Redirecting competition rules towards a more sustainable EU: from restrain to sustain

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1. Introduction

The concept of sustainability focuses on striking a balance between the needs of the current generations and those of future generations considering the environmental, societal and economic limitations present. Sustainable development, as defined in the Brundtland Report (WCED, 1987), is *the development that meets the needs of the present without compromising the ability of future generations to meet their own needs*. The report aims to put in place the main principles that would facilitate sustainable development.

The UN Sustainable Development Goals (SDGs) set forth broader development targets for both developed and developing countries. They encompass economic, financial, institutional, social, and environmental aspects of sustainability that are part of the 2030 Agenda for Sustainable Development. Together with the Paris Agreement on Climate Change, 17 SDGs strive for global cooperation towards a better future. EU has fully committed to the 2030 Agenda with its numerous policies in place, and its robust "Action Plan for Financing Sustainable Growth", which is followed by the ambitious European Green Deal.

The implementation of the sustainability objectives would require a greater commitment. EU has grasped this need and exerted further efforts to form a concrete legal framework that materializes the policy goals happen. A robust legal framework will have considerable impacts on the public and private sector. Besides the other areas of law, EU Competition Law has a crucial part in the sustainability objectives, along with the economic and organizational transition that EU is striving for. The sustainable development targets are, in fact, enshrined in various articles of the TEU and TFEU[1]. Among many other articles of TEU and TFEU, Art. 13 TFEU is of particular importance as it suggests broader interpretative guidance for the effective implementation of EU law, including competition law.[2] It is therefore clear that the principle that EU competition law should protect and facilitate the environmental and sustainability objectives derives from EU's constitutional framework.

EU acknowledges that climate change is the greatest threat to EU economy, internal market, and competitiveness. Economic loss caused by climate change in 2020 alone is over and above $200 b. There is no doubt that we must take urgent action to tackle climate change, not only due to environmental concerns but also for economic reasons. The strong link between energy, climate policy and competition rules supports this urgent need. Perceiving the threats, in 2019, the EC launched the Green Deal as a guideline towards a sustainable EU economy with an ultimate aim to become carbon neutral by 2050. Energy alone is responsible for more than 75% of the CO2 emissions globally, which makes it the focal point of the green transition. This has allowed sustainable usage of natural resources to attract more attention from businesses, consumers and policymakers. However, EU energy system is not the only one that calls for an urgent transformation. The achievement of the Green Deal objectives also entails EU undergoing a massive economic transformation. This transformation must be facilitated by competition policy, and be strengthened by industrial, energy and climate policy. To ease this transition, in 2020, European Central Bank announced its support for European Commission's work to develop a sustainable finance strategy.[3]

In this article, we will mainly tackle the question of how competition policy can play a part in facilitating the green transition, and we will be focusing on the "antitrust" aspect of the issue particularly. Antitrust rules are applied in parallel by European Commission, national competition authorities and national courts. Thus, it is useful to first examine the approach of European Commission, followed by the practice and guidelines of selected NCAs. Finally, before concluding, we will take a look at some of the contributions submitted as a response to EU Commission's Call for Contributions on Competition Policy Supporting the Green Deal.[4]

2. European Commission's Approach and the Application of TFEU 101

[1] Art. 3(3) TEU: "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." ; Art. 11 TFEU: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular, to promote sustainable development."

[2] Art. 13(1) TEU: "…The EU institutional framework shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions."

[3] Cf. EZB, Eurosystems reply to the European Commission's public consultations on the Renewed Sustainable Finance Strategy and the revision of the Non-Financial Reporting Directive, 6 August 2020,

[4] https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf

There is an ongoing discussion on whether competition law inhibits collaborations between competitors that could facilitate sustainable development or mitigate global environmental problems. Initiatives such as environmental certification or ethical standards for production and agreements aiming at protecting natural resources from overexploitation are at the centre of these debates. The conflict between competition law and public-interest oriented business collaborations has been a point of discussion throughout the evaluation of the competition rules. The necessity of urgent action to be taken to tackle climate change has made these considerations more prominent than ever.

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

I. the extent to which agreements among competitors or companies across the value chain to enhance social and environmental sustainability could be cleared, either as not falling within Article 101 (1) or exempted under Article 101 (3) TFEU,
II. the extent to which sustainability considerations could be taken into account when assessing mergers and acquisitions and,
III. whether abusive practices of a dominant firm under Article 102 TFEU may also extend to practices seen as unfair under an environmental, social or moral point of view or if there should exist a sustainability defence regarding conduct that may otherwise constitute an abuse of a dominant position. [5]

The transition towards a circular economy and the achievement of Green Deal goals are perceived as a new door opening to market opportunities and future economic development, unlocking more than €10 trillion of value across different economic areas, such as food and agriculture, energy, materials, cities, health and well-being, and millions of new jobs. Two pillars are bearing this new strategy, namely digital transition and green transition. This new industrial policy framework conceives sustainability not as a burden or a regulatory cost to be incurred, but as an opportunity to acquire a 'competitive advantage' that may provide EU-based industries with a significant advantage over towards their global competitors. [6] Massive investments and sustainability-driven initiatives are needed in the private sector for sustainable products and services to be perceived by the consumers as the most affordable and beneficial ones. Due to their critical part in the digital and green transition, businesses are called upon to adopt sustainability goals throughout their strategy.

