many have argued that, since sustainable agreements are arguably beneficial to a larger group of consumers than the narrow category of directly impacted consumers of the products (for instance "consumers" located where the products are produced rather than consumed, more largely society as a whole, or even "future" (generations of) consumers), the notions of "consumer" and of "fair share" should be interpreted and applied more broadly than what has traditionally been the case (in the last two decades in particular).[7] Benefits of sustainability may arguably materialize elsewhere than where the "consumers" of the products live, and may do so only several decades later (i.e. impacting "future generations of consumers" rather than actual consumers of the products). In other words, the (classical) strict interpretation of this condition, which limits the relevant benefits to those occurring on the markets concerned, arguably creates a risk of competition law impeding necessary sustainable cooperation initiatives.

A famous example of such strict application in a sustainability context is the *Chicken of Tomorrow* case in the Netherlands (2015), which regarded an agreement between poultry producers to introduce a minimum standard of animal welfare protection across the industry (covering approximately 95% of the national market). Such coordinated practice was however not exempted by the Dutch Competition Authority ("Autoriteit Consument en Markt", hereafter "ACM") under the (Dutch equivalent of) Article 101(3) TFEU, as it resulted in a cost – and, hence, a price – increase for chickens as well as in a reduction of consumer choice (i.e. a restriction of competition). More specifically, and interestingly for the purpose of the present contribution, the ACM considered that the price increase and the choice reduction imposed on consumers were not (sufficiently) compensated by the environmental benefits – in other

[7] The Commission in the late 1990s adopted, under the growing influence of the US modern industrial organization theory, the so-called "more economic approach" for the EU competition policy. This evolution has been reflected in a more intensive use of economic theories in EU antitrust enforcement. The "neoclassical" theories conveyed by this (Chicago School-inspired) movement have profoundly influenced the competition policies adopted in Europe, resulting in a less interventionist approach: see D. Bartalevich, "The Influence of the Chicago School on the Commission's Guidelines, Notices and Block Exemption Regulations in EU Competition Policy", *Journal of Common Market Studies* (2016), p. 267-283.

terms, that no "*fair share*" of the (economic) benefits generated by the agreements would accrue to the consumers concerned. Indeed, those benefits were measured through a consumer willingness-to-pay survey, which concluded that the consumers of the chickens affected would only be willing to pay EUR 0.68 more for each sustainably produced kilogram of chicken, while the price increase induced by the agreement between producers would amount to EUR 1.46 per kilogram. Benefits were therefore outweighed by the estimated price increase and consumers, as a result, were not (sufficiently) compensated by the sustainability agreement, which was consequently not exempted by the ACM.

In other terms, the ACM relied on a "price-centric snapshot" of (a limited group of) consumers' (stated) preferences, without considering the possible broader benefits of those agreements on other possible (indirect and/or future) consumers, let alone on society as a whole. In this sense, through the recourse to price-centric economic tools focusing on a strict interpretation of the "consumers affected", the ultimate beneficiaries of (genuine) sustainability cooperation initiatives – that is, society as a whole – are "muted". This example therefore illustrates the "antitrust issue" – i.e. how the "strict" application of competition law (and the prohibition of concerted practices under Article 101 TFEU in particular) may create obstacles to sustainable cooperation initiatives between market players.

To express it in a wider sense, the restrictive – arguably, too "static"[8] – interpretation of the conditions of Art. 101(3) TFEU (and more specifically of the notion of "fair share" to "consumers") could, in the particular context of this publication, be described as "muting" a whole category of stakeholders. One thinks, in particular, of those whom the economic tools traditionally used in competition policy render invisible, because they are not the consumers directly affected and cannot therefore assert their interests by means of their 'willingness to pay', whether they be future consumers (citizens of the next generations), workers involved in supply chains across the world, or (following a very broad interpretation) even animal suffering. Against this background, the will to tackle the above-described "antitrust issue" resulted in July 2023 in the adoption of the (revised) Guidelines. The latter arguably constitute a real yet modest evolution which, as we show, only partially

[8] See in this sense I. Lianos, "Reorienting competition law", *Journal of Antitrust Enforcement*, vol. 10, n°1 (2022), p. 1-31.

"unmutes" the environment in EU competition law (part 1). Other policy initiatives at national level, in the Netherlands, in Austria and in the UK go further and could serve in turn as an inspiration for EU competition law enforcers, as such evolution is (arguably) not prevented by the CJEU case-law, and is possibly even needed in light of the broader EU (primary and secondary) law framework (part 2).

1. What the new EU Commission's guidelines on cooperation agreements foresee – A (modest) evolution

The Guidelines include an entirely new ninth chapter devoted to sustainability agreements. Many stakeholders consulted during the revision process argued for the inclusion of this specific new chapter. It should be noted, however, that this new feature is not a complete innovation, as such a section on sustainability already existed in the 2001 version of the Guidelines (the predecessor of the 2011 Guidelines that were replaced by the 2023 Guidelines). Thus, from a certain perspective, the new Guidelines mark a return to – but mainly a further development of – an approach that looks (more favourably) at the situation of sustainability agreements. In the present part, we highlight the main principles of this ninth chapter of the Guidelines (1.1) and have a closer look at the condition of "fair share to consumers" (1.2).

