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Sustainability and Competition – Note by BEUC

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

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BEUC

1. Introduction

1. Competition policy cannot be the primary tool to promote sustainability, to fight climate change and protect the environment. The focus to achieve this should remain on specific legislation. Nevertheless, within the boundaries of the existing EU legal framework there is scope to clarify the application of the principles of EU competition law and its enforcement to ensure that competition law does not unnecessarily stand in the way of sustainability initiatives and, where possible, can actively support climate change and environmental protection projects.

2. Taking environmental considerations into account in the application of competition law reflects not only current EU policy priorities but also fits within the normative system of EU law which foresees the integration of certain EU law goals into other policies. These include both environmental protection considerations (Article 11 Treaty on the Functioning of the European Union (TFEU¹)) and consumer protection (Article 12 TFEU²). These normative principles embedded in the Treaties should guide the interpretation and application of EU rules. Competition law enforcement must however remain founded on the tried and tested principle of consumer welfare - which will not stand in the way of agreements genuinely promoting sustainability but at the same time ensures that consumers do not pay a disproportionate price for the imperative transition to a sustainable economy. BEUC fully agrees with EVP Vestager's view that:

“Competition policy has to do its bit, of course. But it cannot replace the essential role of regulation. And in any case, as competition enforcers, we also have our own task to carry out – to protect consumers, by defending competition. It’s a task that’s been given to us by the Treaties – and one that’s essential to keep our economy working fairly for everyone, in the green future.”³

3. Consumers are conscious and concerned about the climate crisis and this is a factor that should be taken into account by competition authorities. However, this does not require changing the fundamentals of competition policy but rather a search for solutions within the competition law enforcement system and its well-established concepts such as consumer welfare. A concept that in Europe is not limited to prices but encompasses also other dimensions such as quality, innovation, and choice.

4. The following looks specifically at how competition policy can contribute to realising sustainability objectives in the areas of antitrust and merger control.

¹ And Article 37, EU Charter of Fundamental Rights.

² And Article 38, EU Charter of Fundamental Rights.

³ Renew Webinar, 22 September 2020, at:

https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en.

2. Antitrust

5. Antitrust enforcement can play a role in achieving sustainability goals by ensuring that its interpretation does not stand in the way of agreements that support these goals and by vigorously enforcing antitrust rules against conduct by business that would harm them.⁴

2.1. Clarifications on sustainability agreements would be beneficial

6. BEUC encourages the European Commission (“the Commission”) and other competition authorities to provide further clarification on the characteristics of agreements that serve sustainability objectives and are compatible with Article 101 TFEU (or national law equivalents). This clarification could be given through decisions in specific cases, informal and formal published guidance. It is essential that businesses are encouraged to play their part and do not hide behind any smoke screen of purported competition law restrictions to justify inaction. This clarification should cover the types of agreements that fall outside Article 101 altogether, and the types of environmental/sustainability initiatives and benefits that could fall within Article 101(3).

7. As set out further below, this clarification should not, and does not need to, be stretched so far as to undermine basic principles of EU competition law such as consumer welfare. On the contrary, it is through the consumer welfare standard lens that environmental benefits could be internalised, and this is because consumers play a key role in the green transition. However, consumers should not end up bearing the cost of businesses’ sustainability agreements, either directly in the form of unjustifiably increased prices or indirectly through inefficient market outcomes.

8. It has been suggested by some national competition authorities, notably the Netherlands ACM and Hellenic Competition Commission, that companies should be able to experiment with genuine joint sustainability initiatives without fear of sanction for conduct that subsequently proves to be illegal. Whilst this may be advantageous, this approach must be carefully controlled to avoid gaming or other pretextual abuse or inefficiencies. It would also have to be carefully ringfenced to avoid setting a slippery slope precedent or effectively amount to the reintroduction of a notification system in the EU.

