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Article 101 TFEU in the decisive decade

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Dirk Middelschulte

dirk.middelschulte@unilever.com

Global General Counsel Competition

Unilever, Brussels

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Dirk Middelschulte*

dirk.middelschulte@unilever.com

Global General Counsel Competition

Unilever, Brussels

1. With sustainability targets defined by the UN Sustainable Development Goals (SDGs), the Paris Agreement and the European Green Deal, the defining question for the “*decisive decade*”¹ ahead of us is how they can be achieved. I will argue that joint initiatives of industry peers can fill a gap that unilateral action and regulation alone are not able to close, or not in an acceptable timeframe. Essentially three categories of business co-operations promise to play a complementary but critical role in that respect: mandatory standards, joint offtake/investment guarantees and industry agreements to balance negative environmental impacts or to extend producer responsibility (see section I.).

2. The framework of Article 101 TFEU is principally capable of addressing such co-operation satisfactorily. However, antitrust policymakers have difficult decisions to make in specifying the benefits that outweigh restrictive effects of sustainability agreements and to ensure that the costs of unsustainable business are borne by those who cause them, rather than society.² I will try to outline ways to integrate environmental and³ social considerations into Article 101 TFEU analysis, with a focus on how sustainability benefits other than price reductions or product functionality improvements can be conceptually embedded in Article 101(3) TFEU (see section II.).

3. My conclusions translate into suggestions and certain asks for the Commission but also to in-house lawyers and external advisors as they, too, will have to venture outside their comfort zones to make effective industry action happen (see section III.).

I. The case for industry collaboration

4. The antitrust policy debate on sustainability collaborations has not only revolved around the technical application of Article 101 TFEU (see section II.) but also invoked the more normative question as to what contribution private sector co-operation can and should make to environmental and social progress. Let’s start there.

1. Residual market failure: Individual action and regulation are not enough

5. External and intrinsic motivations for businesses to engage in sustainable business practices could not be more compelling (see section 3.). Individual action is likely to remain the first-choice approach as it enables companies to differentiate their products⁴ and win competitive advantages. But as they stretch their pledges and as stakeholder pressure to match words with deeds continues to mount,⁵ businesses are realizing that they can only achieve so much unilaterally—be it due to insufficient individual scale of even the biggest players, or be it for the risk of isolated first movers not being able to recover their additional costs.⁶ Examples from the consumer

* I would like to thank Simon Holmes, Grant Murray and Martijn Snoep for valuable comments, Lauren Gest for precious support in researching and incorporating sources, and countless Unilever colleagues for sharing their expertise and insights as to how we can realize our company’s purpose to make “sustainable living commonplace”—as an individual business and together with others.

1 See e.g. <https://www.iisd.org/articles/global-climate-change-governance-search-effectiveness-and-universality>.

2 Recent comments by Director General Olivier Guersent suggest that the Commission is indeed revisiting its horizontal rules in that respect; see EU weighs environmental benefits in new antitrust rules, *MLex*, 25 March 2021.

3 I am not distinguishing social and environmental sustainability since they are intertwined in many ways; efforts often overlap (e.g., living wages for farmers in developing countries reduce environmentally harmful practices), notably climate change has materialized already now as a major social problem in that it disproportionately affects the livelihoods of the most vulnerable groups—and EU law does not warrant a distinction (II.2.1.); see also Unilever’s response to the ACM’s consultation on its Sustainability Agreements Guidelines, under 3.a., https://www.unilever.com/Images/acm-guidelines-sustainability-agreements_tcm244-555475_1_en.pdf.

4 A. Gayk, Brands, Competition and Sustainability, in *Competition Law, Climate Change & Environmental Sustainability*, S. Holmes, D. Middelschulte, M. Snoep (Concurrences, 2021).

5 See, e.g., P. Eavis and C. Krauss, What’s Really Behind Corporate Promises on Climate change?, *New York Times*, 22 February 2021, <https://www.nytimes.com/2021/02/22/business/energy-environment/corporations-climate-change.html?referringSource=articleShare>.

6 For a view across industries on the deplorable shortcomings of siloed initiatives see S. Holmes, D. Middelschulte, M. Snoep (n 4), Part II (Industry Perspectives).

goods industry illustrate the limits of sustainability innovations already on a relatively small scale when consumer buy-in is lacking.⁷ More disconcerting, the industries with the heaviest carbon footprint are soberingly far off course in their endeavours to meet the two-degree target set by the Paris Agreement.⁸

6. Regulation can often effectively mandate environmental and social standards where pioneering efforts of individual companies are economically unviable and/or where the scale of the entire industry is needed. But legislative efforts have not always proven capable of creating the level-playing field needed to galvanize sustainable practices:

- Legislation may not materialize in the first place, or too late, notably for lack of political compromise.
- Regulation is geographically limited—the EU can only indirectly influence human rights and environmental standards in non-European supply chains, firms can enforce them contractually.
- Legislation may be insufficiently implemented and enforced, especially in jurisdictions with weak executive structures; supplier-customer relationships provide another kind of leverage.
- Where international standards exist, they may set the bar too low for the richest and most sophisticated economies—which happen to be the greatest per capita carbon emitters.⁹
- Regulation will often resort to the lowest common political denominator; it can be fragmented¹⁰ or otherwise ineffective and/or outdated.¹¹
- Regulation can be unfit to address evolving moral perceptions of harmful, though not illegal practices, say in R&D or advertising.¹²

7. Often overlooked in the antitrust policy debate, in its State aid secondary legislation the Commission expressly recognizes what it refers to as “*residual market failure*”—meaning nothing else than the insufficiency of unilateral

action and regulation to internalize businesses’ environmental costs (instead of having society pay the bill for these negative externalities).¹³ Concerning emission reductions, for instance, the Commission considers that firms do not have appropriate incentives to reduce pollution beyond EU standards since such reductions increase their costs without any return on investment, increased productivity or decreased operational costs.¹⁴

8. Importantly, compliance with (new) regulation itself may necessitate industry collective action. Examples include impending national¹⁵ and EU¹⁶ legislation introducing mandatory supplier due diligence requirements—which in order to work in practice may necessitate joint auditing and information sharing between peers (see under 2.1(iv))—or the EU Single-Use Plastics Directive¹⁷ and national taxes on virgin plastics¹⁸ that are likely to strengthen the case for horizontal offtake and/or investment agreements (see section 2.2.).

9. Government policy initiatives and industry co-operation can go hand-in-hand where governments or regulators remain involved in target-setting while leaving execution to businesses. Examples include government-orchestrated agreements between car manufacturers to apply stricter emissions standards,¹⁹ among pork producers to achieve humane euthanization of hogs²⁰ and between retailers to charge consumers for plastic bags.²¹

2. Industry collective action as a complement

10. Where individual action does not deliver the desired results and regulation (alone) fails to bring about more sustainable practices, industry self-regulation may be able

7 Examples include Lidl’s failed attempt to introduce Fairtrade bananas unilaterally (<https://www.bananalink.org.uk/news/lidl-backs-away-from-fairtrade-bananas/#:~:text=The%20German%20discount%20retailer%20Lidl,the%20switch%20to%20Fairtrade%20only>) and Unilever’s unsuccessful efforts to bring compressed deodorants to market in the UK (see FoodDrinkEurope, Competition Policy supporting the Green Deal, 20 November 2020, p. 2, fn. 1, www.fooddrink.eu/publication/green-deal-and-competition-policy).

