Organisation for Economic Co-operation and Development

DAF/COMP/WD(2020)64

Unclassified **English - Or. English**

3 November 2020

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Sustainability and Competition – Note by Greece

1st December 2020

This document reproduces a written contribution from Greece submitted for Item 1 of the 134th OECD Competition Committee meeting on 1-3 December 2020.

More documents related to this discussion can be found at
http://www.oecd.org/daf/competition/sustainability-and-competition.htm

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JT03467791

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1. Introduction

1. This paper aims to provide some insights on the concept of sustainable development within the context of competition law and policy. It makes suggestions as to the different ways sustainability concerns may be taken into account in competition law enforcement and presents possible approaches to address sustainability concerns under Articles 101(1), 101(3) and 102 of the Treaty of the Functioning of the European Union (TFEU) and the Merger Regulation, with the aim to foster sustainable development goals while also curtailing anticompetitive practices.

2. The principle of sustainable development

2. As defined in the 'Brundtland Report' (Common Future)[1], published in 1987 by the World Commission on Environment and Development (WCED), "sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs". The essence of the concept of sustainable development is that it entails a balance of the needs of the current generations and those of the future generations, taking into account the environmental, societal and economic limitations we face.

3. The Sustainable Development Goals (SDGs)[2] adopted by the General Assembly of the United Nations (UN), in September 2015, defined broader development targets for both developed and developing countries, encompassing all sustainability dimensions (economic, financial, institutional, social and environmental). This set of 17 goals addresses global challenges, including those related to poverty, inequality, climate change, environmental degradation, peace and justice, which are all part of the '2030 Agenda for Sustainable Development'[3]. The SDGs, along with the Paris Agreement on Climate Change6[4], have put in place a global framework for international cooperation on sustainable development. However as '(t)he SDGs are designed to be indivisible'[5], it

[1] The report entitled 'Our common future' and came to be known as the 'Brundtland Report' after the Commission's chairwoman, Gro Harlem Brundtland.

[2] SDGs: 1: No Poverty, 2: Zero Hunger, 3: Good Health and Well-being, 4: Quality Education, 5: Gender Equality, 6: Clean Water and Sanitation, 7: Affordable and Clean Energy, 8: Decent Work and Economic Growth, 9: Industry, Innovation and Infrastructure, 10: Reduced Inequality, 11: Sustainable Cities and Communities, 12: Responsible Consumption and Production, 13: Climate Action, 14: Life Below Water, 15: Life on Land, 16: Peace and Justice Strong Institutions, 17: Partnerships to achieve the Goal.

[3] See https://sustainabledevelopment.un.org/post2015/transformingourworld. For the basic measures of the '2030 Agenda for Sustainable Development' see, also, M. Polemis & P. Fotis, 'European Commission's Energy and Climate Policy Framework' in M. Shahbaz& D. Balsalobre (eds) Energy and Environmental Strategies in the Era of Globalization, Green Energy and Technology (Springer Editions, 2019).

[4] To address climate change, countries adopted the Paris Agreement to limit global temperature rise to well below 2 degrees Celsius.

[5] European Commission, Reflection Paper Towards a Sustainable Europe by 2030 (March 2019), p. 29.

becomes crucial to take action across all the various interconnected levels of the economy and society.

4. Furthermore, as outlined in the reflection paper ‘Towards a Sustainable Europe by 2030’[6] published in 2019[7], the EU has fully committed to the implementation of the 2030 Agenda through its internal and external polices. The EU’s action plan includes the transition to a circular economy, ensuring sustainability from farm to fork, building a sustainable low-carbon and low-input economy, increasing resource efficiency, decreasing energy consumption, reversing the loss of biodiversity and natural resources, limiting climate change and ensuring a socially fair transition.

5. All the above declarations put an emphasis on the need for ‘policy coherence’, which is ‘a critical condition to ensure that we can deliver on the SDGs and ensure long-term green and inclusive growth for the EU’[8]. There are various ‘interlinkages between the different sustainability challenges and opportunities’, and coherence between different policy areas, sectors and levels of decision-making is essential[9]. This may be better operationalized through the form of ‘thorough impact assessments’ that may facilitate any ‘trade-offs between the economic, social and environmental policy objectives that need to be minimized and mitigated’. Article 7 TFEU[10] sets a framework for ‘consistency’ between EU policies and activities and all its objectives, which is profoundly linked to the principle of policy coherence that is essential for the attainment of SDGs[11]. In this framework, as with all other areas of law, EU competition law should take stock of these developments and contribute to this economic and organizational transition[12].

6. EU competition law is closely embedded in a constitutional framework. For instance, Article 11 TFEU imposes obligations to all EU Institutions to ‘integrate’ environmental considerations when applying EU’s policies and activities (including competition policy) upgrading the sectorial, environmental specific provisions of the Treaty of Amsterdam to horizontally applicable provisions[13].

[6] Available at: https://ec.europa.eu/info/publications/towards-sustainable-europe-2030_en.

[7] European Commission, Reflection Paper Towards a Sustainable Europe by 2030 (March 2019), available at https://ec.europa.eu/info/publications/towards-sustainable-europe-2030_en.

[8] European Commission, Reflection Paper Towards a Sustainable Europe by 2030 (March 2019), p. 16.

[9] European Commission, Reflection Paper Towards a Sustainable Europe by 2030 (March 2019), p. 29.

[10] Art. 7 TFEU: “The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers”.

[11] As emphasized in para 7 of the Annual Report on Competition Policy (2018/2102(INI)) by the Committee on Economic and Monetary Affairs of the European Parliament: “the fact that competition rules are treaty based and, as enshrined in Article 7 of the TFEU, should be seen in the light of the wider European values underpinning Union legislation regarding social affairs, the social market economy, environmental standards, climate policy and consumer protection; takes the view that the application of EU competition law should address all market distortions, including those created by negative social and environmental externalities”.