2.2. Substantive issues of enforcement practice

2.2.1. Introduction

9. EU antitrust law enforcement has taken different approaches (both at the European Commission and in the national competition authorities) over the last 25 years as regards agreements in the field of sustainability and in particular environmental issues.⁵ This in part reflects the development in the use of economic concepts. Rather than seek to reconcile partially inconsistent approaches and decisions from different eras where this is not

⁴ Simon Holmes, (2020), “Climate Change, sustainability, and competition law”, *Journal of Antitrust Enforcement*, Vol. 8/2, pp. 354-405, <https://doi.org/10.1093/jaenfo/jnaa006>; OECD Sustainability & Competition Law and Policy – Background Note 2020, Julian Novag (“OECD Sustainability & Competition Background Note 2020”), para 45, at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2020\)3&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2020)3&docLanguage=En).

⁵ For example: Case C- 238/ 05 *ASNEF- EQUIFAX* EU:C:2006; CECEC Commission Press Release IP 01/1659, 26/11/2001; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011], OJ C11/01, (“Horizontal Guidelines 2011”), Guidelines on the application of Article 81(3) of the Treaty [2004], OJ C 101/97, (“Article 101(3) Guidelines”).

necessary, BEUC would suggest taking a holistic approach to dealing with today's and tomorrow's issues – within the constraints of the framework of the TFEU and guided by the principle that competitive markets are generally the best way to achieve green outcomes. The Commission essentially already has the tools, including economic tools, required to do this. In common with other areas which are challenging competition law enforcement today, notably the digital economy⁶, there should however be greater focus on dynamic theories of harm and efficiencies.⁷

10. It is true that sustainability objectives will not be realised without wide business support. Unilateral initiatives alone are also unlikely to be sufficient to move us forward at the necessary speed, given the need for scale and the first mover disadvantage problem. However, at the same time, when reviewing policy to support a sustainable economy, regulators must be mindful that outsourcing the formulation and pursuit of public policy objectives to the private sector can be problematic from different perspectives⁸:

- First, agreeing on obligatory minimum standards of production may in some circumstances reduce competition either because this may prevent the emergence of higher standards or products produced at lower standards and at a lower price will no longer be available in the market. The Dutch *Chicken of Tomorrow* case illustrates both of these dangers (see box below).⁹
- Second, competing individually on production standards can lead to more efficient outcomes and therefore increase the quality of products in the interest of consumers.
- Third, private initiatives in the form of agreements between undertakings are more likely to be designed to favour industry rather than focussing on public policy objectives as companies naturally act in their self-interest. This can result in consumers being misled about the real nature of the cooperation and paying higher prices in the name of dubious environmental benefits (greenwashing).

Box 1. Chicken of Tomorrow

In 2015, the Dutch ACM analysed an agreement between the poultry, the broiler meat processing and the supermarket industries in relation to the introduction of welfare-friendly standards for chicken (the “Chicken of Tomorrow” agreement). This agreement involved (slightly) higher welfare standards and at the same time, the removal of regular chicken meat from sale in supermarkets (accounting for 95% of sales), leaving consumers with limited options and paying higher prices.

⁶ BEUC report “The Role of Competition Policy in Protecting Consumers’ Well-being in the Digital Era”, https://www.beuc.eu/publications/beuc-x-2019-054_competition_policy_in_digital_markets.pdf.

⁷ OECD Sustainability & Competition Background Note 2020, para 33.

⁸ See also as regards the democratic legitimacy of this: Offene Märkte und nachhaltiges Wirtschaften – Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis, Hintergrundpapier - Arbeitskreis Kartellrecht, 01.10.2020 (“Bundeskartellamt Hintergrundpapier”), pages 13-14, at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.html?nn=3591568.

⁹ The German DSD case also demonstrated that competition rather than the proposed cooperation led to better outcomes for consumers, Bundeskartellamt Hintergrundpapier, pages 30-31.

The ACM found that while consumers were willing to pay more for animal-welfare and environmental improvements, the planned improvements in chicken welfare under this agreement, which restricted competition, were too little compared with the expected price increase. The ACM, supported by our Dutch member Consumentenbond, concluded that the exemption criteria under the Dutch Competition Act and Article 101 TFEU were not met¹.