8 A study of 238 energy, industrial and transport firms showed that just 18% are on track to cut their emissions sufficiently to reach this target, see Special Report: Business and climate change, *The Economist*, 19 September 2020, p. 10.

9 See <https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf?sequence=1&isAllowed=y>.

10 E.g., the EU anti-deforestation regulatory and policy framework; European Parliamentary Research Service, An EU legal framework to halt and reverse EU-driven global deforestation, September 2020, p. 13, [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654174/EPRS_STU\(2020\)654174_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654174/EPRS_STU(2020)654174_EN.pdf).

11 Which incited car manufacturers in California to jointly lower CO2 emissions to a level lower than envisaged by the federal administration, see <https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html>.

12 For instance, through collective voluntary total bans on animal testing or the marketing of sugary snacks to children.

13 The Guidelines on State aid for environmental protection and energy, OJ C 200, 28.6.2014, p. 1, para. 36, define “*residual market failure*” as “*the market failure that remains unaddressed by (. . .) other policies and measures*,” such as “*sectorial regulation, mandatory pollution standards, pricing mechanisms such as the Union Emissions Trading System (‘ETS’) and carbon taxes*.”

14 See SA.42133 (2015/N) – Slovakia – Scheme of State Aid for environmental protection to reduce air pollution and improve air quality for the 2014–2020 programming period, paras. 94–97.

15 German draft Lieferkettengesetz (Supply Chain Act), <https://www.bmz.de/de/themen/lieferkettengesetz/index.html>.

16 European Commission, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), 11.09.2020, https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf.

17 Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment, OJ L 155, 12.6.2019, p. 1.

18 For example, in the UK (<https://www.gov.uk/government/publications/introduction-of-plastic-packaging-tax/plastic-packaging-tax>) and France (<https://www.completefrance.com/living-in-france/utilities-services/how-france-is-fighting-waste-and-plastic-1-6523809>).

19 See <https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html>.

20 See <https://www.justice.gov/opa/pr/department-justice-supports-national-pork-producers-council-s-ability-combat-meat-shortage>.

21 See <https://www.bundesregierung.de/breg-de/aktuelles/plastiktueten-ab-juli-kostenpflichtig-474674>.

to fill the gap. The scenarios are plentiful,²² but certain patterns recur. Looking first at the types of initiatives that can make the most meaningful contributions to the delivery of the Green Deal, I will try to show under II. that it is currently unclear how they would be captured by Article 101(1) and especially (3) TFEU.

2.1 Mandatory standards

11. Voluntary industry standards are relatively easy to agree on, but everyone can walk away from them at any time; this happens all too often. Where companies principally adhere to standards, implementation tends to be piecemeal and outcomes disappointing.²³ Decisive industry action may therefore require (varying degrees of) mandatory standardization through bindingly agreed rules, for instance by means of:

- (i) Concerted phasing out of non-sustainable (input or output) products—as in the Commission’s *CECED* case²⁴ regarding energy-inefficient washing machines, or in the Dutch competition authority’s *Energieakkoord* case²⁵ where energy producers wanted to close down coal-fired plants. Other examples include commitments not to use coating designed for hot beverages on drinking water cups,²⁶ bans of non-recyclable polymers from packaging materials or a collective conversion of the automotive industry to carbon-free steel in cars.²⁷
- (ii) Agreements on practices more sustainable than required by law²⁸—e.g., moratoria to prevent environmental degradation²⁹ or design requirements to improve recyclability.³⁰
- (iii) Agreements to adhere to poorly enforced laws (outside the EU) ensuring compliance with human

rights³¹ or deforestation legislation³² and other integrity-related laws such as regulations against bribery, money-laundering—or even competition laws.³³

- (iv) Collectively applied standards for suppliers: Supply chains represent 60% of carbon risks,³⁴ and they disproportionately account for other pressing issues such as human rights violations and mass deforestation in developing markets. Relevant local legislation may be non-existent or ineffective due to weak law enforcement structures, and the EU simply does not have jurisdiction. As acknowledged by EU reports, enforcing better standards unilaterally has proven hard as the hands of even big customers are tied when suppliers can switch to less demanding purchasers.³⁵
- (v) Closely related to (iv), buyers may want to agree on auditing standards, exchange information on supplier compliance and ensure coherence in how they sanction non-compliance.³⁶

2.2 Joint offtake guarantees and investment agreements

12. The 2050 carbon net-zero target and other sustainability-related goals are only seemingly far away. Pivotal investment decisions into industrial assets with a long lifespan must be taken in the next few years;³⁷ where technologies have yet to be developed, the clock is ticking even faster. EU State aid policy recognizes that individual firms cannot bear the costs required for the most transformational advances,³⁸ but while state subsidies will be key, industries can deploy bespoke market-driven solutions without taxpayer funding. For example, via:

- (i) Collective offtake guarantees to ignite supplier investment in, for instance: (1) sustainable aviation fuel which would reduce emissions by up to 80%—if sufficient production can be incentivized through volume

22 See FoodDrinkEurope (n 7); Unilever, Sustainability cooperations between competitors & Art. 101 TFEU, Unilever submission to DG COMP (May 2020), Section I, https://www.unilever.com/Images/unilever_submission_sustainability_competition_law_tcm244-551751_en.pdf; S. Holmes, D. Middelschulte, M. Snoep (n 4), Part II (Industry Perspectives).

23 For the examples of environmental certification schemes and voluntary initiatives in the fisheries, palm oil and textiles sectors, see https://changingmarkets.org/wp-content/uploads/2018/05/False-promise_full-report-ENG.pdf; see also the comprehensive references at A. Miaad, Prosocial Antitrust, p. 43, fn. 267, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802194.

24 Commission Decision 2000/475/EC of 24 January 1999, case IV.F.1/36.718 – *CECED*, OJ L 187, 26.7.2000, p. 47.

25 ACM, *Energieakkoord* (2013), ACM analysis of closing down 5 coal power plants as part of SER Energieakkoord.

26 Confederation of European Papers Industries, contribution to the European Commission’s Green Deal consultation, 19 November 2020, https://ec.europa.eu/competition/information/green_deal/index_en.html.

27 <https://www.camecon.com/blog/carbon-neutral-steel-making>.

28 See also Bundesverband der Deutschen Industrie e.V.’s contribution to European Commission’s Green Deal consultation, 27 November 2020, p. 11, https://ec.europa.eu/competition/information/green_deal/index_en.html.