[12] As commissioner Vestager emphasized at the Brussels Sustainability Conference held in 2019, and co-organised by the chairman of the HCC I. Lianos in his academic capacity, “every one of us including competition enforcers-will be called on to make a contribution to that change”.

[13] On the scope of Article 11 see J. Nowag, ‘The Sky is the Limit. On the Drafting of Article 11 TFEU’s Integration Obligations and its Intended Reach’ in S Sjafjell and A Wiesbrock (eds), The Greening of European Business Under EU Law: Taking Article 11 TFEU Seriously (Routledge 2014).

7. It has been argued by some that competition law may inhibit 'socially responsible collaboration' between competitors, in particular in order to tackle global environmental problems, such as, for instance environmental certification or ethical standards for production and agreements to preserve natural resources from overharvest and waste[14]. Evidence sometimes shows that businesses will be no more socially responsible under an "anti-competitive" agreement than under competitive forces. Green washing cartels is another risk that has been pointed out. However, all these risks have led to the development of various doctrines and tools in competition law so as to offer the necessary flexibility to achieve such public interest objectives, while at the same time preserving the degree of the necessary level of competition in markets to the benefit of consumers and the greater public.

8. This discussion has recently expanded to tackle the way competition law may address sustainability concerns[15]. In this context, issues to consider include:

1. the extent to which agreements among competitors or companies across the value chain to enhance social and environmental sustainability could be cleared, either as not falling within Article 101 (1) or exempted under Article 101 (3) TFEU,
2. whether abusive practices of a dominant firm under Article 102 TFEU may also extend to practices seen as unfair under an environmental, social or moral point of view or if there should exist a sustainability defense regarding conduct that may otherwise constitute an abuse of a dominant position and,
3. the extent to which sustainability considerations could be taken into account when assessing mergers and acquisitions.

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[14] See, most recently, I Scott, 'Antitrust and Socially Responsible Collaboration: A Chilling Combination?' [2016] 53 American Business Law Journal 97. The private sector complies to various national and international regulations regarding consumer protection, food safety and quality, imposing, for instance, the traceability of food, feed, at all stages of production, processing and distribution by establishing standards (eg organic agriculture ISO-9000) and specific codes of conduct managed by industry associations formed by competing suppliers.

[15] See, among others, M.W. Gehring, Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law, (2006) 15(2) Review of European Community & International Environmental Law 172; S. Kingston, Greening EU Competition Law and Policy (Cambridge University Press, 2011); J. Nowag, Environmental Integration in Competition and Free-Movement Laws (OUP, 2016); A. Gerbrandy, Solving a Sustainability-Deficit in EU Competition Law, (2017) 40(4) World Competition 539; G. Monti & J. Mulder, Escaping the Clutches of EU Competition Law Pathways to Assess Private Sustainability Initiatives, (2017) 42(5) European Law Review 635; M. P. Schinkel and Y. Spiegel, 'Can collusion promote sustainable consumption and production?' (2017) 53 International Journal of Industrial Organization 371; E. Loozen, Strict competition enforcement and welfare: A constitutional perspective based on Article 101 TFEU and sustainability, (2019) 56(5) Common Market Law Review 1265; K. Coates & D. Middelshulte, Getting Consumer Welfare Right: the competition law implications of market-driven sustainability initiatives, (2019) 15(2-3) European Competition Journal 318; J. Nowag, Competition Law's Sustainability Gap? Tools for an Examination and a Brief Overview (November 1, 2019). Lund University Legal Research Paper Series, October 2019, available at SSRN: https://ssrn.com/abstract=3484964 or http://dx.doi.org/10.2139/ssrn.3484964; T. Ferrando & C. Lombardi, EU Competition Law and Sustainability in Food Systems – Addressing the Broken Links (FairTrade, 2019); S. Holmes, Climate change, sustainability, and competition law, (2020) 8(2) Journal of Antitrust Enforcement 354; E. Zee, Quantifying Benefits of Sustainability Agreements under Article 101 TFEU in terms of Human Well-Being, ILE Working Paper Series, No. 31, 2020, University of Hamburg, Institute of Law and Economics (ILE), Hamburg; M.C. Iacovides & C. Vrettos, Falling through the cracks no more? Environmental degradation and social injustice as abuses of dominance under Article 102 TFEU, available at https://law.haifa.ac.il/images/ASCOLA/Iacovides_Vrettos.pdf; and the recent contributions to the special issue of Competition Policy International available at https://www.competitionpolicyinternational.com/antitrust-chronicle-sustainability/.

9. This debate must take into account the parallel transition to new business models oriented to sustainability aims (as part of the broader shift towards corporate social responsibility), in a period characterized by disruptive innovation, important changes to consumers' and business' behaviour as a result of the Covid-19 pandemic and the looming economic crisis. Businesses would like to be part of the solution to the achievement of environmental and other sustainability goals, but the trade-off between investment and all sorts of benefits should be positive. If they decide to undertake alone such initiatives, they must be sure of the existence of consumers whose willingness to pay is above production and social costs. Otherwise, they may decide to enter into collaborative sustainability-driven initiatives but in this case ill-conceived perceptions and uncertainty over what is the space for legitimate business collaboration may affect the incentives of undertakings to undertake such initiatives. To these difficulties, one may add recent organizational changes that may expand possible tensions between competition law and business activities. Companies are shifting from hierarchical structures, which are black boxes for competition law[16], to 'more networked and collaborative models', sharing assets and establishing platforms that partly operate as collaborative eco-systems among competitors[17].