In 2020, the ACM's published an analysis of the chicken meat market² and found that in the meantime the different market participants had launched their own initiatives. Supermarkets offered differentiated levels of animal welfare, based on welfare classifications of their own, and also based on market-wide sustainability labelling. Chicken welfare standards of the chicken meat sold in Dutch supermarkets today were higher than the planned standards of the 'Chicken of Tomorrow' and more sustainable and animal-friendly chicken meat was offered in supermarkets than ever before.

This case illustrates the need for a careful analysis of sustainability claims to avoid greenwashing and unjustifiably imposing higher prices on consumers. It also clearly demonstrates that competitor cooperation is not necessarily the best way to reach sustainability goals. Other less restrictive alternatives such as labelling may be more beneficial.

Notes:

1 <https://www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition>.

2 <https://www.acm.nl/en/publications/dutch-supermarkets-offer-chicken-meat-more-sustainable-without-any-anticompetitive-agreements>

11. When competition authorities decide on their sustainability policy and give guidance, it is therefore vital that they balance all market participants' interests. The review of antitrust treatment of joint initiatives in furtherance of sustainability must not sacrifice consumer interests, leading to the weakest in European society paying disproportionately for the much-needed sustainability change or not being able to afford these products any more.

12. For consumers this means that in promoting sustainability and giving companies the legal certainty they need, competition authorities must also be careful not to undermine the fundamentals of EU competition law – which is perfectly possible, as recently demonstrated by the European Commission's approach to sensible cooperation in response to the COVID-19 crisis. We set out below further details of how this could be achieved.

2.2.2. Article 101(1)

13. Many agreements promoting sustainability goals can/will fall completely outside the scope of Article 101(1) TFEU. The large scope for agreements here is often underestimated.¹⁰ Such agreements would certainly include:

- Agreements having no appreciable effects on competition in the EU, or no appreciable impact on product diversity/consumer choice or prices.
- Agreements falling within Block Exemption safe harbours, e.g. pre-market R&D or production/specialisation agreements, and the De Minimis Notice.

¹⁰ OECD Sustainability & Competition Background Note 2020, para 57.

- Agreements on targets without obligations on how best to achieve the environmental aim.¹¹
- Agreements creating new markets.¹²
- Non-binding agreements such as voluntary, non-exclusionary, open standardisation agreements.¹³

14. The Commission could usefully set out clear guidance on where sustainability agreements do not restrict competition and are thus wholly unproblematic. In particular, voluntary standardisation agreements may provide a useful vehicle for transparent, inclusive, and beneficial cooperation to promote sustainability and at the same time promote healthy competition.¹⁴

15. On the other hand, we would counsel caution in relation to the scope of Article 101(1) as regards the use of the type of approach set out in the Court's *Wouters/Meca Medina*¹⁵ judgements to exclude the application of Article 101.¹⁶ These cases concerned the fulfilment of well-defined and targeted public policy objectives. There is a significant difference between setting specific rules with a limited scope for particular professions or ethics rules for sports and the vast scope of competitor companies interpreting public interest notions of sustainability in potentially unlimited ways as legitimate objectives. This is too broad a subject matter to allow for a proper and demonstrably objective balancing of different interests, including those of consumers.¹⁷ The approach would thus be open to "misuse" or regulatory capture and risk becoming a slippery slope to undermine the essence of competition law. It would be very difficult to ring-fence this in any meaningful way. Finally, as public interest grounds would need to be identified at state level, this approach would also risk fragmenting the EU Single Market.

16. As set out above, Article 11 TFEU (and Article 37 of the EU Charter of Fundamental Rights) should be taken into account in competition policy, and indeed

¹¹ For example, Case COMP/37.634 JAMA and Case COMP/37.612 KAMA (1999), Case COMP/37.231 ACEA (1998), CEMEP (2000), Commission Press Release IP/00/508, 23/05/2000.