1.1. The main principles of the sustainability chapter of the Guidelines

The provisions in this particular chapter of the Guidelines dedicated to sustainability agreements are intended to strike a delicate balance between the Commission's two main concerns. On the one hand, the introduction of this chapter is a response to the (above-mentioned) often-heard issue that the framework provided by the previous version of the guidelines did not provide sufficient legal certainty for companies to dare to work together for better environmental protection[9]. In other terms, the aim was to address widely shared concerns that a potentially large number of "sustainable" cooperation initiatives would never be

[9] See a.o. S. Holmes, "Climate change, sustainability, and competition law", *Journal of Antitrust Enforcement*, (2020), p. 354-405; T. Fernando, "EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links", *Fair Trade Advocacy Office – Briefing note* (2019); S. Kingston, *Greening EU Competition Law and Policy* (Cambridge, 2011).

implemented because of the fear that these practices would later be analysed by competition authorities as restrictions of competition.

On the other hand, the Commission intended to provide the necessary safeguards to prevent certain companies from using "greenwashing" to enter into anti-competitive agreements in the name of environmental protection, a risk that both critical academic voices and other stakeholders cautioned the Commission against[10]. Furthermore, the Commission always underscored (and also explicitly stated in the Guidelines) that cooperation agreements between competing players in the field of environmental protection should not replace classical market regulation. Such agreements are only necessary insofar as they allow the "remaining market failures" to be addressed, to compensate for the absence of government regulation, or when they complement such regulation, for example by going further[11].

On the substance of the reform, the question was not so much whether the Commission would allow more favourable scrutiny of sustainability agreements, but rather how and to what extent. In particular, the challenge for the Commission was how to integrate this desire to take more account of environmental benefits into the specific (economic) analytical framework of Article 101 TFEU. In summary, two possible avenues could be distinguished in the legal literature: i) those that recommended exempting sustainability agreements from the application of 101(1) TFEU altogether because they are not restrictive of competition, and ii) those that favoured the assessment of such agreements at a later stage under the exemption conditions of Article 101(3) TFEU. Ultimately, the Guidelines combine these two aspects, in particular by giving a series of examples of agreements that fall outside the scope of Article 101 TFEU, of agreements that are not restrictive within the meaning of Article 101(1) TFEU (in particular 'sustainability standards') and, finally, agreements that meet the conditions for exemption under Article

[10] For a sample of legal literature not favourable to adjusting the assessment framework of Article 101 TFEU in the context of sustainability agreements, see a.o. E. Loozen, "EU antitrust in support of the Green Deal. Why better is not good enough", *Journal of Antitrust Enforcement* (2024), p. 75-97; E. Loozen, "Strict Competition Enforcement and Welfare: A Constitutional Perspective Based on Article 101 TFEU and Sustainability", *Common Market Law Review* (2019), p. 1265-1302; P. Schinkel, L. Toth, "Compensatory Public Good Provision by a Private Cartel", *Tinbergen Institute Discussion Papers*, 19-086/VII (2019).

[11] Guidelines, paras 519-520.

101(3) TFEU. The present contribution focuses on this third category, looking closely at the strict interpretation of "consumer" retained by the Guidelines under Article 101(3) TFEU.

Regarding in particular the first condition under Article 101(3) TFEU (existence of benefits generated by the sustainability agreement), the Guidelines adopt a flexible interpretation of the concept of 'objective efficiencies', as sustainability efficiencies can also include qualitative efficiencies – for example, the assimilation of less polluting products into better-quality products –, innovation increases or cost savings. However, it is uncertain how companies should demonstrate the existence of such "sustainability efficiencies" in practice. After all, the Guidelines make it clear that these benefits should not be assumed but substantiated: they must be objective, concrete and verifiable. But no further guidance is given on the means by which companies can actually demonstrate such objective and verifiable benefits. The Commission therefore seems to leave some room for companies to determine for themselves how to provide such evidence, depending on the case. It can be expected that companies will often rely on the expertise of environmental economists in this regard[12].

1.2. Art. 101(3) TFEU – the "fair share to consumers" requirement in particular

The position of the Commission on the condition of "fair share to consumers" is (still) based on the so-called "consumer welfare standard", which has been widely accepted (and adopted by the Commission and EU courts) in the last decades as the prevailing standard in "mainstream antitrust".[13] Simply put, the Commission in the revised Guidelines does

[12] Regarding the application of environmental economics in this context, see in particular B. Baarsma, N. Rosenboom, "A veritable tower of Babel: on the confusion between the legal and economic interpretation of Article 101(3) of the Treaty on the Functioning of the European Union", *European Competition Journal* (2015), p. 402-425.

[13] The "consumer welfare" objective is traditionally reflected in concrete cases by the search for lower prices, higher levels of production and maximisation of the concept of "social surplus". It is therefore an approach that focuses almost exclusively on economic efficiency, based on empirical reasoning that uses scientific tools linked to complex econometric considerations.

not depart from the premise that "mainstream antitrust is sufficiently green as it is"[14].

The condition that consumers in the context of sustainability agreements should receive a fair share of the benefits achieved has been heavily debated. It is clear (and undisputed) that the benefits must outweigh the harm caused and that, except in cases where the harm to competition is clearly negligible compared to the potential benefits, this involves a delicate balancing of interests[15]. However, it was heavily debated whether affected consumers should be fully compensated and whether the fair share of benefits should be assessed only in relation to consumers located in the same market as the market affected by the restriction of competition, was heavily debated[16].

Ultimately, the Guidelines' approach constitutes a compromise between conservative and reformist voices: not only "individual benefits" for consumers, but also so-called "collective benefits" can be taken into account to some extent, yet this is limited by fairly strict rules[17].

On the one hand, there was little doubt that, in line with the Commission's classic decision-making practice, *individual consumer benefits* could be taken into account under Article 101(3) TFEU. Nevertheless, the Guidelines make an additional segmentation within individual benefits. While (i) *individual use value benefits* directly improve users' experience of the product in question (e.g. vegetables grown using organic fertilisers), (ii) *individual non-use value benefits* provide indirect qualitative benefits: they do not directly improve consumers' experience, but consumers are willing to pay more for the beneficial effect on others (e.g. fair trade coffee beans).