In addition to its economic perspective, we must also concede the fact that competition is an important part of the overall policy mix and the sustainability transition, not only because it leads to a more efficient allocation of resources and drives innovation, but also because of its *social dimension*. Sustainability transition contributes to economic democracy and equality and enables affordable prices, higher quality and wider choices for consumers. Furthermore, it limits entrenched economic power that is not maintained on its own merit.[7]

When looking at the initiatives that may harm competition, EU Competition Law requires a further assessment to be made within the framework of Article 101(3) TFEU. In this respect, four conditions must be satisfied for an initiative to fall outside of the prohibition under Article 101(1): An agreement must (i) contribute to improving the production or distribution of goods or to promoting technical or economic progress, (ii)

[5] Draft Staff Discussion Paper on Sustainability Issues and Competition Law, Hellenic Competition Commission,
[6] European Commission, Reflection Paper Towards a Sustainable Europe by 2030, 2019
[7] European Commission, Reflection Paper Towards a Sustainable Europe by 2030, 2019

consumers must be allowed a fair share of the resulting efficiency gains, (iii) it must not include any restrictions which are not indispensable to the attainment of the first two objectives, and (iv) it must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products (or services) in question.

Concerning the nature of environmental agreements, on the other hand, the Commission's 2011 Horizontal Cooperation Guidelines state that environmental agreements should be evaluated as a form of standardization agreement.[8] Although the majority of environmental agreements are formed as standardization agreements, this is not always the case hence, in our opinion, there is room for further clarification on this issue.

3. Different Approaches from Various NCAs

3.1- ACM- "Draft Guidelines on Sustainability Agreements"

The Netherlands Authority for Consumers and Markets has released "Draft Guidelines on Sustainability Agreements" where it indicates its mission to ensure that markets function in a way that benefits people and businesses, for the present generation and future generations. The ACM was the first European competition authority to publish guidelines on how to deal with sustainability initiatives as early as 2014. Since 9 July 2020, a revised version of these guidelines has been available for public consultation, which will be under our focus in this article.

Underlining the fact that sustainability and competition should always go hand in hand, the ACM takes a position consistent with the sustainable mindset and the objectives of the Green Deal. The Guidelines establish a special focus on the sustainability agreements between market players illustrating both the opportunities and limits under EU Competition Law.

In view of the fact that the sustainability aspects of products have started to have a greater impact on the consumers' choices, the ACM has seen the critical importance of the verifiability and reliability of the information provided by businesses to consumers (to prevent so-called "greenwashing" and achieve greater clarity). Thus, back on 22/09/2020, the ACM had released a set of rules of thumb for sustainability claims that businesses use when selling goods and services. [9] It is well known that many consumers are convinced that a considerable percentage of businesses claiming their products are sustainable are simply greenwashing. This, in real life, discourages consumers from choosing seemingly sustainable products. Evidently, this distrust breaks on the market penetration of sustainable products and breeds unfair competition. In this vein, the ACM also called on the Dutch legislator to adopt stricter rules for certification labels to ensure that the relevant certification provides perfectly reliable information on the product.

The UN describes "Sustainability Agreements" as, agreements between undertakings and decisions of associations of undertakings, that are aimed at the identification, prevention, restriction and mitigation of the negative impact of economic activities on people, animals, environment and nature. The ACM, on the other hand, introduces the concept of *environmental damage agreements* as a subcategory of sustainability agreements. Environmental damage is described as *"damage in the production and consumption of goods and services resulting from the overuse or misuse of scarce natural resources."* Undertakings may enter into *environmental damage agreements* and cooperate to reduce environmental

[8] EC Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements.
[9] ACM draws up rules of thumb for sustainability claims | ACM.nl

damage through their transactions. These agreements, in principle, serve the purpose of generating an efficiency gain that is to be reaped by the participating businesses, their stakeholders, and finally by the society as a whole.

When an *environmental damage agreement* is being assessed, the ACM suggests using a different interpretation than usual for the requirement that a fair share of the benefits of an agreement to be reaped by the consumers.

The ACM also argues that cartel prohibition under Art 101 (1) TFEU should not get in the way of sustainability agreements under certain circumstances. Guidelines provide some opportunities for sustainability agreements (may be either horizontal or vertical) that may otherwise fall under cartel prohibition:

- agreements, which, for example, concern less important competition parameters and the impact of which on competition is negligible, may fall outside the scope of the cartel prohibition.
- statutory exemption from the cartel prohibition as specified in Art. 101 (3) TFEU could be also applicable to sustainability agreements
- even if a sustainability agreement is not justified by the above circumstances, parties to sustainability agreements can still be provided with further possibilities to go ahead with the agreement..

Even though sustainability agreements, by their nature, seek to achieve legitimate objectives, this does not rule out the possibility of their falling under cartel prohibition thus, harming competition as a whole. Although the case-law of the CJEU sets some examples regarding agreements falling outside of the cartel prohibition in case the potential anticompetitive restrictions are necessary for the pursuit of a legitimate objective, the ACM finds such case law is insufficient to provide clarification and guidelines for the sustainability agreements in question.

It is particularly crucial to establish a well-structured method to weigh the positive aspects of sustainability agreements against the anticompetitive effects. It would be safe to assume that if a sustainability agreement is not anti-competitive provided that it does not appreciably affect competition based on key competition parameters such as price, quality, diversity and distribution method.

The ACM provides a safe harbour to the following sustainability agreements:

1. Agreements incentivizing undertakings to make a positive contribution to a sustainability objective without being binding on the individual undertakings.
2. Codes of conduct promoting environmentally conscious, climate-conscious or socially responsible practices
3. Agreements that are aimed at improving product quality while at the same time less sustainable products would no longer be sold. These agreements are only allowed if they do not affect the price or product diversity.
4. Agreements born due to the need for a joint venture for the achievement of an initiative creating new products or markets
5. Covenants aiming at bringing binding obligations for the undertakings including their supply chains to respect the national or international standards during their transactions taking place out of the territorial scope of these standards, especially in developing countries. (These standards are usually closely linked to labour laws or fundamental social rights.) If these so-called CSR covenants provide a clear understanding on these binding international standards, they will escape from the cartel prohibition.