¹² DSD Decision of 17/09 /2001,

https://ec.europa.eu/competition/antitrust/cases/dec_docs/34493/34493_63_6.pdf.

¹³ See Horizontal Guidelines 2011, para 280ff.

¹⁴ In this regard, it may be useful to consider a European environmental standards institute (similar to ETSI/CEN/CENELEC) involving all stakeholders including consumers, and not just businesses.

¹⁵ C-309/99 *Wouters and Others*, ECLI:EU:C:2002:98; Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission of the European Communities*, ECLI:EU:C:2006:492. And as more recently confirmed by the ECJ in Case C-1/12 *OTOC*, ECLI:EU:C:2013:127 (for accountants) and Case C-136/12 *CNG*, ECLI:EU:C:2013:489 (for geologists).

¹⁶ The Bundeskartellamt also suggests that this approach can only be used in exceptional cases, see Bundeskartellamt Hintergrundpapier, pages 20, 28, 44-45.

¹⁷ Similarly, the approach suggested by the European Parliament to disapply standard Article 101(1) and Article 101(3) analysis for certain types of vertical agreements promoting sustainability (environmental, animal health or animal welfare standards higher than those mandatory under Union or national legislation) in favour of excluding the application of Article 101(1) altogether provided that the advantages for the public interest outweigh the disadvantages to consumers and that the restrictions are indispensable to the attainment of the objective, is not an appropriate way forward and should not be replicated. (Amendment 144 in EP Common agricultural policy – amendment of the CMO and other Regulations, at: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0289_EN.html).

individual decisions, but where there is a restriction of competition, the balancing of interests, including consumers' interests, in the application of competition law can be done in a much more effective and rigorously verifiable way under the criteria for exemptions under Article 101(3) TFEU than under Article 101 (1) alone. These criteria are there for a purpose. Leaving aside burden of proof, as a "sanity check" on the substance, one would have to ask why an agreement which would fail to meet all of the Article 101(3) criteria should be permissible under Articles 11 and 101(1). Furthermore, Article 11 TFEU needs to be implemented in harmony with Article 12 TFEU on consumer protection and that requires ensuring that cooperation falling within the scope of Article 101(1) does not harm consumers. If the Commission wanted to go further, this could only legitimately be done by regulation¹⁸ or co-regulation¹⁹, in the same way that some existing legislation foresees certain general public interest exceptions from competition law.

2.2.3. Article 101(3)

17. Under Article 101(3) an agreement that is anticompetitive under paragraph 1 can be allowed if four cumulative conditions are met:

1. the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress
2. the agreement allows consumers a fair share of the resulting benefit
3. indispensability of the restriction
4. competition is not eliminated in respect of a substantial part of the products in question.

18. Article 101(3) provides considerable scope to enable sustainability related agreements between businesses to be exempted. In many cases it should be feasible to clarify their compatibility with competition law under traditional interpretations of this Article. Nevertheless, one could also consider expanding the current approach in a limited number of circumstances.

19. In evaluating the room for expanded thinking, from the consumer perspective, a distinction must be drawn between on the one hand the first and second conditions of Article 101(3), where sustainability considerations can be reflected, and the third and fourth conditions which must be rigorously maintained to protect consumers. There would seem to be no good arguments to weaken the notion of indispensability since this could lead to greenwashing. Similarly, for consumers, in particular the most vulnerable consumers, if price competition were eliminated in respect of a substantial part of the products in question, we would be very sceptical that quality parameters alone could outweigh such an

¹⁸ There are two ways in which regulation can do so:

first, by pricing in externalities explicitly and thereby incentivising producers and consumers to change behaviour (e.g. carbon tax) and

secondly by increasing minimum standards of production applicable to all market actors.