Thus, the central criterion for identifying relevant individual non-use value benefits remains the consumers' "willingness to pay". The Guidelines indicate that the latter, in line with classical competition economics tools, should be assessed through (carefully designed) customer surveys.

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[14] E. Loozen, "EU antitrust in support of the Green Deal. Why better is not good enough", *op. cit.*, p. 76.

[15] Guidelines, para. 570.

[16] See a.o. G. Monti, "Four Options for a Greener Competition Law", *Journal of European Competition Law & Practice* (2020), p. 124-132.

[17] Any combination of the above types of benefits is possible. Depending on the case, only one type of benefit can be invoked or a combination of both: Guidelines, para 590.

Interestingly, however, the Guidelines here highlight the importance of designing consumer surveys in a way that avoids behavioural bias. This is in response to several critics who (rightly) consider that customer surveys are less appropriate in the context of negative externalities such as greenhouse gas emissions, the consequences of which often seem abstract to the consumers surveyed. An illustrative example in the context of sustainability agreements is the *Chicken of Tomorrow* case (see *supra*).

On the other hand, the real debate was whether (and, if so, how) so-called "collective benefits", namely "out of market" efficiencies, could be taken into account in cases where individual production and consumption decisions have negative effects on third parties that are not properly addressed through public regulation, and where consumers are unwilling to pay a higher price for more sustainable products. The Commission proposes a positive response, at least on the principle, applying a clear (traditional) economics-based approach centered on the "internalisation of negative externalities"[18].

Hence, while the weighing of the positive and negative effects of the restrictive agreements "is normally done within the relevant market" to which the agreement relates, "where two markets are related, efficiencies generated on separate markets can be taken into account"[19].

However, the response of the Guidelines remains rather cautious: collective benefits may only be taken into account to the extent that the group of consumers that is affected by the restriction and that benefits from the efficiencies is *substantially the same*[20]. Moreover, by analogy with the *Mastercard* case-law[21], where consumers in the relevant market substantially overlap with, or form part of the group of beneficiaries outside the relevant market, the collective benefits to the consumers

[18] Guidelines, para 582: "not all negative externalities can be cured through voluntary, individual consumer actions. As the sustainability impact from individual consumption accrues not necessarily to the consuming individual but to a larger group, a joint initiative, such as a cooperation agreement, may be needed to internalise negative externalities and bring about sustainability benefits for a wider section of society. […] These benefits are referred to as 'collective benefits', as they occur irrespective of the consumers' individual appreciation of the product and accrue to a wider section of society than just consumers in the relevant market".

[19] Guidelines, para 583.

[20] *Ibid.*

[21] Case C-382/12 P, *MasterCard Inc*, EU:C:2014:2201, para. 242.

in the relevant market that occur *outside that market* can be taken into account if they are *significant enough* to compensate the consumers *in the relevant market* for the harm that they suffer[22]. This means that, in practice, sustainability improvements that also benefit consumers affected by the price increase may be taken into account (e.g. cleaner air inhaled by buyers of cleaner, more expensive fuel), but not those that benefit separate groups of product consumers (e.g. consumers of cotton clothing in Europe are not in the same group as African cotton producers who benefit from a production process that uses less water, etc.).

The Commission thereby makes a rather strict application of the principle that the overall impact on consumers in the relevant market must be "at least neutral"[23]. It opposes the position – adopted notably by the Dutch competition authority (see *infra*) – that the agreement can be exempted, even where some consumers may not be fully compensated, when the benefits to society as a whole are substantial.

It should also be noted that this interpretation finally adopted by the Commission seems to contradict to some extent its (old) decision-making practice, in particular its *CECED* case[24]. This case concerned an agreement between the major producers and importers of washing machines to eliminate the least energy-efficient products from this market. The Commission found – in this decision adopted in 1999 – that the agreement was likely to produce both individual and collective benefits for users, and that the environmental results for society would appropriately allow a fair share of the benefits to accrue to those users, even where individual purchasers of washing machines would end up paying a higher price and consequently would not be (fully) compensated[25]. This case is often relied upon by "competition reformists"

[22] Para 584, Guidelines.

[23] Para 570, Guidelines.

[24] See the EC Decision of 24 January 1999, *CECED*, L187/47, para. 48-56.

[25] *Ibid.*, in particular: "(45) Following full implementation of the agreement by the year 2001, 1718 models in energy classes G, F, E and D (i.e. just less than 63 %) would no longer be produced or imported […]. (51) CECED estimates the pollution avoided at 3,5 million tons of carbon dioxide, 17000 tons of sulphur dioxide and 6000 tons of nitrous oxide per year in 2010, working on the basis of average emission values. Although such emissions are more efficiently tackled at the stage of electricity generation, the agreement is likely to deliver both individual and collective benefits for users and consumers. […].
(56) The Commission reasonably estimates the saving in marginal damage from (avoided) carbon dioxide emissions (the so-called "external costs") at EUR 41 to 61

as an example of how the decisional practice of the Commission was more favourable to sustainability claims in the past (i.e. before the "new economic approach" was adopted in EU competition policy in the two last decades).

In addition, the parties to the sustainability agreement have a heavy burden of proof to the extent that they must be able to demonstrate – including on the basis of official or academic reports – that the benefits will (probably) materialise and that the collective benefits will benefit consumers who do effectively (significantly) overlap with consumers in the relevant market[26]. Where there is no available data that allows for a quantitative analysis of the benefits of the agreement, other evidence may be considered, provided that it shows a clearly identifiable positive impact on consumers in the relevant market, not a marginal one. As there is currently little experience with measuring and quantifying collective benefits, the Commission aims to provide more guidance on this issue when it has gained sufficient experience of dealing with concrete cases, which may enable it to develop methodologies of assessment[27].