3. Sustainability as competitive advantage

10. The transition towards a sustainable economy and a 'Green Growth' agenda, are perceived as an important source for market opportunities and economic development in the future, unlocking more than €10 trillion of value across different economic areas, such as food and agriculture, energy, materials, cities, health and well-being, and millions of new jobs[18]. The new 'European Industrial Strategy' relies on two pillars, 'Digital transition' and 'Green transition', the latter englobing initiatives, in order to support a climate-neutral industry and expand the circular economy[19]. This new industrial policy framework conceives sustainability as an opportunity to acquire a 'competitive advantage' that may provide EU-based industries a significant advance towards their global competitors, playing at the same time a 'vital role' in the sustainability transition[20].

4. Sustainable development and competition law: managing the conflicts

11. The various dimensions of sustainability may lead to different approaches in competition law standards and enforcement. First, environmental concerns may be

[16] Case 15/ 74, Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc[1974] ECR 1147 [Centrafarm I]; Case 16/ 74, Centrafarm BV and Adriaan De Peijper v. Winthrop BV [1974] ECR 1183 [Centrafarm II]. ; Case C- 73/ 95 P, Viho Europe BV v Commission [1996] ECR I 5457.

[17] K Schwab, The Fourth Industrial Revolution (World Economic Forum, 2016), 58.

[18] European Commission, Reflection Paper Towards a Sustainable Europe by 2030 (March 2019), 14; A European Green Deal (December 11th, 2019), available at https://ec.europa.eu/commission/presscorner/detail/e%20n/ip_19_6691 ; Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640 final; The Recovery Plan for Europe, available at https://ec.europa.eu/info/livework-travel-eu/health/coronavirus-response/recovery-plan-europe_en.

[19] Communication from the Commission to the European Parliament, the European Council, the Council, the European and Social Committee and the Committee of the Regions, A New Industrial Strategy for Europe, COM/2020/102 final.

[20] European Commission, Reflection Paper Towards a Sustainable Europe by 2030 (March 2019), 26.

conceptualized as broader externalities or social costs that may be taken into account in competition law enforcement. Second, sustainability concerns may impact on the goals of competition law and policy. Third, they may frame the various standards and tests applied in the context of competition law enforcement.

12. In the context of fulfilling SDGs objectives, collective agreements related to environmental schemes, involving companies and other stakeholders, can produce substantial benefits from an environmental perspective, while at the same time they may have the potential to limit competition (such examples include agreements to increase the collection of plastic waste, agreements to improve the efficiency of washing machines[21], attempts to promote sustainable production methods and 'animal welfare'[22], supermarkets developing systems to increase recycling). In such cases the question is whether it is possible to adjust the issues causing competition concerns without harming the sustainability objectives. Joint commitments or other collective initiatives by industry players may be necessary in order to achieve meaningful change in key sustainability areas and can be examined under both Art. 101(1) and Art. 101(3) TFEU.

13. One may in this case combine two approaches: First, that of environmental economics, which emphasizes the broader social welfare including intergenerational welfare, rather than, as it is the case with competition economics, the welfare of the present consumers of the relevant market and seeks to correct market distortions. The prevailing view in environmental economics would be to internalise negative externalities, taking fully into account the social costs and monetizing them in the cost-benefit analysis in order to normalize social preferences and achieve socially optimal results[23]. Second, ecological economics, which studies the interactions between ecosystems and human economies, treating individual preferences as just one element of the various normative criteria to be considered[24].

14. The Tragedy of the Commons[25] outlines the inherent problems in designing appropriate incentives for the preservation of natural resources. At the very least we cannot always rely on markets to provide a Pareto optimum[26] solution in the absence of clearly defined property rights. Different forms of taxes based on shadow prices ensure that common goods, such as a clean environment, are given an economic value in order to equalize private and social costs and therefore preserve these common goods in the long-

[21] See CECED (Case COMP IV.F.1/36.718) Commission Decision 2000/475/EC (2000) OJ L 187/47. In this case the Commission took into account the 'collective environmental benefits' arising by an agreement between washing machine manufacturers to cease production and importation of less energy efficient machines.

[22] The case known as the 'Chicken of Tomorrow' refers to a joint initiative by organizations from the poultry sector and supermarkets to introduce a sector wide sustainability policy. This initiative was disrupted by the Dutch Competition Authority (ACM). See 'ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow' dated 26 January 2015.

[23] 5 G. Geoffrey, The Rule of Ecological Law: The Legal Complement to Degrowth Economics, Sustainability 2013, 5, 316-337

[24] C. Michael & S. Sigrid, Ecological Economics (Cambridge University Press, 2012).

[25] G. Hardin, 'The Tragedy of the Commons', (1968) Science 162 (3859), 1243. The 'tragedy of the commons' refers to situations of over-congestion due to overconsumption in a shared-resource system, and ultimately depletion of a common pool, for lack of investment, as each individual user acts independently, according to her/his own self-interest and contrary to the common interest of all users whose collective action may have avoided the depletion of the resource.

[26] Simply put, Pareto optimum refers to a win-win change, when no further changes in the economy can make one person better off without at the same time someone worse off

run. For the purposes of regulating such markets, cost benefit analysis has sought to accommodate such externalities by allowing for dynamic efficiency concerns to be acknowledged through the translation of future values in present discounted values.

15. Competition law assessment relies on the price-based revealed preferences model, the prices being revealed in the market, or alternatively, if markets do not exist or are distorted, by estimating an implicit value based on an individual's behaviour in a real life situation in which this individual has to face a trade-off between two competing consumption alternatives. If market prices are not available, the contingent valuation method[27] aims to calculate the value of a consumer gain or loss, through a survey of a sample of consumers, by testing their 'willingness to pay' (WTP) when they are faced with a hypothetical consumption choice-set. WTP analyses tend to transform even complex assessment of options into a one-dimensional monetary valuation, the crucial benefit of this process being the facilitation of decision-making.