¹⁹ For example, by setting in the law clear objectives that need to be fulfilled or realised by means of industry-led initiatives. According to the 2003 EU Interinstitutional agreement on better law-making, co-regulation is a mechanism whereby attaining the objectives laid down in a legislative act is entrusted to parties which are recognised in the field (e.g. economic operators, social partners, non-governmental organisations). The basic legislative act therefore defines the framework and extent of the co-regulation. The parties concerned are then able to conclude voluntary agreements between themselves to achieve the objectives of the legislative act.

elimination of competition.²⁰ As long as the least well off in European society still have access to products at a range of price points (knowing that for many consumers the cheapest product is probably their only possible choice), agreements to promote more costly sustainable options which other consumers can choose would certainly be desirable.

20. Assuming the third and fourth criteria of Article 101(3) continue to be interpreted strictly, we set out below some ideas on how the first two criteria could in some limited circumstances be refined to promote sustainability.

21. In relation to the first condition of improvements in production/distribution or technical and economic progress, this does not necessarily need to be reflected in prices but can consist in more choice and higher-quality products.²¹ Quality considerations and innovation in the broad sense, including sustainability features, can be important factors insofar as consumers place a value on them²², i.e. are willing to pay more for them.²³

22. It is often claimed that consumers value sustainability. But it is not enough to make such assertions without reliable evidence. For example, in relation to sustainable food, agriculture being responsible for 10.3% of the EU's greenhouse gas emissions²⁴ and food consumption being the main driver of negative environmental impacts generated by households in the EU²⁵, research suggests that the evidence on consumers' willingness to pay (WTP) more for sustainable food is mixed.

23. BEUC's June 2020 sustainable food report, including a survey carried out in 11 countries²⁶, found that only one in five consumers said they were willing to spend more money on sustainable food²⁷. A Eurostat poll from September 2020 found a significantly higher number (66%).²⁸ However a previous Eurostat poll found that only 19% of those questioned said they have actually changed their diets to incorporate more sustainable food.²⁹ These data do not mean that consumers do not care. Quite the contrary: a survey

²⁰ Here we would not be in favour of the broader approach suggested in the draft ACM Guidelines on Sustainability Agreements, 09-07-2020, para 59, at: <https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements>. See also Article 101(3) Guidelines, para 110.

²¹ The Court has held that physically identical products can be treated differently if their environmental quality differs (Case C-2/90 Commission v. Belgium 1993, para 33, ECLI:EU:C:1992:310) This is also supported by the Horizontal Guidelines, para 308. See also OECD Sustainability & Competition Background Note 2020, para 47.

²² Bundeskartellamt Hintergrundpapier, page 17.

²³ Whilst recognising that consumers does not always mean end consumers, these are the focus of this paper.

²⁴ European Commission, 'Farm to Fork' Strategy for a fair, healthy and environmentally friendly food system, 20 May 2020.

²⁵ European Commission Joint Research Centre, Indicators and assessment of the environmental impact of EU consumption, 2019.

²⁶ Austria, Belgium, Germany, Greece, Italy, Lithuania, the Netherlands, Portugal, Slovakia, Slovenia and Spain. The results were analysed by our Belgian member Test-Achats.

²⁷ https://www.beuc.eu/publications/beuc-x-2020-042_consumers_and_the_transition_to_sustainable_food.pdf

²⁸ 66% of people said that they were prepared to pay 10% more for agricultural products that are produced in a way that limits their carbon footprint; https://ec.europa.eu/info/news/sustainability-rural-areas-food-security-commission-publishes-public-opinion-survey-eu-food-and-farming-2020-oct-13_en.

²⁹ The Gilets Jaunes movement also illustrates the dangers of presuming consumers' willingness to pay more for improvements to sustainability. On the other hand, the European Commission's Consumer Conditions Scoreboard 2019 notes that more than half of EU consumers (56.8%) report that at least some of their purchasing decisions are

by our German member vzbv showed that many consumers (up to 64%) would like farm animals to be reared in better conditions and are willing to pay higher prices in return. But it is currently hard for consumers to tell, when shopping, whether a cow, pig or chicken has had a good life³⁰.