Finally, it should be noted that the (final version of the) guidelines also (briefly) address the temporal aspect of the compensation debate. Namely, they indicate that environmental benefits that only occur after a certain period of time can also be taken into account, provided that the value of those future benefits is appropriately discounted: the greater the time difference, the greater the efficiencies must be to compensate[28].

2. What the EU guidelines could (or should) have foreseen

In parallel with the review process ongoing at European level, several individual (former) EU Member States made changes and innovations to their national competition policies to better take into account the issues

per ton of carbon dioxide. On a European scale, avoided damage from sulphur dioxide amounts to EUR 4000 to 7000 per ton and EUR 3000 to 5000 per ton of nitrous oxide. On the basis of reasonable assumptions, the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines."

[26] Guidelines, paras 587-588.

[27] Guidelines, para 589.

[28] Guidelines, para 591.

surrounding sustainability agreements[29]. Pursuant to the role allocation between the Commission and national competition authorities, these changes are limited to agreements whose impact is geographically restricted to the Member State concerned. However, they do have a significant impact on the European debate surrounding the revision of the Commission's Guidelines. The policy changes analysed below concern the Netherlands, Austria and the United Kingdom respectively (2.1). This more ambitious approach adopted in those countries could also inspire the Commission at EU level, as it arguably finds support – or at least is not contradicted – by the CJEU case-law and is (perhaps even more) consistent with the broader context of EU primary and secondary law (2.2).

2.1. More ambitious national approaches

2.1.1. The example of the Netherlands

First of all, the ACM published in January 2021 its own "Draft Guidelines on Sustainability agreements" (the "Dutch draft Guidelines")[30]. This pioneering role does not come as a surprise, as the ACM has been at the forefront in handling sustainability agreements for several years. The main difference between the Dutch draft Guidelines and the Commission's Guidelines is the broader assessment (in the Netherlands) of the concept of fair share of benefits in particular for certain types of sustainability agreements ("environmental damage agreements").

Most strikingly, the ACM favours a shift from the *consumer* welfare standard towards a *citizen* welfare standard, where *non-consumer benefits* (which are potentially larger than *collective consumer benefits* considered in the Commission's Guidelines) are relevant for the purpose of assessing whether the "fair share" condition under Article 101(3)

[29] It should be noted that, asides from "general guidelines", a number of national competition authorities also implemented innovative "informal guidance" tools, i.e. open-door policies or "sandboxes" enabling companies to submit discuss concrete sustainable cooperation initiatives (more) openly with competition enforcers. On these important developments occurring a.o. in the UK, the Netherlands, France, Belgium, Germany or Greece, see a.o. S. Holmes, "Sustainability and competition policy in Europe: recent developments", *Journal of European Competition Law & Practice* (2024), p. 1-9, p. 3-5.

[30] ACM, *Draft Guidelines on Sustainability agreements. Opportunities within competition law*, 26 January 2021, accessible at: https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.

TFEU is met. Indeed, the ACM in the Dutch draft Guidelines had made a distinction between "environmental-damage agreements" and "other sustainability agreements"[31].

On the one hand, *environmental-damage agreements* (i) concern "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, and (ii) contribute (efficiently) "to the compliance with an international or national standard (to which undertakings are not bound) or to a concrete policy objective"[32]. According to the ACM, as this environmental damage manifests itself as atmospheric heating, reduced biodiversity, and/or less healthy livelihoods, the gains resulting from the agreement will not only benefit the users of the products in question, but also by society as a whole. Environmental-damage agreements may, according to the ACM, be exempted from the cartel prohibition even where users are *not* fully compensated themselves (i.e. non-consumer benefits may be taken into account). Indeed, according to the ACM, in such cases it may be fair that users are not fully compensated for the harms of the agreement because their demand for the products in question essentially causes the problem for which society needs to find solutions.

On the other hand, *other sustainability agreements* may concern social or other forms of sustainability, such as imposing certain minimum standards on production processes (this category covers the *Chicken of Tomorrow* example – i.e. the of setting minimum requirements for animal welfare in the production of meat (see *supra*)). This category also covers the agreements which do relate to the reduction of environmental damage, but which are not necessary for achieving a standard or a concrete policy objective (for instance, products standards or environmental standards that are more ambitious than the standard defined by the policy objective)[33]. For this type of agreements, users still need to be fully compensated for the harm they suffer from the restriction of competition.

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[31] *Ibid.*, p. 14 and f.

[32] *Ibid.*, p. 6.

[33] *Ibid.*, p. 14-15.

Furthermore, the Dutch draft Guidelines – in sharp contrast with the Commission's Guidelines – interestingly provided that economic quantification (in monetary terms) of benefits was not always necessary in the context of sustainability agreements. More precisely, the ACM considered that it is possible to conclude that the fair share condition is met without quantifying the effects of an agreement where (i) the undertakings involved have a limited market share and (ii) the "harm to competition is, based on a rough estimate, evidently smaller than the benefits of the agreement"[34]. Further, where (the above conditions are not complied with and) economic quantification is needed, the benefits of environmental-damage agreements must be expressed in monetary terms using so-called "environmental prices" or "shadow prices" (i.e. not market prices), based on methods such as prevention costs (in cases related to a concrete policy objective) or damage costs (in cases related to the damage caused by a certain production or consumption).