29 E.g., moratoria to stop overfishing, as in the DOJ’s Response to Akutan Catcher Vessel Association’s Request for Business Review Letter, 29 February 2000, <https://www.justice.gov/atr/response-akutan-catcher-vessel-associations-request-business-review-letter>; or on the prevention of soy expansion into natural habitats, <https://www.greenpeace.org/usa/victories/amazon-rainforest-deforestation-soy-moratorium-success>.

30 FoodDrinkEurope (n 7).

31 From bans on slave and/or child labour to living wages and basic health and safety regulations.

32 It is widely acknowledged that deforestation (particularly through forest fires) is predominantly due to insufficient enforcement of existing laws, not a lack of legislation; see <https://www.dw.com/en/lax-law-enforcement-causing-indonesias-forest-fires/greenpeace/a-50460060>.

33 Given the persistent lack of antitrust enforcement in many young jurisdictions; see OECD, Global Forum on Competition: Challenges Faced by Young Jurisdictions (Eighth Meeting, 2009), <https://www.oecd.org/daf/competition/GFC2009-Challenges-faced-by-young-competition-authorities.pdf>.

34 *The Economist* (n 8).

35 [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654174/EPRS_STU\(2020\)654174_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654174/EPRS_STU(2020)654174_EN.pdf), para. 2.4; https://ec.europa.eu/environment/forests/pdf/feasibility_study_deforestation_kh0418199enn_main_report.pdf, p. 126.

36 See, e.g., the DOJ’s Response to Fair Factories Clearinghouse’s Request for Business Review Letter, 19 June 2006; see https://www.justice.gov/archive/atr/public/press_releases/2006/216719.htm.

37 M. Frontczak, Setting the Course – Removing Competition Law Obstacles to Industry Sustainability Collaborations, in S. Holmes, D. Middelschulte, M. Snoep (n 4).

38 See, e.g., European Commission, Press release IP/21/226 of 26 January 2021, European Battery Alliance, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_226.

commitments;³⁹ (2) sustainable alternatives to conventional packaging, as recycling facilities do not even meet today's demand; (3) the cultivation and local processing of novel foods by giving farmers and other supply chain partners volume certainty that makes their investments worthwhile;⁴⁰ (4) transformational technologies—e.g., carbon-neutral steel or chemical recycling.

(ii) Joint infrastructure funding to unlock the development of collection and sorting infrastructures—industry-owned/-run or operated by third parties—like in the example of the Australian Consumer and Competition Commission's recent *Battery Stewardship Council* case,⁴¹ and similarly for plastics waste.

(ii) R&D collaboration to realize big-scale investments, e.g., into the development of innovative pesticides (where the criteria of the R&D Block Exemption Regulation may not be met).⁴²

2.3 Collective impact balancing or producer responsibility extension agreements

13. Where negative environmental impact cannot be avoided or sufficiently mitigated by modifying sourcing or production, firms are increasingly looking at designated instruments to balance their footprint or extend their responsibility. Once more, collective action scales the effects of such initiatives and helps create a level playing field notable where financial investments are substantial. Examples include:

(i) Carbon removal through, e.g., reforestation or carbon capture and storage to balance negative climate impact by industry players and to support sector-wide carbon-neutral claims.⁴³

(ii) Voluntary emission payments higher than those legally required for instance under the EU's emissions trading system, to the extent they compensate negative externalities insufficiently.⁴⁴

(iii) Extending producer responsibility to the post-consumer stage of the product lifecycle, e.g., through collecting, sorting and/or recycling of packaging, where not already legally mandated; an example is deposit systems.

(iv) Voluntary industry contributions payable on plastics produced from fossil fuels; such levies can unlock collection efforts and the development of recycling technologies while the funds collected can be channelled into new recycling technologies, collection infrastructure, and the recovery of harm already inflicted.⁴⁵

14. The balancing and compensation efforts covered under (i) and (ii) are often deemed to be only complementary as they can risk legitimizing business-as-usual growth in emissions, delaying the action required to address more systemic transformations in companies' business models and value chains.⁴⁶

3. Can businesses be trusted?

15. Some scholars have argued against the integration of sustainability considerations in the Article 101 TFEU analysis of industry collaborations, questioning businesses' commitment to environmental and social progress and stressing risks of cartel greenwashing.⁴⁷ Interesting as their arguments may be, they revolve around a point that probably everyone agrees on: no "sustainable" reading of Article 101 TFEU should permit harmful anticompetitive practices; they have to be vigorously repelled and sanctioned.⁴⁸ Similarly, marginal sustainability benefits—as in the Dutch *Chicken of Tomorrow* case⁴⁹—must remain insufficient to outweigh appreciable restrictive effects. As always, every case has to be rigorously assessed on its merits. The pertinent legal and policy question, however, is under what conditions relevant sustainability benefits, if demonstrable, can be factored into the analytical framework (see section II.).

16. This is not to say that businesses' underlying motivations are not important. While differences between sectors and individual firms are undeniable, a couple of developments underline the potential for trailblazing and even system-changing industry collective action:

45 E.g., Mindereroo Foundation, Global industry initiative launched to end plastic pollution, 25 September 2019, <https://www.mindereroo.org/mindereroo-foundation/news/global-industry-initiative-launched-to-end-plastic-pollution>.

46 See, e.g., Transform to Net Zero, Position Paper and Action Plan, p. 10, <https://transformtonetzero.org/files/Transform-to-Net-Zero-Position-Paper-Action-Plan.pdf>; Friends of the Earth International, Chasing Carbon Unicorns: The Deception of Carbon Markets and "Net Zero," February 2021, p. 12, <https://www.foei.org/wp-content/uploads/2021/02/Friends-of-the-earth-international-carbon-unicorns-english.pdf>. Unilever, for example, believes that net-zero strategies must lead with science-based emissions reduction pathways, complemented with neutralization or carbon removal when all feasible reductions have been implemented.

47 M. P. Schinkel and L. Treuren, Green Antitrust: Friendly Fire in the Fight Against Climate Change, and M. Meagher and S. Roberts, The Footprint of Competition: Power, Value Distribution and Exploitation in the Food Supply Chain, in S. Holmes, D. Middelschulte, M. Snoep (n 4).

48 As recently in the EU *Trucks* (https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39824), the French *Hard-wearing floor coverings* (<https://www.autoritedelaconcurrence.fr/sites/default/files/commitments/17d20.pdf>) and potentially also in the pending EU *Car Emissions* case (https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40178).

49 "A 10% reduction of the occupancy rate from 42 to 38 kilos per square meter, which, in practice, means from 21 to 19 chickens per square meter"; see at https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.

39 See ICLAs contribution to the European Commission's Green Deal consultation, 20 November 2020, https://ec.europa.eu/competition/information/green_deal/index_en.html.

40 See FoodDrinkEurope (n 7), section II.B.

41 ACCC, Voluntary battery stewardship scheme granted authorisation, 4 September 2020, <https://www.accc.gov.au/media-release/voluntary-battery-stewardship-scheme-granted-authorisation>; see also <https://globalcompetitionreview.com/sustainability/sustainability-and-antitrust-in-australia-outlier-or-blueprint>.