16. A common characteristic of this approach and others, such as the Total Economic Value (TEV) is that they focus on the price parameter, which explains the success they enjoy among competition authorities. It is however also important to acknowledge the difficulties of a WTP framework. It has been argued that "(o)ne of the implicit assumptions of revealed preferences theory is that the behaviour of the agent is consistent when exercising her/his choice in the marketplace", this assumption "been largely questioned by recent work in behavioural economics", but, also "work noting the 'conflicting preference maps' that most of us have, when acting as consumers in the market place, and as citizens in the political sphere"[28]. Hence, "(e)nvironmental economists have long noted the tension between the 'utilitarian preference based' approach used by the price-based revealed preferences approach and contingent valuation analyses, which focus on consumer wants as utility maximisers, and the 'Kantian (principle-based)' approach on what 'we ought to do as a society'"[29].

17. In EU environmental regulation, three basic principles prevail, prevention, precaution and the polluter-pays principle. The first one dictates that preventive measures must be taken in order to prevent activities that entail a well-defined risk for the environment or human health. The precautionary principle demands for action to be taken against undefined, uncertain risks. Policies tailored to the precautionary principle are criticized for leading to socially undesirable regulatory results, especially when uncertainty is emphasized in the hierarchy of competition objectives versus environmental objectives. However, uncertainty for environmental effects can be modeled as uncertainty in other realms of mainstream economic theory, such as financial markets, and could be accommodated to economic efficiency concerns.

4.1. Sustainable development considerations under Article 101 TFEU

18. Usually, competition authorities are not required to intervene in order to pursue environmental and other sustainability concerns but are more often asked not to intervene in order to prevent agreements promoting such goals. The EU and its Member States actively promote the attainment of SDGs through different means: (i) direct (command and

[27] M. Hanley, D. MacMillan, E. R. Wright, G. Bullock, I. Simpson, D. Parsisson & B. Crabtree, (2008) 'Contingent valuation versus choice experiments: Estimating the benefits of environmentally sensitive areas in Scotland', Journal of Agricultural Economics, 2008, 49(1), 1-15.

[28] 5 I. Lianos, 'Polycentric Competition Law', (2018) Current Legal Problems 161.

[29] M. Sagoff, 'Aggregation and deliberation in valuing environmental public goods: a look beyond contingent pricing', (1998) Ecological Economics 213.

control) regulation based on coercive measures such as permits, zoning, regulatory standards; (ii) incentive regulation with the use of taxes and/ or charges to induce sustainability friendly behaviour from corporations; (iii) the promotion of self- regulation by undertakings; (iv) mixed intervention, such as voluntary agreements, that is, formal, bilateral commitments between the authorities and industry which set forth sustainability objectives and the means to achieve them; and (v) inter- company agreements concluded by undertakings without being coerced or induced by the State. Article 101 TFEU, on its own, may catch anticompetitive practices resulting from categories (iii), (iv), and (v), as the undertakings involved in voluntary agreements are not coerced by the State to restrict competition, but act as autonomous entities on the market.

19. A broader public interest criterion for intervention would have allowed competition authorities to consider a wider range of benefits related to sustainability when examining the compatibility, from a competition law perspective, of agreements between competitors. However, it may be possible to also take into account sustainability concerns in the context of the narrower standard of the existence of a restriction of competition, as is currently the case in the context of Article 101 TFEU. In the light of the currently conducted evaluation process by the Commission of two block exemption regulations and the guidelines on horizontal cooperation agreements[30], a framework for horizontal co-operation to pursue environmental and societal objectives remains a critical area for reform. Some National Competition Authorities have already taken initiatives going towards that direction. For instance, the Netherland Authority for Consumers and Markets (ACM) has introduced draft guidelines on sustainability and competition. This will provide guidance on the application of competition law to business-to-business sustainability agreements by clarifying which joint private sector sustainability initiatives may be allowed under Article 101(1) and (3) TFEU.

20. When private firms work together or agree on various standards[31] to act for wider socio-economic goals, several problems may arise. Free-riding problems where a firm invests in a sustainable strategy from which competitors benefit at no cost, and the first mover disadvantage where a firm withdraws an unsustainable product or production process, letting its competitors benefit from an increasing market share for unsustainable products, are problems that may be solved with the negotiation of a carefully designed agreement between competitors.

21. Competition law must be equipped with the instrumental but also the institutional tools to distinguish between restrictions of competition in order to pursue some well-established public interest aims from other restrictions. The pursuit of public policy objectives by private economic actors is a difficult puzzle and should be dealt as such, with various decision procedures in competition law.

22. Two strategies have been followed. First, a crucial question is to what extent agreements between companies – and possibly other stakeholders – to enhance the social and environmental sustainability of their supply chains are, can or should be excluded from

[30] Commission Regulations (EU) No 1217/2010 (Research & Development Block Exemption Regulation - 'R&D BER') and 1218/2010 (Specialisation Block Exemption Regulation - 'Specialisation BER'), together referred to as the 'Horizontal block exemption regulations' (or 'HBERs'); and the Commission Guidelines on horizontal cooperation agreements ('HGL').

[31] As Commissioner Vestager observed at the Brussels Sustainability Conference, (October 24th, 2019), available at https://wayback.archiveit.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en, 'business has a vital role in helping to create markets that are sustainable in many ways...and...sometimes business can respond to that demand [for more sustainable products], if they get together'.

the scope of the prohibition principle for anticompetitive agreements. It is not always clear from the outset what is allowed and what is not when it comes to collective agreements to enhance sustainability. Second, it is important to explore if the benefits of a specific agreement to sustainability trade off its costs, in terms of less competition and higher prices. This assessment very much depends on how the European Commission and National Competition Authorities value the sustainability improvements and weigh these against the possible reduction in competition. The first obstacle to override in order to encompass sustainability goals in competition law enforcement, is the wording and the relevant interpretations of the competition law provisions, both at the EU and national levels. The second difficulty is the methodology for the evaluation and the weighing of these different concerns.