24. Research has shown that consumers' willingness to pay more will depend (1) on greater transparency for consumers on actual costs of foodstuffs, i.e. clear price signals to show the costs of negative externalities³¹ and (2) on trust in the justification for sustainability price increases – in particular that these are the result of genuine sustainability improvements and are not simply greenwashing.³² Consumers need to have better information in order to be able to make informed choices.³³ To counter greenwashing, measures to try to ensure that information about sustainability is accurate and verifiable will also be essential.³⁴ To evaluate whether particular initiatives really do have sustainability value, competition authorities could consult EU Member State environmental agencies. Furthermore, consumers must believe that any price increases are fair to ensure that the cost of sustainability is not borne by the most vulnerable consumers rather than the “polluters”.³⁵

25. As regards the second criterion of Article 101(3), that consumers receive a “fair share of the benefit”, the basic principle that users of the products that are the object of an agreement should be compensated for the harm caused to them by the restriction of competition is sound and should remain the rule.³⁶ The question is whether one could legitimately apply a broader standard in some circumstances to take into account indirect

influenced by environmental claims: https://ec.europa.eu/info/sites/info/files/consumer-conditions-scoreboard-2019-factsheet_en.pdf.

³⁰ https://www.vzbv.de/sites/default/files/downloads/2017/10/10/2017_vzbv_factsheet_animal_welfare_labelling.pdf; <https://www.vzbv.de/pressemitteilung/umfrage-verbraucher-wuerden-fuer-tierschutz-mehr-zahlen>
This is also confirmed by a study of the German Federal Ministry of Food and Agriculture, 2020 https://www.bmel.de/SharedDocs/Downloads/DE/Broschueren/ernaehrungsreport-2020.pdf?__blob=publicationFile&v=20, (see page 28).

³¹ Research shows that consumers are not seeing the true price of their consumption of different foodstuffs, internalising the negative externalities different types of food generate, see for example: <https://www.uni-augsburg.de/de/campusleben/neuigkeiten/2020/09/04/2735/> or <https://www.rewe-group.com/en/newsroom/press-releases/1710-penny-labels-its-first-products-with-true-prices>. See also on CO₂ pricing of energy: <https://www.vzbv.de/meldung/fuer-einen-verbraucherfreundlichen-co2-preis>;
https://www.vzbv.de/sites/default/files/downloads/2019/01/24/19_07_01_positionspapier-vzbv_co2-bepreisung_kurzfassung.pdf.

³² See also Bundeskartellamt Hintergrundpapier, page 11-12 which notes the important role of consumer behaviour (behavioural economics).

³³ See for example: <https://www.vzbv.de/pressemitteilung/umfrage-verbraucher-wuerden-fuer-tierschutz-mehr-zahlen>.

³⁴ For example, initiatives such as the draft guidance published by the ACM regarding sustainability claims, at: <https://www.acm.nl/en/publications/acm-publishes-consultation-its-draft-guidelines-regarding-sustainability-claims>.

³⁵ https://www.vzbv.de/sites/default/files/downloads/2019/01/24/19_07_01_positionspapier-vzbv_co2-bepreisung_kurzfassung.pdf and https://www.beuc.eu/publications/beuc-x-2020-100_the_consumer_checklist_for_fair_and_efficient_carbon_pricing.pdf

³⁶ As recognised in the Article 101(3) Guidelines, para 43.

benefits such as (1) benefits in other markets or (2) societal benefits – such as collective environmental benefits, and to factor in negative externalities.³⁷

26. As regards benefits in other markets, the fair share criterion can legitimately be considered fulfilled if the benefit accrues to future consumers³⁸, in the same way that agreements on innovation benefit future consumers, assuming this future benefit can be substantiated. Where the consumer benefits arise in a different market but in relation to substantially the same group of consumers e.g. saving electricity costs as a result of more efficient household appliances, the fair share criterion could also be considered fulfilled. Benefits have also been recognised on the other side of two (or multi-) sided markets from where the restriction of competition occurred as in the Mastercard case.