The ACM, referring to the Dutch Competition Act and Art 101(3) TFEU, mentions agreements whose benefits offset their competition drawbacks. Where there is a potential restriction to competition caused by an undertaking, the burden of proof is on this undertaking to demonstrate the agreement meets the exemption criteria. In line with the wording of Art 101(3), the ACM suggests that an agreement must be assessed by using the below cumulative criteria:

1. Agreements must offer efficiency gains, including sustainability benefits,
2. Relevant consumers are provided with a fair share of these benefits
3. It is not possible to reap the benefits without restricting competition, and the restriction must be proportional,
4. Competition is not restricted to a substantial proportion of the relevant products

However, following the above criteria requires a thorough evaluation of each individual case to identify the objective benefits that the agreement at hand may bring. An example of objective benefits might be innovation that is stimulated by the agreement resulting in lower costs for the product in question. Having said that, when assessing the benefits, it must not be borne in mind that identification of qualitative benefits such as animal welfare may be more difficult to quantify.

The concept that a fair share of benefits is to be reaped by consumers, which is stressed in Art 101(3) TFEU, has been highly debated. When identifying the "fair share", the Commission is of the opinion that consumers must be compensated at least for the harm caused to them by the restriction of competition to them. The ACM, however, argues that consumers *do not need to be fully compensated* if two criteria are met (cumulatively):

a) if an environmental damage agreement is in question, and
b) if the agreement efficiently helps to comply with an international or national standard or policy objective.

The ACM attaches particular importance to the distinction between environmental-damage agreements which aim for more efficient use of natural resources, and other sustainability agreements, which concern social or other forms of sustainability (i.e human rights, animal welfare, labour conditions). In the case of the former, the benefits of others (society at large) should be taken into account instead of only current users. Whereas in the latter, the ACM suggests that users must be fully compensated for the harm caused by the restriction of competition. The ACM believes that there is no need to quantify the effects of an agreement, but it is possible to conclude that the agreement falls under Art 101(3) if, the undertakings involved in the agreement at hand have a combined market share of not more than 30% and the restriction on competition is appreciably smaller than the benefits of the agreement.

When needed, the quantitative assessment under Art 101(3) should be extremely accurate in calculating all the pros and cons of the agreement.

Benefits of *environmental-damage agreements* are expressed in monetary terms using so-called environmental prices. These environmental prices are values that express the price that society assigns to the harm of, among other things, pollutive emissions and greenhouse gas emissions. They are also called "shadow prices", not market prices. Social cost-benefit analyses might be used to ascertain the environmental prices. If an environmental price is set with an eye to the realization of a concrete policy objective, it is called an "environmental price based on prevention costs". If an environmental price is more directly based on the damage that a certain production or consumption causes to humans and the environment, it is then called an "environmental price based on damage costs."[10]

It is crucial to stress that environmental prices cannot be used through other sustainability agreements. Rather, various methods must be utilized to determine the monetary value of the improvements caused by a sustainability

[10] ACM, Draft Guidelines on Sustainability Agreements, 2020, Paragraph 58

agreement (i.e consumers' willingness to pay).

The ACM concludes its second draft guidelines by clarifying the practical steps to be followed by the undertakings entering into sustainability agreements. It states that the Competition Authority itself will not carry out an individual investigation but make its assessment relying on the public information available and the information disclosed by the undertakings in question. For sustainability agreements that are already executed in compliance with the guidelines and law but turned out to be incompatible with at least one of them over time, the ACM suggests a consultation between undertakings and the ACM with a view to establishing an amendment to the agreement following the intervention of the ACM. If, however, the ACM concludes that the agreement is incompatible with relevant law and guidelines, the undertakings have two options if they wish to still go ahead with their sustainability initiative. Either, they can submit their initiative to the legislator, aiming at their initiative is being converted into regulations; or, they may choose to contact the Minister of Economic Affairs and Climate Policy (EZK) on the initiative and request an order declaring a sustainability initiative statutorily binding on the entire sector.

So, it is clear that the competition rules must be reviewed with an eye on sustainability and the 2050 agenda. The Dutch Competition Authority has gone ahead in this direction and stretched the requirements of exemption under Art 101(3) TFEU.

3.2- Background paper German Federal Cartel Office (FCO)

In 2018, before the Green Deal was presented, the German Government expressed its commitment to the UN 2030 Agenda, endorsed 17 SDGs and asserted that German policies will be shaped in accordance with the 2030 Agenda for Sustainable Development. The German Government then called on businesses to take necessary steps for safeguarding human rights and social standards in value and supply chains.[11] The majority of large German investors now base their investment decisions not only on economic criteria but also on sustainability criteria.

In the background paper released by the German FCO on 1st October 2020, it is first stressed that sustainability is evolving into a competition parameter. In line with this view, businesses adjust their production and procurement processes in a way that is beneficial for public interest objectives. In the view of the German FCO, public interest objectives and competition policy protection must go hand in hand to their best advantage. Ideally, competition law enforcement should have a positive impact on other public interests. Thus, undertakings' cooperation with the aim of achieving public interest objectives must be examined through the lens of Competition Law. The German FCO delegates the task of mitigating climate crisis and other global problems to the democratically elected legislators. Only the lawmaker should strike a balance between public interests and competition prosperity. Having said that, it recognizes that the gravity and urgency of these problems compel the participation and commitment of other players, above all producers and consumers. Businesses are, in general, free to establish unilateral standards that go beyond statutory requirements. This freedom, however, should not be enjoyed to the disadvantage of consumers. Despite the growing tendency to rely on the sustainability standards set by the private sector, it must be stressed that more state-imposed rules would abolish the need to rely on these business initiatives and provide clarity.