23. The interplay of paragraphs 1 and 3 of Article 101 TFEU is also particularly interesting in order to design optimal legal tests for the occasion. While the burden of proof for Article 101 TFEU is on the plaintiff, the specific NCA or the Commission, the evidential and legal burden shifts to the defendant under Article 101(3) TFEU. The design of legal tests, some restrictions being by their nature anticompetitive, while others requiring a more detailed effects-based analysis, also often depends on a careful consideration of error costs, for over-enforcement or under-enforcement. The weight of each type of error, which should also form part of the calculus, may however vary significantly, if one takes a static framework focusing only on some price-related aspects of consumer welfare, from a more dynamic framework that integrates broader categories of social costs through time. Assuming that some effects are linear may also have different implications as to the design of legal tests than if this assumption is changed to non-linearity, with cascade effects and tipping points.

4.2. Sustainability agreements under Article 101 (1) TFEU

24. The existing case law on Article 101, paragraph 1 TFEU may allow collective actions by the private sector to implement SDGs under specific circumstances.

25. First, in some cases sustainability agreements may be excluded from the scope of the prohibition under Article 101 par. 1 TFEU. Sustainability agreements with the potential to restrict competition may escape the prohibition of Article 101 if they are mandated by regulation. In this case purely environmental protection activities might not be considered as economic activity but as activities of an exclusive regulatory nature[32]. In a similar line of thought, EU competition law has developed a State compulsion defence meaning that if 'anti- competitive conduct is required of undertakings by national legislation with no possibility of deviation, Articles [101] and [102] do not apply'[33]. In this way a 'safety zone' for state-mandated sustainability agreements may be created.

26. Second, in some cases sustainability agreements are unlikely to restrict competition, as is also contended in the recently published Dutch sustainability guidelines. A non-binding code of conduct promoting sustainability-conscious business practices, for

[32] Case C- 343/ 95, Diego Cali & Figli SrL v Servizi Ecologici Porto di Genova Spa [1997] ECR I– 1547 (noting that the anti- pollution surveillance for which the specific entity was responsible in the oil port of Genoa is a task in the public interest which forms part of the essential functions of the State as regards the protection of the environment in maritime areas).

[33] Joined Cases C- 359 and C- 379/ 95 P, Commission of the European Communities and French Republic v Ladbroke Racing Ltd [1997] ECR I– 6265, paras 33– 4. See also Case T- 513/ 93, Consiglio Nazionale degli Spedizionieri Doganali v Commission [2000] ECR II– 1807, para 42.

instance, regarding environmental or climate compatible certification standards, may escape the prohibition of Article 101 par. 1[34].

27. According to the European Commission's 2001 Horizontal Guidelines, an environmental agreement[35] would have been unlikely to restrict competition if: a) it is loose and its scope is to attain a sector-wide environmental target'[36], b) the agreement does not appreciably affect product and production diversity in the relevant market[37], or c) it gives rise to genuine market creation[38]. Although the 2011 Horizontal Guidelines did not include any specific guidance for environmental agreements, the approach put forward in the 2001 Guidelines is still good law, in view of the lack of genuine anticompetitive effects.

28. Third, there are cases where sustainability agreements may fall outside Article 101, paragraph 1, either as ancillary regulatory restraints or under the objective necessity doctrine. In the 'Albany' case, the Court of Justice of the EU held that Article 101 par.1 is not applicable for restrictive practices as long as there is a 'legitimate objective' pursued which is aiming at protecting a public good, given that such an agreement does not impose restrictions on dynamic competition[39]. Such a public good may be one that falls under the provisions of the Treaty as a whole or related national legislation.

29. Another possibility to overcome unnecessary scrutiny under art 101 is to frame the sustainability agreement as a standardisation agreement. A recent example of a business seeking to address climate change through the use of standards is the private agreement between four carmakers, Ford, Honda, BMW and VW and the state of California to adhere to higher standards for exhaust pipe emissions than those favoured by the US Government[40]. This is a classic example of the 'first mover disadvantage', since no one of the abovementioned car makers would have unilaterally reduced its exhaust emission, thus being in a competitive disadvantage against its competitors.

30. Although the intuitive balancing test under Article 101 par. 1 TFEU may be conceived broadly enough to encompass sustainability concerns, Article 101 par. 3 TFEU imposes more rigid criteria.

4.3. Sustainability under Article 101 (3) TFEU

31. Articles 101 par. 3 TFEU require an agreement to meet cumulatively four conditions in order to be exempted.

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[34] OECD, Horizontal Agreements in the Environmental Context, DAF/COMP (2010) 39, p. 100.

[35] The European Commission's 2001 Horizontal Guidelines, para. 179 defined environmental agreements as 'agreements by which parties undertake to achieve pollution abatement, as defined in environmental law, or other environmental objectives...in particular those set out in Article 174 of the Treaty [of the EC]. This provision [now Article 191 of the TFEU] states that Union Policy on the environment shall contribute to the pursuit of the following objectives: -preserving, protecting and improving the quality of environment; -protecting human health; -prudent and rational utilisation of natural resources; - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

[36] Ibid., para.185.

[37] Ibid., para. 186.

[38] Ibid., para. 187.

[39] Case C- 67/ 96, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999] ECR I– 5751.

[40] See, https://www.wsj.com/articles/justice-department-launches-antitrust-probe-into-fourauto-makers-11567778958.