27. As regards societal benefits, the Netherlands ACM has put forward one approach in suggesting that if: (i) the agreement aims to prevent or limit any obvious environmental damage, and cumulatively (ii) the agreement helps, in an efficient manner, to comply with an international or national standard to prevent environmental damage to which the Dutch Government is bound, users will, as a rule, reap the benefits in the same way as the rest of society (for example, less pollution leading to better health).³⁹ According to the ACM, as long as the price increase to users is lower than expected benefits for society as a whole⁴⁰ (and the other three conditions of Article 101(3) are fulfilled), this type of agreement can be exempted. It depends on an explicit legal requirement by which the state is bound which therefore embeds a redistribution between users and non-users in a democratic process.

28. Such agreements would not necessarily fully compensate the increased price to the users of the product affected but arguably this is not required by the term “fair”. Specifically, in relation to recognised globally tangible environmental benefits, such an approach could factor in negative externalities which might be fairer for users and non-users of the affected products. Non-users otherwise necessarily bear the cost of such negative externalities.⁴¹

29. Establishing whether the price increase to users is lower than expected benefits for society as a whole raises the question of quantification of costs and benefits.⁴² It has been suggested that environmental economics and specifically shadow pricing may be one solution. To the extent that such techniques involve consumer surveys carried out by agencies when assessing an agreement under Article 101(3) TFEU, the methodology of

³⁷ There is no fundamental philosophical obstacle to do this according to ‘Consumer Welfare in EU Competition Policy’, Svend Albæk, at: https://ec.europa.eu/dgs/competition/economist/consumer_welfare_2013_en.pdf.

³⁸ Article 101(3) Guidelines, para 87-88.

³⁹ Draft ACM Guidelines on Sustainability Agreements, 09-07-2020, para 38ff.

⁴⁰ In other words, where for example consumers of a restrictive agreement represent only 30% of the population, in deciding whether the price increase to these affected consumers is outweighed by the societal benefit, for this type of environmental agreement one would weigh up the price increase to consumers against 100%, not 30%, of the benefits to society.

⁴¹ OECD Sustainability & Competition Background Note 2020, para 3.

⁴² The ACM suggests that quantification is not necessary in every case, draft ACM Guidelines on Sustainability Agreements, 09-07-2020, para 45ff. Nor would it be necessary to seek exact quantification in every case which may result in misleading precision. A “sanity check” order of magnitude may suffice to determine that there are genuine benefits to consumers.

such surveys will be critical for credibility. In particular, a revealed preference approach is likely to be more accurate than a stated preference approach.⁴³

30. However, this type of “fair share” reasoning could not be accepted in the same way for all sustainability agreements or other social issues which restrict competition and harm consumers and do not internalise negative externalities in the same way as environmental protection improvements. Whilst they are laudable aims, if the group of EU consumers affected by agreements on, for example, animal welfare or fair wages for third country workers (e.g. small farmers), would not sufficiently value the improvements they bring about, i.e. be willing to pay the resulting increased prices, this would be stretching the law too far from the consumer welfare test into an undefinable and ambiguous welfare test, susceptible to politicisation and corporate capture.

31. This does not mean that decision-makers and society do not have a responsibility towards broader sustainability issues beyond the environmental component, including better animal welfare standards or working conditions of workers outside the EU. However, competition law is not the best vehicle to achieve such important goals. This can be legitimately done through the adoption of specific regulation by democratically elected institutions to set minimum standards. This may well involve the sacrifice of efficiencies, but this sacrifice may be justified in specific circumstances and there are precedents for this approach. The GDPR sacrifices economic efficiencies in favour of the protection of personal data for example.

32. On the basis of the above considerations, one approach under Article 101(3) to different types of sustainability agreements is summarised in the table below.

Table 1. Interpretation of criteria required for an Article 101(3) exemption of sustainability agreements

Conditions under Article 101(3)	Environmental benefits	Benefits for workers in third countries	Animal welfare benefits
Improvement in the production or distribution of goods or the promotion of technical or economic progress	Yes*	Yes	Yes
Fair share of the resulting benefit.	Consumers of the affected product are imposing negative externalities on non-users so taking account of benefits to all EU consumers, including non-users, in “fair share” is justified.	No negative externalities directly affecting non-users in the EU, therefore WTP ⁴⁴ must be evidenced for consumers affected by increased prices.	No negative externalities directly affecting non-users in the EU, therefore WTP must be evidenced for consumers affected by increased prices.
Indispensability	Yes	Yes	Yes
Non elimination of competition	No elimination of price competition.	No elimination of price competition.	No elimination of price competition.