However, no open conflict is to be expected between the ACM and the Commission regarding the assessment of sustainability agreements. Indeed, the Dutch draft Guidelines (of 2021) were clearly aimed at steering the Commission in taking a greener direction in the context of the revision of its own Guidelines. After the Commission's actual adoption of (the final version of) these Guidelines in 2023, it became clear that the ACM vision had (influenced but) not really convinced the Commission. As a result, the ACM announced it would – and effectively did – adjust its own Dutch draft Guidelines, resulting in the "ACM policy rule" of 4 October 2023 on the ACM's oversight of sustainability agreements ("ACM policy rule")[35]. The latter are now (broadly) in line with the Commission's Guidelines, providing watered-down wording, for instance, in relation to environmental damage agreements[36].

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[34] *Ibid.*, p. 15.

[35] ACM, *ACM's oversight of sustainability agreements. Competition and sustainability*, Policy rule, 4 October 2023, accessible at: https://www.acm.nl/en/publications/policy-rule-acms-oversight-sustainability-agreements.

[36] For instance, "ACM does not consider it expedient to continue investigating an environmental-damage agreement if the initial investigation shows that it is plausible that the agreement is necessary for achieving the environmental benefits and that such benefits sufficiently outweigh the potential competitive disadvantages. *It is important that consumers in the relevant market receive an appreciable and objective part of the advantages*" (emphasis added)*: Ibid.*, p. 7.

Yet, interestingly, according to the ACM policy rule, the national competition watchdog still has "discretionary freedom within certain boundaries on how it investigates potential violations or what sanctions it imposes"[37], notably where firms agree to comply with a binding sustainability rule or where "environmental-damage agreements […] help comply with an international or national standard or concrete policy goal to prevent or reduce such environmental damage", with the environmental benefits outweighing the potential competitive disadvantages[38]. This comes together with an open-door policy, encouraging stakeholders to discuss sustainable cooperation initiatives openly with the ACM, and with a no-fine policy in certain cases. As Holmes summarises it, "in essence the ACM is being as progressive as it can within the constraints on it as a member of the EU—where the Commission is very much the lead competition authority"[39]. Furthermore, the ACM has not ruled out a "test case" (which could take the form of a preliminary referral to the CJEU) in order to settle the issue.

2.1.2. The example of Austria

Second, Austria adopted an amendment to its national competition rules in 2021 to explicitly include sustainability criteria. Interestingly, the law now provides for a presumption of fair share for users in the case of agreements with a significant contribution to achieving environmental sustainability goals. More precisely, the following subparagraph has been added to Article 2(1) of the Austrian Cartel Act (which so far was materially identical to Article 101(3) TFEU):

> 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.

Thus, in the same spirit as the Netherlands, but here incorporated in legislation rather than in a soft law instrument, Austria goes a step further than the Commission by also giving (more) consideration to

[37] *Ibid.*, para 7.

[38] *Ibid.*, paras 8-9.

[39] S. Holmes, "Sustainability and competition policy in Europe: recent developments", *op. cit.,* p. 3.

out-of-market efficiencies when assessing the fair share condition. Yet, it avoids (direct) contradiction with the Commission's Guidelines by limiting the scope of the provisions to agreements that do not affect trade between Member States[40]. Furthermore, the scope of the Austrian amendment is limited to aspects of "ecological sustainability" and "climate-neutral economy", which 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", but excludes social standards or animal welfare for instance[41].

2.1.3. The example of the UK

Third, the United Kingdom's competition authority (Competition and Market Authority, "CMA") also adopted soft law guidance on "green agreements" ("UK Guidance") in 2023[42].

The UK Guidance takes a flexible approach on sustainability agreements which appears to resemble the Dutch draft Guidelines. A distinction is made between:

i. *Environmental sustainability agreements*: agreements between competitors which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on the environment or assist with the transition towards environmental sustainability (e.g., improving air or water quality, conserving biodiversity and natural habitats, or promoting the sustainable use of raw materials)[43]; and

ii. *Climate change agreements*, i.e. a sub-set of the previous category covering agreements which result in a reduction of greenhouse gases emissions or of other negative externalities which are typically global in nature and are realised over long time periods, with uncertainty

[40] See Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021 – KaWeRÄG 2021 (951 d.B.).

[41] See OECD Competition Committee, Out-of-Market Efficiencies in Competition Enforcement – Note by Austria, 6 December 2023, accessible at: https://one.oecd.org/document/DAF/COMP/WD(2023)103/en/pdf.

[42] CMA, *Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements*, CMA 185, 12 October 2023, accessible at https://www.gov.uk/government/publications/guidance-on-environmental-sustainability-agreements.

[43] However, agreements pursuing broader societal objectives than the protection of the environment fall outside the scope of the UK Guidance.

about their scale (e.g., an agreement between manufacturers to phase out a particular production process which involves the emission of carbon dioxide).

The exemption criteria (a.o. the fair share condition) are applied more broadly for climate change agreements than for other types of agreements[44]. As a result, while consumers of the relevant market still need to be fully compensated in the case of *environmental sustainability agreements* (benefits to consumers in other markets are generally not included in this assessment), a more permissive approach is deemed appropriate regarding *climate change agreements*. For this second type of agreements, "the totality of the climate change benefits to all UK consumers" should be taken into account, rather than "apportioning those climate change benefits between consumers within the market affected by the agreement and those in other markets"[45].