32. The first condition is economic progress and efficiency gains which may include environmental benefits. Sustainability agreements may well fall within this specific condition of Article 101(3) TFEU. The Commission has already taken into account environmental concerns in the interpretation and enforcement of Article 101(3) TFEU. In particular, in CECED, the Commission has exceptionally taken into account as efficiency gains benefits that were not generated on the specific relevant market, where the anti-competitive effects were felt, but also ‘collective environmental benefits’ that were not necessarily limited to the relevant market in question[41]. The OECD has also recognised ‘cost savings, innovation, improved quality and efficiency’ as ‘direct economic benefits’ which are ‘typically recognised in competition law analysis as efficiency gains[42]. However, for the accommodation of environmental and sustainability objectives, it is critical to have a toolbox on how to monetize these and what weights should be placed on each of these and to take a broad view of economic benefits that would also include collective economic benefits.

33. The second condition, which is the most tricky one, is the provision of a fair share of the resulting benefits to consumers. Who are the relevant consumers/users for this purpose, and what constitutes a ‘fair’ share of the resulting benefits?

34. The assessment under Article 101 par.3 of benefits flowing from restrictive agreements is usually confined to a specific relevant market. A fair share implies in general that efficiencies generated by the restrictive agreement must be sufficient to outweigh the anti-competitive effects produced by the agreements. In the Mastercard case the Court has however allowed for the possibility that each group of consumers (in each relevant market) should enjoy appreciable objective advantages, even if these are not ‘to the same extent’[43].

35. As sustainability agreements are often wide in scope, it should not be necessary for the group of customers affected by the restriction and that group benefiting from the efficiency gains to be substantially the same as long as they at least overlap[44].

36. The concept of consumers should not also be understood as referring only to the present customers, but also to ‘subsequent purchasers’[45]. The Commission’s 101(3) Guidelines stipulate the method to encounter for future consumers[46]. The Commission has also in other contexts taken into account out-of-market efficiencies that could outweigh negative effects in a different relevant market. Hence, taking a broader consideration of the concept of user is not impossible under the case law.

[41] See CECED (Case IV.F.1/ 36.718) Commission Decision 2000/ 475/ EC [1999] OJ L 187/ 47, paras 55– 7. See also P&I Clubs (Cases IV/ D- 1/ 30.373 and IV/ D- 1/ 37.143) Commission Decision 1999/ 329/ EC [1999] OJ L 125/ 12, noting that the agreements in question relating to the direct marine insurance market will not only benefit ship-owners (the immediate customers of the protection and indemnity (P&I) clubs) and the final customers of ship-owners, be they passengers or goods carriers, who also benefit from the provision of such a level of insurance, but also ‘any other third person that could suffer from extra- contractual damages produced by a ship-owner (such as marine pollution)’.

[42] 2 See 2010 OECD Report, OFT – OECD, OFT Contribution to the OECD Policy Roundtable on Horizontal Agreements on the Environmental Context 2010 (24 November 2011), p 11.

[43] Case C- 382/ 12 P, MasterCard Inc and Others v Commission, ECLI:EU:C:2014:2201, para. 248.

[44] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/97, para 85.

[45] Ibid, para 81.

[46] On this issue, see C. Townley, Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born, (2011) 11 ECLR 580.

37. The third condition is that an agreement should be no more restrictive than necessary. In this case undertakings need to demonstrate that their proposed sustainability agreement is necessary to achieve the relevant sustainability benefits. This would avoid the situations in which the sustainability aims may be achieved by less restrictive to competition alternatives.

38. The last condition is "no elimination of competition in the relevant market". In this context, it would be important to ensure that the companies participating to an environmental or other sustainability agreement are still able to compete on important parameters of competition in the specific market. There is an outer limit in the restriction of competition that may be accepted when this is indispensable in order to achieve sustainability effects.

39. Although there is no scope for manoeuvre in the last two conditions, the first two can be refined to encompass environmental and other sustainability goals.

4.4. Sustainable development considerations under Article 102 TFEU

40. Sustainability considerations may also arise under the examination of an abuse of a dominant position under article 102 TFEU.

41. Firstly, according to the Commission's Priority Guidance on exclusionary abuses a dominant firm may justify its conduct leading to foreclosure on the grounds of efficiencies[47] or objective justification based on a proportionality test[48].

42. In cases where a dominant undertaking engages in behaviour that contributes to the promotion of sustainability concerns and there are no other less restrictive to competition alternatives, a prima facie restriction of competition may be justified. Such assessment should also take into account the horizontal integration of EU clauses, and in particular Article 11 TFEU, according to which environmental protection objectives "must be integrated" into all EU policies and activities. An example of such behaviour may be the setting of a higher price, without this being found excessive, in order to cover environmental and broader sustainability costs or in order to reinvest in environmental protection.

43. In cases when there are explicit state measures promoting public interest objectives, a dominant undertaking could possibly argue sustainability concerns by, for instance, refusing to supply undertakings that do not comply with SDGs. It rests to the Commission, NCAs and courts to assess the evidence provided by the undertaking and whether the conduct concerned is likely to result in permanent consumer harm.

44. Moreover, we could say that the current law offers some flexibility in integrating environmental and other sustainability concerns in the application of article 102 TFEU, also as a sword, when a restriction of competition also impacts on sustainability goals and therefore jeopardizes the transition of an industry to an equilibrium that is more compatible with sustainability goals, in particular those that are explicitly protected by the EU Charter of Fundamental Rights and also implemented through horizontal integration clauses. There is now some case law regarding abuse of dominance emanating from restrictions of

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[47] Communication— Guidance on the Commission's enforcement priorities in applying [Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/ 7, para. 30. See also Case C- 95/ 04 P, British Airways plc v Commission [2007] ECR I– 2331, para 69 and regarding environmental sustainability, N. Stern, The Economics of Climate Change (CUP, 2014), also known as the Stern Review (2006).

[48] Case C- 209/ 10, Post Danmark A/ S v Konkurrencerådet (Post Danmark I), ECLI:EU:C:2012:172, para. 41; Case C- 52/ 09, Konkurrenverket v Telia Sonera SverigeAB[2009] ECR I– 527, para. 76.

competition that also impact on regulatory objectives. The Astra/Zenecca[49] and Hoffman La Roche[50] cases in the EU, and the Facebook case in Germany are good examples of that.