Interventions in market processes must be made cautiously and prudently, with

[11] Cf. Federal Government, National Action Plan- Implementation of the UN Guiding Principles on Business and Human Rights, 2016-2020, p. 19 f.

utmost attention to external factors in order not to trigger market failure. They must be considered only as last resort for the common good. Sustainability objectives can be achieved jointly with competition goals, one reinforcing the other. While striking a balance between them, the separation of roles between businesses, legislator and competition authority must be preserved to avoid risking market failure. Thus, the German FCO argues that the lawmaker should only allow the enforcement of self-regulation by the private entities where it is the most suitable approach to realize the public interest objective at hand.

If the law is insufficient to define and enforce public interest objectives leaving businesses to perform this task, the question arises as to the extent to which public interest objectives can be taken into account within the scope of Art 101 TFEU. It is crucial to clarify which objectives can fall under the exemptions from the prohibition of anti-competitive agreements outlined in Art 101(3).

Agreements aiming at establishing technical standards or quality marks can justify an exemption under Art 101(3). Principles for the assessment of standardization agreements and quality mark associations were provided in the EC's Horizontal Guidelines which conclude that these types of agreements would generally not restrict competition providing they do not involve any obligation or rules binding other market players to comply with the standard in question. Having said that, it may be problematic when undertakings commit not to manufacture products not compliant with the standards. This may create disadvantages for consumers. However, each individual case requires a detailed assessment.

If we take a look at the case law on the above matter, in the ***Wouters*** judgement, the CJEU held that agreements between undertakings that restrict the freedom of action of the parties might not fall under the prohibition laid down in Article 101(1) TFEU. If the agreements restricting competition are necessary for the fulfilment of a legitimate task, cooperation based on self-regulation might escape from the prohibition. In the ***Albany*** case, the CJEU concluded that collective bargaining agreements inherently restrict competition. However, they may be excluded from the scope of the prohibition of anti-competitive agreements as long as they contribute to a legitimate improvement. In every assessment, the principle of proportionality must be maintained. The ruling was in favour of the agreement in the Albany case as it improved the remuneration of employees (improvement of a term of employment).

To exempt cooperation from the prohibition of anti-competitive agreements under Art 101(3) TFEU, two criteria must be thoroughly examined: the substantial efficiency gains arising from the agreement and the issue of fair share for consumers, for the agreement in question. For such purpose, it should be clarified what can be classified as efficiency gains to meet the first condition of Art 101(3) TFEU. In its 2004 Guidelines, the EC widens the scope of the examples of efficiency gains and includes the environment, culture, public health and social policy issues to the list. These Guidelines acknowledge that in addition to cost-savings, the qualitative efficiencies as in a new or improved product(s) would also increase or create value. This opens up opportunities to include public interest objectives. According to the EC, it is fundamental to assess the value of such efficiencies concerning public interests[12], but this is certainly not an easy task in practice.

Considering that many improvements can not be evaluated with reference to a market price, it becomes necessary to develop some theoretical formula for monetisation, one of which was

[12] Cf. European Commission, Guidelines on the application of Article 81(3) of the Treaty, OJ (EU) C101/97 of 27 April 2004

developed by Hicksian, the compensating variation. [13] The "compensating variation" looks at two ends of the spectrum: the minimum amount that would suffice for a person to willingly accept a negative change in his utility (willingness to accept / WTA); and the maximum amount a person is willing to pay for a positive change (willingness to pay / WTP). There are various direct and indirect evaluation methods deriving from *Hicksian's compensation variation*. We will not go into explaining these methods as this would require an individual, in-depth study. For the sake of this article, we may leave it by stating there are substantially practicable and normative problems linked to monetising or quantifying the efficiency gains regarding in relation to public interest objectives.

The 2004 Guidelines also call attention to the issue that consumers should receive a fair share of benefits occurring as a result of the restrictive agreement. They emphasize that the impact of the agreement must be at least neutral for current and potential consumers. The concept of "consumers" encompasses all direct and indirect users of the services or products covered by the agreement. Negative effects on consumers in one geographic market or product market cannot in principle be balanced against and compensated by positive effects for consumers in other unrelated markets. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the groups of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same. Also, benefits to future consumers must be taken into account keeping in mind that the value of a gain for consumers in the future is not the same as a present gain for consumers. To allow for an appropriate comparison of a present loss to consumers with a future gain to consumers, the value of future gains must be discounted. [14]

The German FCO is of the opinion that the wording of Article 101(3) TFEU is not crystal clear in terms of the concepts of "efficiency gain" and "fair share of benefits". Also, the EC's interpretation on the matter on Horizontal Guidelines can be seen as quite restrictive. Thus, NCAs could interpret the requirements under Art 101(3) in a more flexible manner.

3.3- The Competition and Markets Authority of the UK: CMA's Guidance on Environmental Sustainability Agreements and Competition Law

In accordance with the Trade and Cooperation Agreement signed between the UK and EU, the UK officially left European Union on 31 December 2021. The TCA lays down provisions requiring both parties to maintain the status quo of the existing EU and UK competition law rules to address anti-competitive agreements and abuses of a dominant position. It is crucial to stress that the rules governing the UK competition law are almost the same as those of EU. Moreover, according to Section 60 of the UK Competition Act (1998), competition authorities and national courts are required to interpret the UK competition rules in a manner consistent with the case-law of the CJEU. Nevertheless, the enforcement of competition law in the UK is expected to change drastically in the post-Brexit period.