42 Bundesverband der Deutschen Industrie e.V.'s contribution to European Commission's Green Deal consultation, 27 November 2020, p. 12, https://ec.europa.eu/competition/information/green_deal/index_en.html.

43 See <https://sdg.iisd.org/news/177-companies-have-pledged-to-reach-net-zero-emissions-by-2050>.

44 Fighting climate change, *The Economist*, 23 May 2020, <https://www.economist.com/briefing/2020/05/23/the-world-urgently-needs-to-expand-its-use-of-carbon-prices>.

- Sustainability has proven a driver of growth as purposeful brands see a surge across categories⁵⁰ and sustainable firms outperform their peers.⁵¹
- Sustainable practices protect companies from the direct impact of climate change on their operations, notably supply chain disruptions, as well as indirectly in the face of the costs of technological change and regulatory and litigation risks.⁵²
- Shareholders are pushing companies to incorporate sustainability in their business models⁵³—not for altruistic motivations but to respond to the systematic—or “unhedgable”—financial risk that radically diversified institutional investors with “economy-mirroring” portfolios are confronted with.⁵⁴ This argument has been elaborated on by Amelia Miazaad,⁵⁵ who invokes findings from stakeholder governance theorists “*that the corporation’s purpose is not to create profits at the expense of society, but to solve society’s problems profitably.*”⁵⁶
- With the embrace of purpose-led business models, corporate strategies have undergone a shift of paradigms. Business commitment to contribute to the delivery of the Green Deal objectives and the UN SDGs has become a stand-alone target for many companies as they strive to surpass legal obligations and often also the aspirations of political actors.

17. It has become very difficult to argue that businesses do not care about the climate crisis and inequality. Against that backdrop, policymakers should help raise the potential of legitimate co-operation where unilateral action is ineffective. Both the SDGs and the Green Deal set the scene for their efforts.⁵⁷

II. Rereading Article 101 TFEU to make the right industry efforts work

18. Article 101 TFEU provides substantial leeway for light-touch industry initiatives (see section 1.). But it remains unclear to what extent sustainability benefits can outweigh the restrictive effects of agreements (see section 2.).

1. Sustainability agreements outside Article 101(1) TFEU

19. On the basis of a conventional reading of Article 101(1) TFEU, many co-operations by competitors will not have appreciable effects on markets and consumers and therefore remain outside the provision. This includes:⁵⁸

- (i) Agreements which loosely commit competitors to a sustainability objective but leave discretion as to the means by which to achieve it.⁵⁹ They are unlikely to fall within the remit of Article 101(1),⁶⁰ as illustrated by long-standing EU⁶¹ and UK⁶² case law.
- (ii) Voluntary standardization agreements under the conditions defined by the Horizontal Guidelines.⁶³ Such non-binding standards are ubiquitously common.⁶⁴
- (iii) Agreements to replace non-sustainable products or production methods without appreciable effects on product diversity or only marginal influence on purchasing decisions,⁶⁵ as in cases decided by the Commission and the Dutch Authority for Consumers and Markets (ACM).⁶⁶

50 There is comprehensive evidence of sustainable brands outperforming conventional products; see <https://www.stern.nyu.edu/experience-stern/about/departments-centers-initiatives/centers-of-research/center-sustainable-business/research/research-initiatives/ccb-sustainable-market-share-index>; Co-op, Twenty Years of Ethical Consumerism (2019), https://assets.ctfassets.net/5ywmq66472jr/5hkc6bA1y2eNRGSHJzyvX2/14449115f1ac1c02c4f9fd5a52b13b/20_years_of_ethical_consumerism_2019.pdf.

51 R. Henderson, Tackling the Big Problems (October 2019); Nielsen, The Sustainability Imperative (October 2015), https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/Global20Sustainability20Report_October202015.pdf.

52 *The Economist* (n 8).

53 <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.

54 Notably the “big three” asset managers BlackRock, State Street Global Advisors and Vanguard that collectively hold shares comprising over 20% of the S&P 500 and about 80% of all indexed funds; as a group, these three are the largest shareholders in 90% of all companies in the S&P 500; see A. Miazaad, Prosocial Antitrust, p. 18, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802194.

55 *Ibid.*, Chapter I.C.

56 *Ibid.*, p. 12.

57 European Commission, The European Green Deal, COM(2019) 640 final, makes a number of references to the necessity of industry contribution and collaboration to attain the objectives of the Green New Deal (see pp. 8, 9 and 18); SDG 17, <https://www.globalgoals.org/17-partnerships-for-the-goals>.

58 See also Autoriteit Consument & Markt (ACM), Guidelines, Sustainability Agreements, section 4, pp. 8–11, <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>; Unilever, Sustainability cooperations between competitors & Art. 101 TFEU, Unilever (n 22), Section 1..

59 As examples for such industry initiatives, see <https://www.unesda.eu/sugar-reduction> and <https://www.newplasticseconomy.org/assets/doc/globalcommitment-download.pdf>.

60 As per the previous Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 6.1.2001, para. 185.

61 Case COMP/37.231 – *ACEA* (1998), Commission Press release IP/98/865 of 16 October 1998; case COMP/37.634 – *JAMA* and case COMP/37.612 – *KAMA* (1999), Commission Press release IP/99/922 of 1 December 1999; *CEMEP* (2000), Commission Press release IP/00/508 of 23 May 2000.

62 <https://www.dairyreporter.com/Article/2020/12/07/Total-Intraplas-and-Yoplait-use-polystyrene-from-chemical-recycling-in-yogurt-pots>.

63 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011 (Horizontal Guidelines), section 7, para. 280.

64 See <https://www.standardsmap.org/identify>.

65 Horizontal Guidelines, para. 186.

66 European Commission, *CEMEP* (2000), Press release IP/00/508 of 23 May 2000; NMa, case 6456 (2008) – *Pig castration anaesthesia*, <https://www.acm.nl/en/publications/publication/6223/NMa-noobjections-against-agreements-on-the-castration-of-boars-with-the-use-of-anesthesia>.

- (iv) Agreements creating markets for new sustainable products where the parties would not be capable of conducting the activities in isolation and there are no appropriate alternatives available,⁶⁷ such as in the Commission's *DSD* case.⁶⁸
- (v) Research co-operations to develop shared intellectual property for sustainable products, as in EU case law⁶⁹ (and more generally pursuant to the R&D BER⁷⁰).

2. Restrictions inherent in the pursuit of a legitimate public interest objective

20. Well beyond the above categories of agreements, the European courts have developed case law that excludes restrictions of competition from Article 101(1) TFEU if the restriction is inherent in the pursuit of a legitimate public interest objective.⁷¹ This cannot, of course, be interpreted as a *carte blanche* to randomly exonerate agreements that claim to pursue environmental or social objectives. But in many instances, mandatory standards to establish and/or safeguard sustainable business practices could, if translated into the respective sustainability context, be measured by criteria similar to those that the ECJ applied to anti-doping rules in *Meca-Medina*. They “were adopted (. . .) for competitive sport to be conducted fairly”⁷² in order to “ensure healthy rivalry between athletes”⁷³ and “to safeguard equal chances (. . .) the integrity and objectivity of competitive sport and ethical values in sport.”⁷⁴

21. The Commission should specify under what circumstances—proportionate—environmental or social public interest considerations can remove competitor agreements from the remit of Article 101(1) TFEU.⁷⁵

67 Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 6.1.2001, para. 187; Judgment of the Court of 22 December 2016, case E-3/16 – *Ski Taxi SA v. Norwegian Government*, para. 98.