45. Under Article 102(a) TFEU imposing 'unfair purchase or selling prices or other unfair trading conditions' is considered an abuse of dominance. A broader approach of this definition may lead to consider environmental or social sustainability goals in this assessment analysis. A good example is the excessively low prices paid by retailers or other intermediaries to farmers for their production. A sustainability approach would argue that low prices, in particular if these are not significantly passed on to final consumers, may encourage an excessive use of scarce resources (such as for coffee, cocoa and bananas)[51]. Such analysis however raises difficulties with regard to the definition of 'fair' prices and 'true costs' of production by the competition authorities and courts and may not be practical at the current stage.

5. Sustainability and Merger Control

46. Finally, sustainability issues can also be taken into account when assessing mergers and acquisitions. M&A processes have important effects on the firms' competitiveness and sustainability is increasingly considered as an important competitive advantage[52].

47. Under the current EU merger control regime, there are at least 4 ways to address wider in scope sustainability issues. Firstly, under Article 2(1)(b) of the EUMR, environmental and sustainability issues may be taken into account if assessed within the context of technical and economic progress provided that it is to the consumers' advantage and does not restrict competition. The Commission sets out three cumulative conditions in its horizontal merger guidelines to analyse the positive environmental factors as 'efficiencies'. These efficiencies should benefit consumers and they should also be 'merger specific' and 'verifiable'.

48. Secondly, remedies can be used to account for negative environmental externalities identified during the substantive assessment of the merger. The drafting of uniform rules for the correction of such externalities through the design of appropriate remedies, could prove helpful. In this case it would be useful to reach some sort of consensus on how far a competition authority should go.

49. Thirdly, Article 21(4) EUMR includes a legitimate interest clause, which provides that Member States may take appropriate measures to protect a) public security, b) plurality of the media and c) prudential rules, as well as other unspecified public interests that are recognised by the Commission after notification by the Member State. Environmental and other sustainability goals most likely fall under "public security", in view of the climate crisis or they could be "recognised" by the Commission as a legitimate interest following

[49] Case T- 321/ 05, Astra Zeneca v Commission [2010] ECR II– 2805, paras 672 & 817; Case C457/ 10P Astra Zeneca v Commission [2012] ECLI:EU:C:2012:770, para. 134.

[50] Case C- 179/ 16, F Hoffmann- La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato, ECLI:EU:C:2018:25.

[51] See S. Holmes, Climate change, sustainability, and competition law, (2020) 8(2) Journal of Antitrust Enforcement 354.

[52] See, Deloitte, How Green is the Deal? The Growing Role of Sustainability in M&A (2008), available at https://www2.deloitte.com/content/dam/Deloitte/il/Documents/risk/CCG/other_comittees/how_green_is_the_deal_deloitte_102408.pdf ; T. Gonzalez-Torres, J.-L. Rodriguez-Sanchez, E. Pelechano-Barahona& F. E. Garcia – Muina, "A Systematic Review of Research on Sustainability in Mergers and Acquisitions", (2020) 12 Sustainability 513;

notification by Member States. Alternatively, Article 21 (4) EUMR could be amended to explicitly encompass sustainability goals.

50. Fourth, sustainability concerns may also be indirectly considered when assessing innovation effects. Merger control may apply to protect actual and potential competition in technologies that are important for attaining the environmental and other sustainability goals. Also sustainability-related innovation and the development of new markets for complements could help the set up of innovation ecosystems.

6. Discussion and Recommendations

51. In the face of a 'climate emergency' and important social challenges that will certainly result from this development, it is important to equip all public policies with the tools to accommodate and enhance sustainability initiatives from both the public and the private sector. Business as usual is no more an option and the transition to an economy that is environmentally (and socially) sustainable is urgent. Systemic resilience becomes a goal for public action.

52. Sustainability-oriented policies will benefit the well-being of citizens and consumers but may also be a means of acquiring a competitive advantage for undertakings in Europe, thus serving a broader European industrial policy agenda, as this has been put forward by some Member States.

53. The front-end costs of efficiency improvement and renewable energy use, taking into account this dimension in the sustainable development goals, are indeed high and financing of investment is key to realizing potential benefits. Even if these goals are implemented in time it is not however certain that a climate change problem will disappear. However, with a benefit side subject to larger uncertainty than the uncertainty facing the cost side, the prospect of financing a transition to green economy may not be good, in particular with European governments struggling to regain economic strength during and after the coronavirus pandemic.

54. Furthermore, with regard to public funding, an assessment of net benefits between climate investment and non-climate investment should be made in order to decide the allocation of scarce public funds among competing Sustainable Goals Investments. Hence, there are choices to be made and opportunity costs to be assessed.

55. In view of the funds required, this transition to a sustainable economy will be successful if it is also supported by private actors and funding. For the Green transition to work ,both public and private funding is needed, while some net-saving sectors should indeed become in the next few years net-investing sectors. However, business faces financial market instability. Climate disruption risks may indeed potentially depreciate the assets of banks and other financial institutions. However, with stricter regulation and higher CO_2 emission pricing there is also a risk that the legacy investments of financial institutions in the fossil fuel sectors will be devaluated.

56. On the other hand, a regulatory public intervention approach for the Green transition at the EU level may not be possible for political reasons and the policy space that each national government has depends on a number of factors, in particular budgetary space. Differences in financing capacity are enormous among EU Member States, despite the significant effort done for public EU funding. Hence, an important effort needs to be made in order to limit uncertainty, such as regulatory uncertainty, and provide incentives to banks and institutional investors to make the necessary investments for this Green

Growth change, although one need also be careful of the first-mover risk in completely new, innovative and unknown areas of business.