EU Competition Law provisions will continue to apply to UK based business deals impactingon the EU market, however, domestic law will govern competition within the UK. The Commission will no longer be entitled to pursue on-site investigations or request the CMA to carry out investigations on

[13] Cf. Kloosterhuis und Mulder (2015), Competition Law Environmental Protection: The Dutch Agreement on Coal-fired Powerplants, Journal of Competition Law & Economics, 11 (4), pp. 855 – 880.
[14] Cf. European Commission, Guidelines on the application of Article 81(3) of the Treaty, OJ (EU) C101/97 of 27 April 2004, para. 80-88.

behalf of the EC. The power of the Commission will be limited to making requests for information. It is also a very likely that there will be an increase of parallel investigations by the UK and EU authorities.

The above two paragraphs could serve as a short prologue to give a better understanding of the application of EU Competition Law in the post-Brexit UK. The CMA published Guidance in January 2021 aiming to provide businesses and trade associations with further clarification on how competition law applies to sustainability agreements and shed some light on the potential controversial or problematic issues. The report seeks to ensure that the businesses are not deterred from adopting sustainability initiatives due to the fear of breaching competition law. After acknowledging that the SDGs encompass a wide range of environmental, social and economic aspects, the CMA focuses on the environmental aspect of sustainability agreements. This focus appreciably prioritizes the goal of transition to a low carbon economy to tackle climate change.

Like the ACM and the FCO, the CMA also takes a closer look at the sustainability agreements whose benefits outweigh the disadvantages for the consumers resulting from the restriction of competition. It suggests that two different evaluation method should be applied to exempt them from the competition rules. Firstly, there should be an evaluation of whether the agreement at hand falls into an exemption category under EU law (i.e Art. 101 TFEU) or under a provision of national legislation. The evaluation process must be carried out very carefully to identify any possible intention of the parties to create a business cartel.

The CMA specifies the criteria that standard-setting agreements must meet and the situations that must be prevented in order not to breach competition rules. According to their view, throughout a standard-setting process;

- consumers must be given information on each stage of the standardisation work,
- potential competitors must be given the possibility to actively participate in the process and join the agreement,
- the end product of the process must be fair, reasonable and not discriminatory,
- should the intellectual property rights (IPR) of participants be involved in the process, they must be disclosed in good faith and a manner complying with the applicable law on IPR,
- the members of the standard-setting organization must be free to develop alternative standards, including higher ones than the standard at hand,
- participating organizations should not share or disclose more information than required,
- participating organizations should not impose obligations on non-participating businesses, they should not use quality norms in a way that inhibits innovation or competitor entering into or staying in the market.

The information sheet then tackles the issue of the size of the market share of undertakings entering into a sustainability agreement. It endorses that if the total market shares of the participants do not exceed the relevant threshold and the agreement does not gravely restrict competition, it generally does not breach the competition law. This rule of thumb should not presuppose that the competition rules are automatically breached if the market shares are above a certain threshold.

Last but not least, the CMA Guidance looks at the criteria for an individual exemption from the anti-competitive agreements' prohibition. In the case of an agreement that seemingly restricts competition, the CMA allows parties to illustrate that the benefits of the agreement outweigh the disadvantages. To prove this, below criteria must be met:

- the agreement should generate efficiencies - for example, improve the quality of products,
- these efficiencies cannot be achieved by other economically practicable and less restrictive means,

- these efficiencies benefit consumers,
- the agreement will not lead to the elimination of competition in the market,

In the last part of the Guidance, the CMA provides a "framework for assessment" flowchart that includes questions that are aimed at giving undertakings an insight on whether the sustainability agreement at hand could constitute a breach of competition law. The full chart can be found on the dedicated website of gov.uk.[15]

Question 1: Is there an agreement or a trade association's decision? (either formal or informal, written or oral) If yes, go to question 2. If no, agreement is not prohibited.

Question 2: Is the agreement covered by a block exemption and meets all of the requirements under that exemption? If yes, agreement is not prohibited. If no, go to question 3.

Question 3: Is this a standard-setting agreement which meets all of the criteria for standardisation agreements? If yes, agreement is not prohibited. If no, go to question 4.

Question 4: Does the agreement contain a restriction of competition 'by object'? (e.g. price fixing, market sharing, output limitation etc.) If yes, go to question 6. If no, go to question 5.

Question 5: Could the agreement have a restrictive effect on competition? (e.g. may lead to increased prices, reduced variety of quality of products, reduced innovation etc. In the analysis, consider whether there a numerous and strong competitors, market characteristics such as low barriers to entry, buyers/suppliers with countervailing bargaining power etc.) If yes, go to question 6. If no, agreement is not prohibited.

Question 6: Does the agreement meet all four conditions for individual exemption? If yes, agreement is not prohibited. If no, agreement is prohibited.

3.4- The Italian Antitrust Authority for Competition and the Market (AGCM) - Proposals for Competition Reform

The Italian Antitrust Authority for Competition and the Market has sent a report to the President of the Council of Ministers entitled *"Proposals for competition reform, for the purposes of the Annual Law for the Market and Competition for the year 2021".* The AGCM formulates a series of proposals divided into eight chapters. The proposals focus on how the infrastructural developments could lead to the promotion of sustainability and a circular economy rather than on sustainability agreements *per se*. However, a close look at Chapter 5, entitled *"Competition at the service of environmental sustainability"* will be useful in the context of this article. Chapter 5 is made up of 4 sections:

A- Infrastructure for charging electric cars:

The AGCM stresses that the development of infrastructures for recharging electric vehicles is an essential step towards sustainable mobility. Infrastructure development must be carried out without harming the principles of competition. Maintaining the technological neutrality and interoperability of the charge points must be a priority so as to avoid any possible restriction on competition between operators. To prevent the creation of cartels in this emerging sector, public spaces for the installation of charge points must be allocated by public administrations in a transparent and non-discriminatory way.