Hence, the CMA adopted an approach on climate change agreements that goes further than the Commission's Guidelines. This difference may hardly be explained by Brexit (only) – i.e. by the CMA not being bound anymore to apply Article 101 TFEU (as interpreted by the CJEU). Indeed, even though the CMA may now disregard the *Mastercard* case-law of the CJEU (heavily relied upon by the Commission's Guidelines to exclude consideration of non-consumer benefits)[46], there is similar case-law of the UK Supreme Court in a comparable case which, just like the (CJEU) *Mastercard* case, could appear to confirm the principle

[44] This is because "*climate change represents a special category of threat: the sheer magnitude of the risk that climate change represents (including the need for urgent action), the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into set it apart*": *ibid.*, at 1.11.

[45] *Ibid.,* at 6.4. This means concretely, for instance, that an agreement between delivery companies to switch to electric vehicles would benefit all UK consumers through a reduction in carbon dioxide emissions. As this is a climate change agreement, the different approach to the "fair share to consumers" condition means that the delivery companies will be able to take into account the totality of the carbon dioxide emissions reduction to compensate the harm to consumers of the relevant products that results from their agreement, without apportioning those benefits between consumers of the delivery service (inside the relevant market) and other UK consumers (i.e. the wider group of the consumers who benefit from the agreement, which is outside the relevant market) : *ibid.*, at 6.5.

[46] Indeed, the CMA and the UK Courts are not bound anymore by Articles 3 and 16 of Regulation 1/2003 which prevented them from exempting agreements that would have been prohibited by the Commission or the CJEU.

that the harm to one given set of consumers should not be offset against the benefits to a different set of consumers[47]. The CMA, however, interestingly noted the difference between cases such as those precedents and sustainability agreements: the *Mastercard* situation is one where the customers sustaining harm from the agreement were different from the customers benefiting from the agreement (retailers versus cardholders) – the two sets of customers were essentially separate from each other. By contrast, the benefits of mitigating the impact of climate change apply to society as a whole, a group of consumers which by definition includes, and is not wholly distinct from, the consumers of the agreement products who may be adversely affected by the restrictive effects of the agreement[48].

2.2. (Further) unmuting consumers (citizens) in the Commission's Guidelines

Not only does a further integration of sustainability interests through the consideration of non-consumer benefits under Article 101(3) TFEU appear to be possible in light of the CJEU case-law, but a more ambitious approach would also bring competition law (more) in line with the (EU constitutional and secondary law) context surrounding EU competition policy.

2.2.1. The CJEU case-law does not stand in the way of (further) greening EU competition policy

One of the main arguments that is usually put forward by opponents of further greening competition policy (but also by the Commission itself) is that considering non-consumer benefits (*citizen* welfare) under Article 101(3) TFEU would not be possible in light of the CJEU case-law[49]. More specifically, as is acknowledged by the Guidelines too (through references in footnotes), the Commission insists that cases like *GlaxoSmithKline*[50] or (most famously) *Mastercard*[51] would justify

[47] *Sainsbury's v Mastercard* [2020] UKSC 24, in particular paras 173-174.

[48] *UK Guidance*, see *supra*, footnote 83.

[49] See for instance E. Loozen, "EU antitrust in support of the Green Deal. Why better is not good enough", *op. cit.*, p. 82-85.

[50] Case T-168/01, *GlaxoSmithKline Services and Others v Commission*, EU:T:2006:265, paras 248 and 251.

[51] Case C-382/12 P, *MasterCard Inc*, EU:C:2014:2201, para 242.

that the effect on consumers directly affected in the relevant market should be at least neutral (i.e. that collective benefits to the consumers in the relevant market that occur outside that market could be taken into account only if they are significant enough to (fully) compensate the consumer in the relevant market)[52].

Other interpretations of the relevant CJEU case-law are possible. First of all, the context of all those cases (as well as other cases cited elsewhere in the Commission's relevant soft law instruments) was not anywhere close to the context of sustainability agreements. It is also striking, as the CMA rightly noted in relation to the comparable (UK Supreme Court's) *Mastercard* case (see above), that the benefits of mitigating the impact of climate change apply to society as a whole (i.e. by definition to overlapping groups of consumers or citizens), which is different from a situation where the two groups of consumers considered are two (fully separate) sets of customers (on a specific two-sided market). More fundamentally, none of the cases referred to by the Commission clearly provides that full compensation of the consumers on the relevant market is a generally applicable requirement for a fair share[53]. Lastly, the Commission's strict reading of the case-law seems to ignore other cases where it was found, notably, that regard should be had under Article 101(3) TFEU not only to benefits of agreements on "the relevant market", "but also, in appropriate cases, [on] every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any [service or product] the quality or efficiency of which might be improved by the existence of that agreement"[54].

[52] Guidelines, para 584.

[53] See in particular ACM, "What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?", *Legal Memo* (27 September 2021), p. 2-4; see 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?", *European Competition Journal* (2022), p. 315.

[54] See case T-86/95, *Compagnie Générale Maritime a.o.*, EU:T:2002:50, para. 343. See also T-213/00, *CMA CGM a.o*., EU:T:2003:76, para. 227.

2.2.2. The (constitutional) need to consider broad sustainability interests in the analysis framework under Article 101(3) TFEU

EU competition law cannot be considered in complete isolation from its (constitutional) context. In particular, systemic legal arguments exist for supporting a broader consideration of sustainability interests (for instance a broad notion of consumers) in EU competition law, which is part of the wider context of the 'European Economic Constitution'. EU law aims notably at achieving sustainable development in a social market economy (Article 3 TEU) and several provisions of the Treaties demand that environmental protection be taken into account in the other policies pursued by the Union. Crucially, Article 11 TFEU provides that environmental protection requirements "must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development". Similarly, Article 37 of the EU Charter of Fundamental Rights contains the principle that "[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".