68 Commission Decision of 17 September 2001, case COMP/34493 – *DSD*, para. 114.

69 Case IV/35.742 – *F/2 – Eucar*, OJ C 185, 18.6.1997, p. 12.

70 Commission Regulation (EU) No. 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 335, 18.12.2010, p. 36, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1217&from=DA>.

71 Such as “the proper practice of the legal profession” (Judgment of the Court of 19 February 2002, *Wouters and others*, case C-309/99), the fairness of sports (Judgment of the Court of 18 July 2006, *Meca-Medina and Majcen v. Commission*, case C-519/04 P) or the quality of accountancy services (Judgment of the Court of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência*, case C-1/12).

72 Judgment of the Court of 18 July 2006, *Meca-Medina and Majcen v. Commission*, case C-519/04 P, para. 43.

73 *Ibid.*, para. 45.

74 *Ibid.*, para. 43.

75 See also the Hellenic Competition Commission, Competition Law and Sustainability, 17 September 2020, <https://www.epant.gr/en/enimerosi/press-releases/item/1089-press-release-initiative-competition-law-and-sustainability.html>, para. 58; L. Peepkorn, in Sustainability and competition law, *Concurrences* n° 4-2020, art. n° 97390, pp. 26–65, at para. 51.

3. A sustainable reading of Article 101(3) TFEU

22. Where competitor agreements may have restrictive effects on competition—which will often be the case for the types of co-operation outlined under section I.2.—they must be weighed against the benefits (see section 3.1.) of the agreement. Consumers must get their fair share of these benefits (see section 3.2.).

3.1 Sustainability benefits and consumer welfare standard

23. Sustainability benefits can easily meet the criteria of Article 101(3) TFEU where they lead to cost reductions that the co-operating companies are likely to pass on to their customers.⁷⁶ Similarly, quality improvements and innovation are recognized as benefits that can outweigh anticompetitive effects.⁷⁷ But the Commission’s current position on what qualifies as quality or innovation under the consumer welfare standard risks being insufficient to capture all relevant environmental and social benefits in that it tends to focus narrowly on what can be described as product functionality improvements.

24. The wording of Article 101(3) TFEU does not warrant this restrictive reading. It looks at whether agreements contribute to “improving the production or distribution of goods or to promoting technical or economic progress”: Qualifying emission reductions as production-improving and biodiversity protection or humane working conditions as contributions to economic progress needs no stretching of the letter of the law. Accordingly, lawyers and economists have argued that the consumer welfare standard is “perfectly capable”⁷⁸ of integrating sustainability benefits.⁷⁹

25. Conceptually, there are two complementary avenues to reflect them adequately in Article 101(3) TFEU:

- (i) Economically, agreements, e.g., reducing pollution and temperature increases, reduce negative externalities—or, more plainly, the true costs or shadow prices—of unsustainable business practices. Both the

76 For example, the energy cost savings brought about by the concerted outsourcing of less energy-efficient washing machines in *CECED*; Commission Decision 2000/475/EC of 24 January 1999, case IV.F.1/36.718 – *CECED*, OJ L 187, 26.7.2000, p. 47.

77 Horizontal Guidelines, p. 1.

78 S. Kingston, Introduction, in S. Holmes, D. Middelschulte, M. Snoep (n 4), p. IV.

79 S. Holmes, Climate change, sustainability, and competition law, *Journal of Antitrust Enforcement*, Vol. 8, Issue 2, July 2020, pp. 354–405, at pp. 362–365 and 372; M. Dolmans, Sustainable Competition Policy, *Competition Law and Policy Debate*, Vol. 5, Issue 4 and Vol. 6, Issue 1, March 2020; G. Murray, Antitrust and sustainability: globally warming up to be a hot topic?, *Kluwer Competition Law Blog*, 18 October 2019, <http://competitionlawblog.kluwercompetitionlaw.com/2019/10/18/antitrust-and-sustainability-globally-warming-up-to-be-a-hot-topic/?print=print>; M. Ristaniemi and M. Wasastjerna, Sustainability and competition: Unlocking the potential, in Sustainability and competition law, *Concurrences* n° 4-2020, art. n° 97390, pp. 26–65, at p. 53; C. A. Volpin, Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves), *CPI Antitrust Chronicle*, Summer 2020, 8; S. Delarue and M. Walker, United Kingdom, in S. Holmes, D. Middelschulte, M. Snoep (n 4); A. Miazad, Prosocial Antitrust, p. 22, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802194.

ACM and the Hellenic Competition Commission (HCC) therefore rightly assume that the internalization of these costs is a benefit that can offset anti-competitive effects.⁸⁰ Many externalities materialize over the long-term, which means the time horizon for the benefits assessment has to be adapted; a logic inherent in the very notion of “sustainability,” recognized in the EU public procurement directive⁸¹—and also in the EU treaties.

- (ii) Constitutionally, and consistent with the case law of the European courts, Article 101 TFEU must be interpreted in the light of the treaty objectives.⁸² The protection of competition serves the establishment of an internal market, a core Union objective enshrined in Article 3(3) TEU but even in that very provision accompanied by sustainability goals.⁸³ They are also reflected in the social (Art. 8–10) and environmental protection provisions (Art. 11) of the TFEU.⁸⁴ In that vein, Martijn Snoep has underlined that while previously the Commission could integrate wider treaty considerations in Article 101(3) TFEU, the self-assessment regime of Regulation (EC) No. 1/2003 has created a void in this respect; restricting Article 101(3) TFEU to in-market efficiencies is a related, equally unintended consequence.⁸⁵ To remedy these shortcomings, the Commission can draw rich inspiration from its more holistic pre-2004 practice.⁸⁶

26. Both the economic and the constitutional approach confirm that sustainability benefits in a wider sense, encompassing environmental and social targets, and also those benefits materializing outside the territory of the EU,⁸⁷ are relevant within Article 101(3) TFEU.