Note: * This is a factual question that needs to be proven in the specific case.

⁴³ See also Bundeskartellamt Hintergrundpapier pages 24-26 on the difficulties of accurate quantification, which also raises normative concerns.

2.2.4. Anticompetitive conduct harming sustainability objectives

33. Existing antitrust law is well equipped to deal with anticompetitive agreements/conduct by business that can harm sustainability objectives. Cartels preventing consumers from buying sustainable products or restricting sustainability in other ways can and should be pursued in the same way as cartels that raise prices, restrict other quality parameters, output or innovation. A good example of this is the ongoing EU investigation into an alleged collusive scheme restricting competition in the development of technology to clean the emissions of petrol and diesel passenger cars⁴⁵.

34. It would seem difficult for the European Commission to change its stated policy of pursuing all cartels to suggest that it will prioritise sustainability cartels without thereby signalling that other would-be cartelists may be safe from prosecution. This could have a seriously harmful effect on consumers of a potentially very wide range of products. The Commission should however reflect on whether fines for collusion to harm sustainability or to indulge in greenwashing have a sufficient deterrent effect on potential cartelists.

3. Merger control

35. Recognising sustainability as a quality dimension, and therefore as a relevant parameter of competition, would not seem to require any radical change to the current approach in merger control. A merger reducing consumer choice of sustainable options would harm consumers and should not be cleared, any more than a merger reducing innovation - unless the restriction of competition can be solved by remedies.⁴⁶ Similarly, clearing an anticompetitive merger merely because it promotes sustainability should not be considered compatible with the EU Merger Regulation⁴⁷ unless it can genuinely fulfil criteria for efficiencies. The policy developed by the Commission in relation to innovation in recent merger cases could serve as a useful model for the dynamic analysis of mergers with a sustainability element.

36. By contrast, opening the door to purely non-competition factors in merger control decisions would seem difficult to reconcile with the current legal framework. Such an approach would be a risky slippery slope to special pleading of other types and could ultimately undermine the fundamental rationale on which merger control is built, that competitive markets are in the best interests of consumers, economic efficiency and thus society in general.⁴⁸ It has not been considered necessary to weaken merger control by softening the application of the failing firm defence in response to the COVID-19 pandemic. If effective competition is considered the driver of efficient outcomes, the same should hold true in relation to sustainability.

37. It is noted that some EU Member States foresee the ability to overrule merger decisions by national competition authorities on the grounds of public policy, including environmental protection.⁴⁹ The Commission may need to consider whether environmental

⁴⁵ https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008.

⁴⁶ Case M.8084 – Bayer/Monsanto, Decision of 21.3.2018.

⁴⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139>.

⁴⁸ See also Bundeskartellamt Hintergrundpapier page 43.

⁴⁹ For example, the *Miba/Zollern Gesch.-Z.: I B 2 – 20302/14–02*, Decision of the Minister of the Economy and Energy of 19/08/2019 in Germany in relation to a renewable energy related merger, at:

protection could constitute a valid public interest ground within the meaning of Article 21(4) second paragraph of the Merger Regulation.

38. Consumer preferences are a key aspect in the assessment of the effects of a merger, both in terms of identifying the relevant product markets and analysing the extent to which the merging companies compete against each other and against other firms. Today, environmental and sustainability considerations play an ever-increasing role in this respect. As set out above, when analysing individual cases, it will be important for the Commission to take steps to determine what preferences consumers really hold and their actual market behaviour on the basis of objective and well-designed studies, and not simply to rely on assumptions or assertions by merging parties on the basis of surveys carried out with the merger in mind.

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