This horizontal obligation of integration also applies to decisions taken by the Commission in competition law. Indeed, Article 11 TFEU's wording of "implementation" as well as the *effet utile* principle suggest that the scope of this provision extends further than the policy-making stage and also concerns the application of (competition) law in actual Commission decisions,[55] as supported by the case-law[56]. Moreover, as there would be no reason for competition law to derogate from the general rule that the obligation of environmental integration applies to all areas of EU law[57], Article 11 TFEU is equally applicable in competition law, which could hardly be given higher constitutional status than the protection of the environment[58].

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[55] J. Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford, 2016), p. 23-24.

[56] See a.o Case C-487/06 P, *British Aggregates v Commission*, EU:C:2008:757.

[57] J. Nowag, *op. cit.*, p. 27.

[58] See A. Gerbrandy, "Solving the Sustainability Deficit in European Competition Law", *World Competition* (2017), p. 137. See also the opinion of AG Geelhoed that Article 11 requires "to take due account of ecological interests in policy areas outside that of environmental protection stricto sensu": Opinion of AG Geelhoed in case C-161/04, *Austria v Parliament and Council*, EU:C:2006:66, para 59-60.

Admittedly, Article 11 TFEU does not deprive the Commission of its wide margin of discretion when environmental interests conflict with other EU objectives. It might therefore be argued that since Article 11 TFEU is only one of the thirteen horizontal clauses existing in the Treaties. Yet, this provision arguably does not have the same binding force as all the other clauses, as the Maastricht and Amsterdam Treaties considerably broadened this provision and reserved it a strong prescriptive wording which has not been used in any of the other horizontal clauses ('must be integrated')[59]. More fundamentally, it has been argued that the competition enforcers would lack the democratic legitimacy to make value judgments including environmental protection. The consideration of environmental concerns would be reserved to the legislator[60]. However, although it may indeed not be the role of competition enforcers to actively design environmental standards, the text of the Treaty as much as the jurisprudence of the Court arguably conferred on the Commission the legitimacy to balance different interests under Article 101 TFEU. Administrative authorities and courts arguably routinely conduct balancing exercises between competing values and interests, often involving issues of greater complexity than the more confined type of economic balancing needed in the context of competition law disputes[61]. There is no reason to consider that competition law (only) would be too technical or "objective" to take into account broader interests, all the more in a context where the text of the Treaty itself refers to the concept of "fairness" (i.e. a "fair share" of the benefits must be allowed to consumers).

Moreover, the polluter-pay principle enshrined in Article 191(2) is relevant too in this context. Indeed, these issues raise questions such as who the beneficiary of polluting consumption is, and who therefore should pay for this pollution. Is it not in some way logical that consumers of the polluting products would not be fully compensated and would incur (part of) the costs of measures designed to reduce pollution? Applying the polluter-pay principle here could mean that the costs of "negative externalities" should be paid by the direct beneficiaries of

[59] For a comparison of the respective prescriptive ambits of the horizontal protection clauses in the Treaties, see J. Nowag, *op. cit.*, p. 4.

[60] See a.o. P. Schinkel en L. Toth, "Compensatory Public Good Provision by a Private Cartel", *op cit.,* p. 30.

[61] See I. Lianos, "Reorienting competition law", *op. cit.*, p. 4.

the pollution, while the benefits derived from the measures addressing those externalities could also accrue consumers other than those direct beneficiaries[62].

Of course, the point here is not to imply that Article 11 TFEU, (Article 37 of the Charter) or Article 191(2) TFEU would mandate to exempt from the cartel prohibition any allegedly sustainable agreement (and thereby give a blank cheque to any sustainable cooperation initiative). It is simply to suggest that, when several readings of notions such as the "fair share for consumers" under Article 101(3) TFEU are possible, in view of the discretion left to the Commission, the "constitutional argument" should at least be taken into account when considering interpretations more favourable to the protection of the environment.

2.2.3. The requirement for companies to "collaborate" in order to meet their corporate sustainability due diligence obligations

An additional question that arises is how a strict interpretation of the conditions of Article 101(3) TFEU can be reconciled with recent secondary European law and, in particular, the Directive on corporate sustainability due diligence ("CSDDD")[63]. The CSDDD, which entered into force in July 2024, aims at fostering sustainable and responsible corporate behaviour in companies' operations and across their global value chains[64]. Consequently, as the CSDDD itself states, "[i]n some instances, a collaboration with other entities could be the only realistic way of preventing potential adverse impacts being caused even by direct business partners if the influence of the company is not sufficient"[65].

[62] See a.o. ACM, "What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?", *op. cit.*, p. 4.

[63] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, PE/9/2024/REV/1, OJ L, 2024/1760.

[64] It should be noted that the von der Leyen II Commission announced the publication in early 2025 of a so-called "omnibus simplification package" aiming at "reducing regulatory overlap" (in particular between sustainability-oriented instruments such as the CSDDD, the Corporate Sustainability Reporting Directive ("CSRD") and the Taxonomy Regulation). The concrete impacts of such forthcoming "omnibus simplification package" on the substantial obligations imposed on companies by the CSDDD are yet unknown: see the Commission's press release of 29 January 2025, "An EU Compass to regain competitiveness and secure sustainable prosperity", accessible under https://ec.europa.eu/commission/presscorner/detail/en/ip_25_339 (last consulted on 7 February 2025).

[65] *Ibid.*, recital (49).

The CSDDD therefore imposes on companies, where relevant, a *duty to collaborate*. More precisely, according to Article 10(2), (f) and 11(3), (g) of the CSDDD concerning obligations to prevent, remedy or bring to an end potential and actual adverse impacts respectively, "[c]ompanies shall be required to take the following appropriate measures, where relevant: […] *in compliance with Union law, including competition law*, *collaborate with other entities*, including, where relevant, in order to increase the company's ability to prevent or mitigate the adverse impact, in particular *where no other measure is suitable or effective*" (emphasis added).