27. Would this rereading of Article 101(3) TFEU come with a risk of tampering with established principles of

European competition law? It is clear that the letter of the law prescribes the limits of its evolution and the Commission will have to carefully scrutinize any proclaimed sustainability benefits. But the progression of the law as such is inherent in EU competition policy and enforcement:

- The Commission’s change of heart concerning the inclusion of sustainability benefits in Article 101(3) TFEU, from numerous pre-2004 decisions and the 2001 horizontal guidelines, on the one hand, to the 2010 guidelines on the other, illustrates how swiftly policy paradigms can undergo substantial revision. What would prevent the Commission from returning to previous (and better) positions?
- In fact, recent Commission practice might already suggest a (re-)rethink of (or at least a certain incoherence with) its reductionist approach: In the 2017 *Dow/DuPont* merger decision, the Commission considered the environmental safety and health benefits of better crop protection explicitly also “*from a public policy perspective*,”⁸⁸ and more recently it has recognized the working conditions of self-employed workers as relevant elements of Article 101 TFEU analysis.⁸⁹
- Similar to innovation, which has only made a showing in competition policy since the mid-1990s, other dynamic concepts such as privacy protection may well be factored into the benefits analysis,⁹⁰ following the example of the Bundeskartellamt’s landmark *Facebook* decision.⁹¹

28. As Ariel Ezrachi has demonstrated, competition law is “*inherently pre-disposed to a wide range of values and considerations*.”⁹² Environmental and social sustainability are amongst those that legitimately find their place within its remit.

3.2 Consumers getting their fair share of sustainability benefits

29. Article 101(3) requires that restrictive agreements allow “*consumers a fair share of the resulting benefit*.” Assuming that the case law of the courts does not mandate

⁸⁰ ACM (n 8), para. 36; Hellenic Competition Commission (n 75), para. 71.

⁸¹ OJ L 94, 28.3.2014, p. 65, at para. 96.

⁸² Article 7 TFEU: “*The Union shall ensure consistency between its policies and activities, taking all of its objectives into account*”; Judgment of the Court of 9 July 2009, *3F v. Commission*, case C-319/07 P, para. 58; Judgment of the Court of 6 October 1982, *Srl CILFIT v. Ministry of Health*, case 283/81, para. 20; Judgment of the General Court of 7 March 2012, *British Aggregates v. Commission*, case T-210/02, para. 117. For a comprehensive analysis of the relationship between competition law and “constitutional” treaty provisions see S. Holmes (n 79), at pp. 359–362.

⁸³ “*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.*”

⁸⁴ Which, according to Christopher Thomas’ analysis, gives the European courts scope “*to recognise sustainability as an efficiency, should they wish to do so*,” C. Thomas, Exploring the Sustainability of Article 102, in S. Holmes, D. Middelschulte, M. Snoep (n 4), p. 112.

⁸⁵ Bundeskartellamt, 20th International Conference on Competition on March 4, 2021 (video recording: https://www.bundeskartellamt.de/EN/AboutUs/Conferences/InternationalConferenceonCompetition/ICC2021/ICC2021_node.html).

⁸⁶ Such as Commission Decision 94/322/EC of 18 May 1994, case IV/33.640 – *Exxon/Shell*, OJ L 144, 9.6.1994, p. 20; Commission Decision 94/986/EC of 21 December 1994, case IV/34.252 – *Philips/Osram*, OJ L 378, 31.12.1994, p. 37; Commission Decision 2000/475/EC of 24 January 1999, case IV.EI/36.718 – *CECED*, OJ L 187, 26.7.2000, p. 47.

⁸⁷ Article 3(5) TEU: “[The Union] shall contribute to (...) sustainable development of the Earth (...) eradication of poverty and the protection of human rights.”

⁸⁸ Commission Decision of 23 March 2017, case M.7932 – *Dow/DuPont*, para. 1975.

⁸⁹ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12483-Collective-bargaining-agreements-for-self-employed-scope-of-application-EU-competition-rules#574486_20210106114658.

⁹⁰ C. Caffarra and T. Valletti, Google/Fitbit Review: Privacy IS a Competition Issue, CEPR Policy Portal, 4 March 2020; M. Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?* (Wolters Kluwer, 2020).

⁹¹ Bundeskartellamt, Case Summary: Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, case B6-22/16, 6 February 2019, see https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4; the case has now been referred to the ECJ for a preliminary ruling, see Facebook’s fight against German antitrust case goes to top EU court, *MLex*, 24 March 2021.

⁹² A. Ezrachi, Sponge, *Journal of Antitrust Enforcement*, Vol. 5, Issue 1, April 2017, pp. 49–75, at p. 50; see also A. Miazad, Prosocial Antitrust, p. 22, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802194.

a restriction to in-market efficiencies,⁹³ several conceptual approaches are conceivable to address the reduction of negative externalities within the “fair share” criteria:

- (i) The Commission has presented the most radical solution itself in *CECED*, not requiring any individual benefit: “Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines.”⁹⁴
- (ii) Consistent with the Commission’s Article 101(3) TFEU Guidelines,⁹⁵ the ACM argues that individual consumers in the relevant product market do not have to be fully compensated for higher prices if society as a whole can reap their fair share of the benefits.⁹⁶ The ACM’s approach is intriguing but risks to fail where no relevant “conventional” individual consumer benefits can be identified, for instance if positive effects are exclusively or largely long-term and/or out-of-market, either product-wise or geographically.
- (iii) Against that backdrop, it seems more stringent to disregard the benefits of the concrete user in the relevant product and geographic market and let the collective consumer benefit suffice; a reading that Article 101(3) TFEU permits because it does not refer to individual consumers. This extension of the “fair share” concept is justified because (and only to the extent that) absent the restrictive agreement the individual user would impose the true costs of her/his environmentally or socially harmful shopper behaviour on other consumers. The proposed approach values the environmental/social treaty objectives over the individual’s liberty to incur—but not pay for—the external costs associated with unsustainable shopper decisions.⁹⁷ The argument is very much built on fairness, also reflecting the fact that the consumer behaviour of the rich—societies globally as much as individuals locally—is disproportionately unsustainable⁹⁸ while vulnerable consumers are disproportionately exposed to environmental hazards.⁹⁹

(iv) Lastly, a strong case can also be made to regard the value consumers assign to sustainable practices as their fair share of sustainability benefits; a concept the HCC has alluded to, noting that consumers “*are simultaneously active in various social spheres, and have wider interests than their narrow financial ones in the specific relevant market.*”¹⁰⁰ This approach supposes that consumers take a longer-term perspective, valuing the welfare also of future consumers.¹⁰¹

30. It is critical to distinguish such stated consumer preferences from revealed shopper preferences articulated in choices made in front of physical or virtual shelves: In Eurostat surveys in 2020, 66% of respondents said they would pay more for sustainable food products but only 19% actually did;¹⁰² a phenomenon also observed by economists¹⁰³ and recognized by the Bundeskartellamt.¹⁰⁴

31. These findings also imply that a restrictive interpretation of the “fair share” element—which would limit it to shopper preferences—would pin its faith on cognitive biases towards short-term benefits such as low prices and convenience, however important these elements are within Article 101(3) TFEU. In a case of hyperbolic discounting, it would turn a blind eye to what happens after the immediate in-store shopper experience, disregard the differentiated motivations of consumers in their capacity as citizens, risk contradicting the Green Deal agenda and would sanction the unfair outcomes of an economy that still incentivizes externalization of environmental and social costs.¹⁰⁵ The alternative would be for antitrust policy to continue to “*encourag[e] (. . .) companies to profiteer from negative externalities by cementing consumer price as a normative goal.*”¹⁰⁶

3.3 Restrictive effects and sustainability benefits: Balancing and quantifying

32. The greater the restriction of competition found under Article 101(1) TFEU, the greater must be the

93 Judgment of the Court of First Instance of 28 February 2002, *Compagnie générale maritime and others v. Commission of the European Communities*, case T-86/95, para. 10; see also Judgment of the General Court of 24 May 2012, *MasterCard and Others v. Commission*, case T-111/08.