[15]https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law

The Authority's proposals also focus on the tariff regulations for these charge points. It is suggested that a level of tariffs must be guaranteed, prices should be slightly lower than those applicable to more traditional energy supply sources.

B- Management of differentiated waste:

Management of urban waste in Italy is carried out by thousands of small private and public operators. The Consolidated Law on the Environment (Legislative Decree no. 152 of 3 April 2006) Art 238(10) envisages a tariff reduction for unsorted waste management only for agreements exceeding the duration of five years. The AGCM considers this rule as improperly extending the right of public management and has pronounced it necessary for this article to be amended so as to eliminate the minimum five-year duration rule and free competition between the various operators.

It must be ensured that public or private operator follows the principles of competition, and do not favour their subsidiaries and/or associates.

C- Incineration / waste-to-energy plants:

The AGCM first states that in 2019 landfilling still accounted for a significant share of total municipal waste in Italy, equal to 21%, well above the target of 10% by 2035 introduced by the Directive (EU) no. 850/2018. There is an imbalance in terms of distribution of the waste-to-energy capacity between the regions of Italy. This suggests a clear need for rapid infrastructural development in the geographical areas which are currently under-equipped so as to achieve homogeneity throughout the country. This objective can only be achieved by introducing appropriate measures for further bureaucratic streamlining of authorization processes, including the activation of substitutive powers where the competent authorities show reluctancy/inaction. Further legislation should be adopted enabling appropriate incentives and compensations for the populations and local authorities affected by the building of waste-to-energy plants.

D- System charges:

Ensuring that the sustainability of electricity generation is compatible with full development of the electricity market means eliminating the excessive burden of system charges. System charges are fixed costs present in the bill accounting for 20% of the total. These are costs related to the support of renewable energy and cogeneration, and other costs such as nuclear charges, subsidies for the railway system and energy-intensive industries, support for R&D activities. The gradual process of modifying the electricity tariff system in Italy has already been underway for some years, but there is still room for further improvement. The forms of taxation must facilitate the achievement of environmental objectives. Encouraging incentives for the use of renewable sources is likely to decrease the consumption of fossil fuels for heating and transport. Moreover, it may change consumer habits in the long term. It is therefore proposed to exclude system charges from the bill where electricity is generated from renewable sources.

4. Analysis of the Selected Reports of the Contributors

EC Executive Vice President Vestager has underlined: *"To succeed, everyone in Europe will have to play their part – every individual, every public authority. And that includes competition enforcers."* On 13 October 2020, the EC published a call for contributions on the issue of how competition rules and sustainability policies work together and how competition policy can ease the achievement of Green Deal's objectives.

We believe that the Commission successfully triggered an innovative and fruitful debate among contributors on the interplay between competition rules and their enforcement on one hand, and sustainability objectives on the other. It is a great pleasure to see that a fruitful European debate has successfully been carried out on how EU competition policy can best support the Green Deal objectives and EU's transition to a circular, green economy. Contributions have been received by 189 stakeholders. They have focused on all three aspects of competition law: State Aid, Antitrust, and Merger & Acquisition. For the sake of this article, we will again particularly focus on the “antitrust” aspect of the debate.

EU antitrust rules already contribute to the Green Deal objectives by punishing uncompetitive behaviour such as restrictions in the development or roll-out of clean technologies. Businesses can contribute to the Green Deal by joining efforts to go beyond binding standards. Standardisation agreements frequently produce significant positive effects, in particular, by enabling the development of new and improved products or markets, or improved conditions of supply.[16]In antitrust law, sustainability agreements are allowed so long as they do not distort competition. Under EU competition law, such agreements are evaluated within the framework of Article 101(3) TFEU. Although Article 101 TFEU has put in place the main rules, the contributions seem to agree on one point: there are misconceptions, uncertainties and loopholes in EU competition law. This, in turn, complicates and clouds the process for businesses that are willing to enter into sustainability-driven collaborations.

4.1- Giorgio Monti-Tilburg University (Academia)

In his contribution, Giorgio Monti underlined the fact that further clarification is needed to facilitate business collaborations aimed at facilitating sustainable development and this clarification should come in the form of guidelines or another form of a soft law document. Lack of such instrument(s) causes businesses to feel at risk when engaging in a sustainability agreement as they cannot see the potential pitfalls they may face. Although there should be no one-size-fit-for-all approach, a structure for the assessment of agreements must be defined along with the routes to be followed by undertakings to show the positive effects of the agreement. Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment could serve as an example.

Methods should be developed to identify the economic benefits and the share of benefits reaped by consumers, from a sustainability agreement. There are tools already in place in environmental economics that can be utilized for EU-wide policy making and ultimately can be integrated into the competition law. Monti suggests a useful list that can be blended in a soft law instrument to demonstrate the benefits of an agreement:

- calculated cost-savings due to the use of the product by consumers (i.e increased life cycle of the product),
- improvements in the quality measured by WTP indicators,
- use of less direct indicators of economic gain to reveal the preferences of consumers.