It is unclear how companies will be able to navigate these potentially conflicting obligations, as in some instances they will have no option but to collaborate under the CSDDD, while having to respect Article 101 TFEU and the related Commission's Guidelines. The Guidelines themselves do seem to have anticipated such hurdles, as they further indicate – as an example of agreements "unlikely to raise competition concerns" – that sustainable agreements "may be an appropriate measure to enable undertakings to *implement their sustainability due diligence obligations under national or EU law* and can also form part of wider industry cooperation schemes or multi-stakeholder initiatives to identify, mitigate and prevent adverse sustainability impacts in their value chains or their sector"[66].

However, this mention alone – although helpful – will probably not suffice to grant companies a sufficient level of legal certainty. It is indeed doubtful whether the above-quoted provisions of the CSDDD may constitute a valid application of the public compulsion doctrine or defence, according to which anti-competitive conduct resulting from undertakings' compliance with government measures and regulations

[66] Guidelines, para 528. It can be noted that, quite oddly, this indication is provided as an example of agreements that "aim solely to ensure compliance with sufficiently precise requirements or prohibitions in legally binding *international* treaties, agreements or conventions" (emphasis added), i.e. not explicitly EU secondary law such as the CSDDD. Interestingly, the ACM policy rule also foresees a similar "exemption" but itself explicitly covers other EU rules: "Under the EC Horizontal Guidelines, such agreements that relate to compliance with international rules fall, under certain conditions, outside the scope of the cartel prohibition of Article 101, paragraph 1, of the Treaty on the Functioning of the European Union (TFEU). ACM follows this line. Additionally, ACM will also in principle not further investigate agreements concerning compliance with binding sustainability standards based on other rules, like *national or European rules*" (ACM policy rule, *op. cit*., para 8).

may, under certain conditions, escape the application of Article 101(1) TFEU[67]. In particular, the CJEU has been quite strict in its interpretation of this concept, categorically refusing to accept as an excuse for illegal collusion the existence of measures that merely *facilitate*, *encourage*, *support* or *approve* such conduct[68]. Thus, the CSDDD's wording that such collaboration be implemented only "where relevant", "in particular *where no other measure is suitable or effective",* may possibly not reach the rather high threshold defined for the application of the public compulsion defence.

Moreover, it should be noted that most agreements concluded in order to meet obligations under the CSDDD might be *vertical* in nature, i.e. between operators active at different levels of the value chain. Such vertical agreements are not subject to the *horizontal* Guidelines of the Commission, but rather to its Guidelines on *vertical* restraints, which do not contain specific guidance regarding compliance with EU due diligence obligations (let alone any specific chapter on vertical sustainability agreements)[69].

It therefore seems that, as anticipated by the CSDDD itself[70], further guidance from the Commission regarding the avenues available for companies to collaborate under the CSDDD while respecting competition rules would be needed. This, in light of the wording foreseen by the CSDDD, could in turn (at least marginally) imply a new evolution in the Commission's interpretation of Article 101 TFEU in the context of sustainability agreements.

Conclusion

Competition policy is at a crossroads. A solution needs to be found to the "antitrust issue", which arguably results in muting a range of

[67] See Van Bael & Bellis, *Competition Law of the European Union* (Kluwer, 2021), 2.7.

[68] *Ibid.* See for instance case C-136/86, *BNIC v. Aubert*, EU:C:1987:524, para. 13; case T-217/03, *FNCBV and Others v. Commission*, para 92.

[69] Communication from the Commission - Guidelines on vertical restraints 2022/C 248/01, C/2022/4238, OJ C 248. For (limited) indications as to the relevance of sustainability motives for the assessment of the legality of vertical agreements by the Commission, see paras (8), (9), (144), (235) and (316).

[70] See for instance CSDDD, recital (52): "The Commission, in collaboration with Member States, should issue guidance setting out fitness criteria and a methodology for companies to assess the fitness of industry and multi-stakeholder initiatives".

stakeholders who are not always the direct consumers of the products concerned by an agreement between competitors, and ultimately hinders important private initiatives in the context of climate change. Against this background, the Guidelines mark a positive but modest development in the Commission's application of the "fair share to consumers" condition in the context of sustainability agreements. They push the classical model of interpretation of Article 101 TFEU to its outer limits, without departing from its fundamentals: reference is made, for instance, to the continuous reliance on consumers' willingness to pay and to the refusal to fully consider collective environmental benefits, understood as "pure out-of-market" efficiencies. Hence, it is to be feared that the Guidelines will not allow for the implementation of some legitimate and important sustainability agreements, aimed in particular at reducing carbon emissions on a sector-wide scale, and could fail to effectively "unmute" affected consumers or citizens, in particular future generations or stakeholders of global value chains. In this respect, the national models studied in the Netherlands, Austria and the United Kingdom provide interesting alternatives which, arguably, take better account of environmental benefits, substituting the *consumer* welfare standard with a *citizen* welfare standard. A broader approach, and an (even) greater consideration of environmental issues, seems consistent with (or at least not precluded by) the applicable case-law of the CJEU and may even be required in light of the broader legal context. In particular, the "constitutional" framework arguably suggests that the Commission should use its margin of discretion under Article 101 TFEU in a way that is more favourable to sustainability agreements. Such an approach might also prove necessary to enable companies to comply, in certain circumstances, with their new obligations to cooperate under the CSDDD. Further guidance as to and evolution in the application of Article 101 TFEU in the context of sustainability agreements will therefore be needed to really unmute the environment in EU competition law.