94 Commission Decision 2000/475/EC of 24 January 1999, case IV.F.1/36.718 – *CECED*, OJ L 187, 26.7.2000, p. 47, at para. 56.

95 Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, pp. 97–118, at paras. 85–87.

96 ACM (n 8), para. 41: “[I]t can be fair not to compensate users fully for the harm that the agreement causes because their demand for the products in question essentially creates the problem for which society needs to find solutions”, <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>.

97 See also M. Dolmans, Sustainable Competition Policy, *Competition Law and Policy Debate*, Vol. 5, Issue 4 and Vol. 6, Issue 1, March 2020, pp. 19–20, though I disagree as to whether the fairness argument can be directly anchored in the “fair share” wording of Article 101(3) TFEU, simply because the original language versions of the Treaty, English not being one of them, do not warrant this interpretation (Art. 101 TFEU has not been changed since 1958).

98 United Nations Environment Program (2020), Emissions Gap Report 2020, Nairobi, p. 13, <https://www.unep.org/emissions-gap-report-2020>.

99 See <https://datadrivenlab.org/featured/press-release-most-cities-burdening-low-income-residents-with-unfair-share-of-environmental-hazards-according-to-index-that-will-launch-at-the-world-urban-forum-on-feb-9>.

100 Hellenic Competition Commission (n 75), para. 71. See also I. Lianos, Polycentric Competition Law, pp. 13–18, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257296; S. Holmes (n 79), Vol. 8, Issue 2, July 2020, pp. 354–405, at p. 375.

101 See also I. Lianos, Polycentric Competition Law, p. 22, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257296.

102 BEUC, How Competition Policy can Contribute to the European Green Deal, p. 8, https://www.beuc.eu/publications/beuc-x-2020-113_green_deal_and_competition_consultation_20_november.pdf.

103 See, with further references, R. Henderson, *Reimagining Capitalism in a World on Fire* (PublicAffairs, 2020), p. 54; Hellenic Competition Commission (n 75), para. 25; C. A. Volpin, Sustainable as a Quality Dimension of Competition: Protecting Our Future (Selves), *CPI Antitrust Chronicle*, Summer 2020, 8, 11.

104 Bundeskartellamt, Offene Märkte und nachhaltiges Wirtschaften – Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis, p. 25, https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.html.

105 See also M. Dolmans, Sustainable Competition Policy, *Competition Law and Policy Debate*, Vol. 5, Issue 4 and Vol. 6, Issue 1, March 2020, pp. 6–12.

106 A. Miazad, Prosocial Antitrust, p. 16, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802194.

benefits relevant under Article 101(3) TFEU.¹⁰⁷ In other words, mere temporary restrictive effects are easier to justify. Importantly, many of the sustainability co-operations outlined under section I.2. bring about only transitory cost increases while prompting market penetration of sustainable technologies and practices:

- Where companies agree on joint offtake commitments or collective infrastructure financing, they scale up demand to unlock the development of transformational technologies or drive other kinds of (supplier) investment in sustainable input products. While such co-operations themselves will often only be transient in nature, their positive effects are likely to be long-lasting, for example leading to cost reductions thanks to economies of scale, potentially turning sustainable alternatives into mainstream solutions.
- Similarly, by enforcing a transition to more sustainable sourcing and production practices, mandatory standards boost demand for alternatives to conventional products, delivering scale and associated cost decreases. Here too, the restrictive effects promise to be only temporary while potentially accelerating the penetration of sustainable practices.

33. Article 101(3) TFEU does not prescribe the quantification of benefits. For qualitative benefits the Commission has already established that (only) a value judgement is required to assess their countervailing effects.¹⁰⁸ The ACCC's comprehensive case practice in this field shows that sustainability efficiencies can be captured effectively without putting numbers to them.¹⁰⁹ At the same time, where possible, quantification should be required with a view to objectivizing the balancing exercise of Article 101(3) TFEU and its results. The comprehensive joint ACM/HCC technical paper,¹¹⁰ work done by economists outside the antitrust space but also the methodologies developed in State aid and public procurement law,¹¹¹ especially in the transport sector,¹¹² provide guidance and inspiration.¹¹³

¹⁰⁷ Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, pp. 97–118, at para. 90.

¹⁰⁸ *Ibid.*, para. 103.

¹⁰⁹ See, e.g., the 2020 Battery Stewardship Council Final Determination, paras. 4.13–14 (https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2004.09.20%20-%20PR%20-%20AA1000476%20-%20BSC_0.pdf) and the 2008 Sydney Waste Management Group of Councils Authorisation Determination, paras. 6.51–54 (<https://www.accc.gov.au/system/files/public-registers/documents/D08%2B110060.pdf>).

¹¹⁰ https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf.

¹¹¹ P. Thieffry, Environmental and Climate Sustainability in Public Procurement, in S. Holmes, D. Middelschulte, M. Snoep (n 4).

¹¹² European Commission Handbook on the external costs of transport, <https://op.europa.eu/en/publication-detail/-/publication/9781f65f-8448-11ea-bf12-01aa75ed71a1>; see also B. Linke and U. Woll, Right on Track – The Legal Framework as a Locomotive for Sustainability in Transportation, in S. Holmes, D. Middelschulte, M. Snoep (n 4).

¹¹³ For a quantification of the expected—rising—external costs of carbon emissions, see <https://www.mcc-berlin.net/en/news/information/information-detail/article/climate-damage-to-the-global-economy-greater-than-expected.html>. See also M. Dolmans, Sustainable Competition Policy, *Competition Law and Policy Debate*, Vol. 5, Issue 4 and Vol. 6, Issue 1, March 2020, p. 13.

3.4 Indispensability and no elimination of competition

34. It appears that the following types of scenarios can be distinguished when assessing the indispensability of sustainability agreements:

(i) Indispensability will often follow from first-mover disadvantages when individual action is not economically feasible; this is true for most types of agreements outlined under I.2. It also confirms that willingness-to-pay assessments which rely on revealed preferences are largely unhelpful to assess sustainability benefits in Article 101(3) TFEU, simply because companies will choose to introduce more sustainable products unilaterally where enough consumers are ready to pay any related price mark-ups to make the more sustainable products profitable.

(ii) In other instances, co-operation is indispensable to overcome a lack of scale of individual firms, notably in the scenarios described under I.2.2 (collective offtake/investment) agreements.

(iii) A possible third category would be situations where individual action would be feasible in spite of limited scale, but co-operation would be imperative to deliver meaningful environmental or social results in an acceptable timeframe. This impact-oriented reading of “indispensability” would broaden the criteria significantly, although still warranted by the language of Article 101(3) TFEU, especially in the light of the constitutional provisions (see section II3.1(ii)). To be sure, the relevant scenarios seem to be relatively hypothetical at this stage as companies are prioritizing competitive advantages over scaled collective impact. But that may change in the face of the dynamics of stakeholder capitalism, and possible EU antitrust policy reshaping.