He focuses on the need to measure the benefits to society and the harm caused by the restriction on competition (the former should outweigh the latter according to Art 101 TFEU). It is important to stress that the consumers do not need to be guaranteed all such benefits to compensate the harm they suffer due to restriction on competition (i.e facing higher prices), but enough for a fair share. However, the concept of the “fair share” needs a value judgement, the methodology of which can only be clarified in the guidelines recommended as referred to above. A further option is to opt for informal advice and to publish a document to follow this up. The model he

[16] The European Commission, Competition Policy supporting the Green Deal-Call for contributions, Pg. 3

suggests is similar to the COVID-19 comfort letter. [17]

He reiterates that *"the overall gains to all stakeholders must be considered when evaluating an environmental damage agreement, not only the direct consumers"* as stated in the ACM's Draft Guidelines. However, he takes a stance in favour of widening this approach to cover other forms of sustainability agreements.

4.2- Enel Group- Industry

On the question of how the EU Antitrust Policy can better contribute to the achievement of the EU Green Deal's objectives, Enel Group is also of the opinion that there is room for guidelines and communication of priorities by the EC. Certain initiatives could be authorized by comfort letters instead of being subject to merger control. This could be done simply by widening the scope of comfort letters beyond Covid-19 to sustainability-driven collaborations and initiatives.

Enel Group also favours the approach followed by the ACM on some points. One example is that certain agreements restricting the competition should still be authorized if the following criteria are met: the benefits outweigh the disadvantages of the agreement, the undertakings have acted in good faith and followed the guidance but could not manage to meet all the conditions. In the latter case, undertakings must be enabled to amend the agreement to comply with the requirements.

The guidelines needed at EU level should focus on clarifying the following:

I. route to be followed to verify the benefits of the agreement at hand, with particular attention to the criterion of "fair share of benefits",
II. criteria to be met to favour cooperation over competition in the cases where the cooperation is aimed at mitigating environmental damages,
III. the level of sufficient competition to be maintained taking into consideration the grave and urgent nature of climate change.

Once the above criteria are established through guidelines, the same approach could be applied for agreements involving undertakings with a dominant position in the market (Art. 102 TFEU)

The above criteria should be applied more rigorously for agreements with potentially negative environmental impact. In such cases, undertakings should prove that their approach is the only way to meet the sustainability objectives of their cooperation, and the harms linked to their cooperation could not have been less.

Enel argues that RES PPAs could be managed more beneficially for both ends of the cooperation. As energy producers/suppliers and large industrial consumers, the parties to such agreements are not competitors and, hence, are subject to the Vertical Block Exemption Regulation (VBER). The VBER exempts these agreements from the prohibition of restricting competition provided the aggregated market shares of undertakings engaging in the agreement are below 30% of the market and the agreement duration does not exceed five years. To guarantee the full achievement of the Green Deal objectives, Enel Group is in favour of removing these limitations to expedite RES development. Their view is that long-term contracts, regardless of the undertakings' market shares, could provide greater certainty of the return on green investments. Furthermore, they could allow businesses supporting renewable energy to further commit to EU Green Deal objectives.

[17] Giorgio Monti, Tilburg University, Response to Competition Policy Supporting the Green Deal, Pg.5

4.3- International Bar Association (IBA)- Law Practitioners

We have chosen to include the contribution of IBA as it is EU's leading international organisation of legal practitioners, bar associations and law societies. In addition, it wields the power to influence the development of international law and policies.

The IBA Working Group opens its contributions regarding antitrust rules stressing the increasing tendency of industries to engage in sustainability agreements or initiatives. These initiatives are critical from the point of Competition Law as while they are likely to contribute to the Green Deal Objectives, they may restrict the competition. Thus, the EC needs to adopt an effective approach aimed at striking a balance between the achievement of sustainable goals on the one hand, and preservation of competition rules on the other.

In their report, it is acknowledged that the ambitious objectives of the Green Deal require a greater portion of participation of the market players. The phenomenon of "path dependency" makes industry-wide change possible only if the majority of the players agree on a different path. The path dependency problem also presents itself in consumers' choices and once again, industry-wide action is required to convince consumers of the necessity, urgency, and advantages of change.

The report suggests a list of types of agreements intended to favour the Green Deal objectives and further sustainability goals but which could have a negative effect on competition:

1. standardization agreements aspiring to enhance the environmental performance of products or production processes. The concerns arise from the fact that they could increase taxes on the use of materials harming the environment and could, thus, harm competition eliminating some market participants who are not complying with their standards.
2. agreements that restrict purchase from producers whose products or production processes are not environmentally friendly. This practice could turn into a "collective boycott" which is strictly prohibited under EU Competition Law.
3. agreements that intend to terminate the use and circulation of less green products. These agreements may result in price-fixing or output reducing cartels, which could in turn, severely harm competition.

In the same direction as the ACM, the IBA Working Group also recommends the Commission , when assessing the sustainability-driven initiatives, to consider the benefits not only for the current consumers but also the for the next generations, the intended environmental benefits of the initiative, and finally whether the necessary means for the achievement of the foreseen benefits are in place or could be put in place.

The Working Group considers the adoption of Block Exemption Regulation impractical for the time being. It could rather be more useful for the Commission to issue detailed guidelines to provide the undertakings willing to enter in sustainable initiatives with further clarification and give them a certain level of comfort. The guidelines could specify the characteristics of agreements that would fall outside the scope of Art. 101(1) or that would qualify for exemption under Art 101(3). Like the ACM, the Working Group is also in favour of fixing a "threshold" of the total market shares of participants. It is again suggested that below that threshold the sustainability agreements would not fall under the prohibition in Art. 101(1). Finally, the Commission is asked to define criteria to balance the short-term competition impact and long-term sustainability benefits of the agreement at hand.