57. Business requires some legal certainty, but also a complex system of nudges and incentives in order to integrate sustainability objectives in their business strategies. Of course, governments need to develop overall strategies for the Green transition and use a mix of policies, such as innovation support for green energy, fiscal policies (tax and subsidies), carbon pricing and issuance of green bonds.

58. Competition authorities should have a role in facilitating this transition to a Green economy.

59. First, they should make efforts to enforce competition law in a way that does not jeopardise private and public sustainability strategies. This is not about authorising what some have called 'Green cartels', but adopting a similar hospitable approach taken for R&D horizontal agreements and agreements promoting innovation. Hence, competition policy should be applied with caution not to 'greenwash' cartels, although it can be more relaxed on the fact that the consumers that may be affected by higher prices are those that have the lowest appreciation for the public good and therefore are the hardest to compensate. This is acceptable in the context of a transformational effort to also shift consumer preferences towards more sustainable products under the guidance of the polluter pays principle. Of course, one needs to keep an eye for distributional implications, as these consumers may also be among the poorest in society. For this reason combining environmental and social sustainability is key.

60. Second, competition authorities should make the necessary investments in re-defining their role and objective function in a broader context that takes into account various sorts of externalities and their inter-generation effects rather than focusing on the simple price effects of market power. To this end, the Hellenic Competition Authority plans to explore these new approaches in the next few months with the drafting and publication of a technical note.

61. The assumptions on which theories of harm to competition are based must also encompass some notion of long-term sustainability effects. Competition law should break its insularity and in accordance with the principle of consistency and that of policy coherence become more synchronised with the broader constitutional values and programmatic aims regarding sustainability, at the international, EU and national levels. This could take place with the integration of complex adaptive systems thinking in competition law, that takes into account the non-linearity of the processes under examination and the interaction of different fields of human (and non-human) activity[53]. This methodological upgrade of competition law may require joint efforts between various like-minded NCAs at the European level, so as to experiment with common approaches.

62. It is furthermore suggested that, in view of the legal uncertainty and the recognised need for a rapid transition to the Green economy, more efforts should be made in order to provide undertakings with the legal certainty they need in order to make the necessary investments. This also requires more targeted competition law interventions that provide a clear set of rules to follow. Collecting information on the various business strategies and the issues they face in proceeding to this Green economy transition are also crucial so as to adapt competition law enforcement to the specific circumstances that are faced by each national economy in managing this process of major economic change.

[53] See, J. R. Ehrenfelfeld, Sustainability by Design (Yale Univ. press, 2008); W. B. Arthur, Complexity and the Economy (OUP, 2015).

63. This may require close collaboration with other regulatory authorities, in particular through discussions in the suggested national regulatory network for competition and regulatory policy, in light of the collaboration between competition authorities and sector-specific regulators in other jurisdictions[54]. Eventually, a common 'Advice Unit', formed by personnel from a variety of regulatory authorities, may be formed in order to provide informal steers on proposed sustainability-related innovations, across all fields of regulatory activity, to enable more direct communication between firms, the government and other stakeholders. This may help establish, if need be, bespoke regulatory frameworks that would promote investments for Green Growth, following a process of public engagement with all stakeholders, including representative citizens' groups (civil society, NGOs).

64. This process may be facilitated with the development of a competition law sustainability 'sandbox'[55] in order, for the industry to experiment with new business formats that aim to realize more quickly and efficiently sustainability goals, and which involve cooperation between competing undertakings or even more permanent changes in market structure in order to be accomplished[56]. This could be done under the condition of some form of time-constrained authorisation, under a periodical targeted supervision of the national competition authority, after balancing the possible anticompetitive effects with the need to provide incentives for the sustainability investment and following a process of public participation, as is the best practice for environmental infrastructure projects[57]. In addition, even if such arrangements produce anticompetitive effects, businesses will not be penalised by competition authorities, if the arrangements form part of the 'sandbox', although competition authorities may and should proceed with other remedies.

65. Systematic post-implementation reviews that would integrate both competition and sustainability assessments of past mergers and/or antitrust infringement cases should also be helpful.

66. Another avenue could be for NCAs to issue general guidelines to clarify under which conditions the private sector may take cooperative action to promote the attainment of sustainability objectives and what form of public accountability mechanisms should be put in place, including the enforcement of competition law. The effort accomplished in the Netherlands with the issuance of insightful sustainability guidelines by the ACM is an example to be followed by other competition authorities as well.

67. These initiatives at the national level may provide interesting spaces of experimentation in EU competition law and policy. To the extent that the case(s) involve(s) an effect on EU trade, ultimately, it/they could be moved up from the national level to the

[54] See, for instance in France, https://www.autoritedelaconcurrence.fr/en/pressrelease/independent-public-and-administrative-authorities-develop-their-collaboration.

[55] A sandbox is defined as 'a safe space where both regulated and unregulated firms can experiment with innovative products, services, business models and delivery mechanisms without immediately incurring all the normal regulatory consequences of engaging in such activity': Financial Conduct Authority, "Regulatory Sandbox", (2015) Research Paper.

[56] 4 There is experience with regulatory sandboxes in the financial industry field, in particular Fintech. See, Industry Sandbox, 'A Blueprint for an Industry-Led Virtual Sandbox for Financial Innovation' (2016) Consultation Guide. The UK Financial Conduct Authority also recommended the establishment, with the support of Project Innovate, of a Fintech industry-led virtual sandbox, which would allow firms to experiment in a virtual environment without entering the real market, using their own or publicly available data and a sandbox umbrella company.

[57] M. Lee, C. Armeni, J. de Cendra, S. Chaytor, S. Lock, M. Maslin, C. Redgwell & Y. Rydin, Public Participation and Climate Change Infrastructure, (2013) 25(1) Journal of Environmental Law 33.

Court of Justice of the EU that may set useful legal precedents for the future that could also influence private enforcement of competition law.