35. As mentioned, many competitor co-operations presented here are defined by short-term scale-ups, meaning that they may not be indispensable anymore once penetration of the sustainable technology, practice or product itself has been attained. Therefore sustainability agreements would have to be restricted to the relevant transitory periods.

36. In terms of the last exemption criteria under Article 101(3), though, of course, a matter of case-by-case appraisal, sustainability co-operation is unlikely to eliminate competition. Being limited to sustainability aspects of sourcing or production, they will normally leave ample room for many other parameters on which the parties can continue to compete, such as price, quality, innovation and branding.

III. Conclusions and proposals for action

37. I will try to translate my findings into recommendations for the Commission, notably with an eye to the review of the Horizontal Guidelines that might (I think: should) include a designated chapter on sustainability agreements (see section 1.), and for the lawyers and economists advising companies (see section 2.).

1. Paving the way to optimal industry contribution to the Green Deal

38. It is already very applaudable that the Commission has recognized the role of competition policy within the Green Deal¹¹⁴ and the necessity of guidance to businesses that want to engage in more sustainability collective action.¹¹⁵ I will take a look at the challenges ahead (see section 1.1) and specify the substantial questions that I believe should be addressed (see section 1.2); Simon Holmes, in particular, has already laid out the instruments available to the Commission to increase legal certainty and incite co-operation.¹¹⁶

1.1 A competition policy for sustainability agreements— it’s no mean feat

39. Antitrust policymakers find themselves at a peculiar starting point as businesses are still figuring out how to embrace the historic transition to a green and more equitable economy. As management scholar Sarah Kaplan recently said, “*We are in the early stages of development of a new more responsible capitalism. People want to run businesses differently but they still do not know how to do it.*”¹¹⁷

40. In that sense, the Commission needs to draw the boundaries in a territory that remains largely uncharted. Contributors to the 2020 consultation on the Green Deal and competition policy have put forward numerous examples of peer co-operations but they are unlikely to be exhaustive. Ideally, the Commission would anticipate as much as possible the range of scenarios, thus creating the safest possible space for companies exploring novel co-operative solutions where individual action is unviable; I cautiously hope that the classification proposed under section I.2. can be helpful in that respect.

41. Other than that, the Commission’s consultation and the ongoing policy debate have shown that:

- While voluntary self-commitments and other laudable light-touch industry initiatives hardly cause competition law concerns, their positive environmental and social impact is often scant.
- The principle of primacy of regulation over self-regulation is uncontested but so are largely the shortcomings of regulation, as explained in section I.1.
- A consumer welfare standard relying solely on individual short-term shopper preferences is unsustainable—a more nuanced consumer concept should integrate the benefits for future consumers and society as a whole.
- Consistent with environmental legislation, State aid and public procurement law, antitrust should “desocialize” the true costs of harmful business practices.

42. Notably the latter two points make hard choices, and a rethink of established assumptions, inevitable. It may come down to Commissioner Vestager’s observation that “*the market is there to serve us as citizens.*”¹¹⁸ And it is also a matter of preventing “*perverse outcomes,*”¹¹⁹ i.e., competition enforcement contradicting the objectives of the Green Deal agenda rather than being part of the solution.

1.2 Commission guidance— fields for exploration

43. In terms of concrete issues that the Commission may want to address in the new Horizontal Guidelines and/or elsewhere, the following questions seem to be relatively straightforward:¹²⁰

- (i) Which types of sustainability agreements fall outside Article 101(1) TFEU (see section II.1.)?
- (ii) Which restrictions can be considered as inherent in the pursuit of a legitimate sustainability objective (see section II.2.)?
- (iii) How does the Commission evaluate certain categories of sustainability agreements that are likely to fall under Article 101(1) TFEU (see section I.2.)?
- (iv) Under what conditions do sustainability benefits qualify as quality improvements or innovation in the sense of Article 101(3) TFEU (see section II.3.1.)?

114 M. Vestager speech, Competition and sustainability, Brussels, 24 October 2019.

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

116 S. Holmes, Climate change, sustainability, and competition law (n 79) at pp. 402–405.

117 As cited in L. Abboud, Danone’s test case for sustainable business, *Financial Times*, February 2021.

118 As cited in *The Guardian*, 17 September 2017: “[T]he market is not the society (. . .) For a long time we have been told that is all it is. But the market is there to serve us as citizens”; <https://www.theguardian.com/world/2017/sep/17/margrethe-vestager-people-feel-anxious-about-tax-avoidance-european-competition-commissioner>.

119 S. Kingston, Introduction, in S. Holmes, D. Middelschulte, M. Snoep (n 4), p. VI.

120 See also the detailed “catalogue” of questions in FoodDrinkEurope (n 7), section III; see also D. Middelschulte, Competition Policy as an Enabler of a Sustainable Economy – A View Across Sectors, in S. Holmes, D. Middelschulte, M. Snoep (n 4).

- (v) How can other sustainability benefits be captured as benefits within the meaning of Article 101(3) TFEU, namely, to the extent that they reduce negative externalities (see section II.3.1)?
- (vi) What are the criteria to assess the consumers' fair share of the relevant benefits when they materialize out-of-market (see section II.3.2)?
- (vii) What is the impact of temporary cost (and price) increases resulting from sustainability co-operations (see section II.3.3)?
- (viii) When is it necessary to quantify sustainability benefits—and how—and how are they weighed against the restrictive elements of sustainability agreements?
- (ix) Does the indispensability criteria in Article 101(3) TFEU permit an impact-oriented reading as described at section II.3.4?

2. Helping businesses to find the way: The role of legal and economic advisors

44. The Commission is ready to guide businesses in realizing legitimate, meaningful joint contributions to the Green Deal and beyond. It is now for companies to bring cases and populate the uncharted territories sketched above (see section 1.1.). As interfaces between authorities and business, in-house lawyers have a pivotal role to play—and an opportunity to drive the sustainability agendas of their firms through co-operations that industries have shied away from previously, be it for antitrust concerns, overconfidence in unilateral action or reactive sustainability strategies that they are now revisiting.

45. In-house practitioners should bring the ongoing evolution of the enforcement environment to the attention of their internal stakeholders and encourage them to explore collective action as a complement to individual activities. As not every company can afford internal experts that monitor competition policy developments, external advisors are discovering a new field to generate business. Rightly so, and hopefully also driven by the ambition to make a genuine contribution to fundamental business transformations across industries. Creative and courageous solutions in this space will help to rebut Commissioner Vestager's criticism of "*conservatism in the advisory industry*."¹²¹ ■

121 M. Vestager, keynote speech at Conference Sustainability and Competition Policy: Bridging two Worlds to Enable a Fairer Economy, 24 October 2019, available at <https://www.youtube.com/watch?v=7mpWAOhkQbY>.

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