The part devoted to "antitrust" issues concludes with suggestions to the Commission to take a more flexible, more far-sighted approach on the consumer welfare standard and consider long-term sustainability impacts of an initiative throughout the assessment process. While expanding its approach, the Commission should be highly attentive to the risks that may arise. It must ensure that no greenwashing is taking place, and that the green initiative at hand is not a cover for the establishment of a cartel or other prohibited actions such as price-fixing, market allocation etc.

5. Conclusion

The question of whether the current competition law is sufficient to facilitate sustainable cooperation must be tackled carefully. Ideally, competition rules should not get in the way since effective competition is indeed beneficial or rather essential for the green economy to thrive. Having said that, the contributions examined above demonstrate that the general opinion is that the competition rules are not clear enough. This implies a lack of clarity, not necessarily a problem of strictness. The affirmation that there is a lack or insufficiency of information on sustainability, suggests that creating clear and trustworthy information on the subject will have numerous benefits. Explicit information would liberate undertakings willing to partake in sustainable initiatives to grasp which actions would let them play safe. On the flipside, better communication of clear information would increase consumers' willingness to pay. As a result, companies will strive to innovate and compete for the sake of both their businesses and consumers.

Innovation is our strongest ally in the fight against climate change. It is evident that private firms are the main actors utilizing innovative technology, but the problem is that not all firms are spontaneously moving forward with green innovations. As explained earlier, this is mainly due to the *path dependence problem.* This is the point where state intervention and society intervention would come into play with an important role. They must cooperate to push firms to drive their businesses towards sustainability, to redirect their innovation and initiatives towards green transformation. An example from the case-law of European Court of Justice emerges in could be given from the *GlaxoSmithKline Services Unlimited v Commission* case. In its ruling, the court stressed that innovation is a benefit that counts as an efficiency gain, and here the future consumers will be the ones reaping the benefits more than the present ones. [18]

Looking at the state intervention aspect, taxation and carbon pricing are the most important tools. This, however, should not trivialize the impact of policymaking in other areas of the law, one of which is competition law. As to the role to be played by the society, on the other hand, consumers must be informed regarding their impact on firms' business strategies: when consumers demand greener products, then the competition pushes firms to renovate greener. Consumers should perceive the long term impacts of their demands for environmentally friendly products.

To facilitate the green transition, the competitiveness of EU producers within EU must be maintained without throwing them into a less competitive position in the global arena. It is a problem that within EU there are different rules and regulations, and there is a growing need for harmonization. Thus, EU needs to level the playing field and work in an integrated way. Only this will allow EU market to remain fiercely competitive market. Multiple governances in various states should work together, to prevent races on lowering of costs taking place in a way that is harmful for the competition. While reviewing EU Competition Rules and policy, managing the green transition in a manner that is virtuous for both producers and consumers must be kept sharply in focus.

Within the Green Deal and Digital Act, EU has all the instruments to do this. The question is how they are used which is

[18] *GlaxoSmithKline Services Unlimited v Commission*, C-501/06P, EU:C:2009: 610, 95.

the most difficult task. Implementation of the green transition calls for effective cooperation between industry sectors, national competition authorities and governments. To allow cooperation and initiatives to thrive, there is a clear need for increased legal certainty. This could be achieved with certain guidelines or comfort letters as suggested by a majority of contributors. We strongly believe that regulation (even in a form of a soft law document) should come from the Commission, so as to remove the risk of undermining the well-balanced system of Art 101. The Commission could adopt a broader view in terms of consumer welfare and efficiency gains under Article 101(3) TFEU. In particular, efficiencies outside of the market (providing environmental benefits or benefits to society at large) can be included in the evaluation process.

Although it has not been discussed thoroughly within this article, sustainability considerations may also arise in connection with the provisions on abuse of a dominant position in Art. 102 TFEU. It is not at the focal point of debates for the time being, but we believe there is room for some flexibility also in the application of Art. 102. The question here is, whether a conduct that may constitute an abuse of a dominant position could be justified under specific conditions (i.e a sustainability defence) and consequently be excluded from the scope of prohibition. If stretching Art. 102 would be beneficial for the achievement of Green Deal objectives and SDGs at large, what is the most efficient way to attain this flexibility?

Introducing an additional soft law instrument, or improving the already existing EC Communication could be worth considering. The existing Communication on the Commission's enforcement priorities in the application of Art. 102 TFEU dates back to 2009.[19] Especially Part D entitled "Objective necessity and efficiencies" is worth a brief comment. It suggests circumstances under which the otherwise illegal conduct of a dominant undertaking can be justified. Here, it is clear that the Commission follows an approach similar to that of Art 101/3. Paragraph 28 ff. provides conditions that should be fulfilled by the dominant undertaking to demonstrate that the conduct concerned is objectively justified. For each case, indispensability, proportionality and whether substantial efficiencies of the conduct outweigh its anticompetitive effects on consumers are examined by the Commission. The Communication indeed brings some flexibility in the application of Art 102. However, advances in international law and the sustainability movement since 2009 call for an amendment. To encourage undertakings to move on with their sustainable initiatives, further clarification is also needed here.

Another way to achieve more flexibility could be further development of Art 102 case law. To do so, sustainability and public interest concerns could be put forward by European Courts when looking at cases related to abuse of dominance.

Our main conclusion is that sustainability and competition rules must be directed in a virtuous circle of mutual benefit. The growing importance of sustainability has brought some types of cooperation into sharper focus. Now, the debate is on whether sustainable goals can best be driven by the fruitful cooperation between private entities and thus giving them greater responsibility, or rather by regulations.

[19] Communication from the European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02)

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