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„Environment Protection and Competition: Revision of the Guidelines on Horizontal Cooperation Agreements"

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LIST OF ABBREVIATIONS

2001 Horizontal Guidelines	Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001/C 3/02).
2004 Exemption Guidelines	Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08)
2010 Horizontal Guidelines	Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01).
Charter	Charter of Fundamental Rights of the European Union
Commission	European Commission/EU Commission
Court	European Court of Justice
EEC	European Economic Community
EU	European Union
Member States	Current EU member states: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TEC	Treaty Establishing the European Community
Treaties	TFEU, TEU

1. INTRODUCTION

To maintain the human population at its current living and consumer standards, it has been estimated that 1.6 Earths would be needed[1]. This situation unsustainable. Although studies have shown that over 70% of greenhouse gas emissions since 1988 have come from just 100 companies[2], much of the awareness-raising messages and the fight against climate change are concentrated on the actions of individuals and states. The call to action should be directed squarely at the business for more concrete and faster results. Given that the conduction of business has caused in the recent decades massive destruction of the environment and an exponential acceleration of climate change, business now must have a vital role in helping to create markets that are sustainable.

Why, then, in the face of this urgent need, do companies remain inactive? One of the reasons is that companies currently have little room for manoeuvre to take climate action, which can partially be attributed to competition law[3]. As the Brussels conference *Sustainability and Competition Policy: Bridging two Worlds to Enable a Fairer Economy* and the Paris We-are-Competition *Competition Law and Sustainability Conference 2019* have shown, EU competition is currently unable to address problems of sustainability[4] and is, on the contrary, an “obstacle to much-needed collaboration between companies that aim to promote such sustainable development”[5]. Commissioner Vestager has recently admitted that: “the rules on horizontal agreements between companies and the Horizontal Guidelines are useful tools for businesses. At the same time, the evaluation has identified several areas where the rules are not sufficiently adapted to the digitisation and the pursuit of sustainability goals”[6].

Collaboration between companies is essential firstly to achieve a wider and more effective reach of the actions taken[7] and secondly, to avoid what economists call “first mover disadvantage”, viz. be-

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[1] HM TREASURY, *Biodiversity* p. 1.

[2] RILEY, *100 companies.*

[3] TEORELL, *A Company’s Guide* p. 5.

[4] NOWAG, *Sustainability Gap* p. 3.

[5] HOLMES, *Climate change* p. 3.

[6] European Commission, *Press release*.

[7] TEORELL, *A Company’s Guide* p. 5.

ing at the forefront of change is costly[8]. Therefore, environmental agreements between companies can potentially be a valuable instrument to combat the current environmental crisis. Besides, by letting firms reach agreements between them, the goals can be achieved without the need for specific government legislation or explicit regulation in the field – which comes with inevitable burdensome bureaucracy and time-consuming processes slowing down the necessary engagements[9]. As such, firms would have the freedom to pursue, in the most efficient way, actions that secure beneficial environmental outcomes[10].

However, within the current legal framework, which is based on the 2010 Horizontal Guidelines and which emphasises a strictly economic approach to competition law, environmental objectives are hardly taken into account appropriately in the analysis of the advantages and disadvantages of an agreement under Article 101 TFEU[11]. Accordingly, they do not yet benefit from a more than necessary and relevant exemption. Companies that join forces and collaborate risk infringing Article 101 TFEU, if their actions are considered illegal horizontal agreements or "cartels"[12].

Thus, the context of this thesis is the current environmental crisis. It argues that to combat the crisis in which we find ourselves, environmental agreements are, can and must be an essential instrument. For this reason, it is necessary to find an approach to legally collaborate in a horizontal way. Ultimately, this thesis aims to outline the critical points that the new horizontal guidelines should have and to eliminate the uncertainty caused by the lack of clarity in these guidelines – which hinders the action of companies that wish to use the tool of horizontal agreements in their own business towards a positive environmental change. Furthermore, it considers that the current interpretation of Article 101 TFEU and its application by the Commission is too narrow and needs to be changed to allow for the creation of these desirable horizontal agreements.

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[8] BOULDING / CHRISTEN, *First Mover*.

[9] NOWAG, *Sustainability & Competition Law* p. 11.

[10] 2010 OECD Report p. 97.98.

[11] 2010 OECD Report p. 11.

[12] TEORELL, *A Company's Guide* p. 1.

2. COMPETITION LAW AND ENVIRONMENT

2.1. THE GOALS OF COMPETITION LAW

The EU is founded on the objectives of economic growth, of which competition law is an essential element. For this reason, economic growth and the internal market are fostered by a complex framework of competition law developed by the Member States, which is based *–inter alia-* on Articles 101 and 102 of the TFEU.

According to a part of the doctrine, competition law has only one objective: maximising economic efficiency. In this view, the consideration of socio-political criteria such as environmental policy is not envisaged[13]. A controversial statement was made in this regard by HOVENKAMP according to which no one "[W]ould any longer assert that consumer welfare should not be the central or even exclusive goal of antitrust, or that antitrust should be concerned about unemployment, inflation or other macroeconomic issues"[14].

The other part of the doctrine, which this thesis joins, holds that underlying competition policy is a multitude of values that cannot be reduced to a single economic objective. These values reflect the culture, institutions, desires, history, and self-perception of society. When applying competition law, these values should not and cannot be ignored[15].

It may be noted that over the years, EU environmental and competition policies - the latter being one of the EU's most important areas of economic competence - have drifted apart[16]. Competition law was modernised in 2004, and since then, a stricter economic view has been adopted by the Commission. In this modernisation, the Commission stated that the "… objective of Article [101][17] is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources"[18]. The trend is for this subject to be treated by competition spe-

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[13] TOWNLEY, *Article 81* p. 1; 2010 OECD Report, p. 11.

[14] EHLERMANN / LARAINE, *The Objectives* p. 13.

[15] TOWNLEY, *Article 81* p. 1.

[16] HOLMBERG, *Integrate or Isolate* p. 4; TEORELL, *A Company's Guide* p. 8.

[17] Ex-Article 81 TEC.

[18] Article 81(3) Guidelines, § 13; TOWNLEY, *Article 81* p. 2.

cialists increasingly technically, thus distinguishing it from Community law as a whole[19]. Hence, community competition policy, according to many and in agreement with the Commission, should follow a unitary objective of *consumer welfare*[20]. The Commission started therefore to use only the "consumer welfare" criterion, thus modifying its analytical framework[21]. This approach, focused on the requirements of objective economic benefits, does not allow for the consideration of other criteria and benefits, such as those related to public policy[22]. However, when examining the objectives of competition law in the light of the goals of the EU, the question must be asked whether competition policies should remain focused solely on the preservation of a free internal market, or whether it is now time to pursue other values as well, such as environmental policies[23]. There are several arguments to favour the latter.

Firstly, the EU and its members have set a range of objectives and principles that are the basis for all activities undertaken within its borders, and all strategies and regulations undertaken by its members and bodies. Inscribed in its main treaties are, among others, the promotion of peace, the well-being of its peoples, freedom, and improvement of the quality of the environment[24]. More specifically, according to Article 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**". The absence of an explicit hierarchy within the Article suggests that an internal hierarchy between EU objectives is not desired even though this may give rise to conflicts, e.g. between competition law, economic growth and environmental principles[25].

Secondly, Article 3 (5) TEU continues stating that the Union "shall contribute to […] the sustainable development of the earth". Multiple other provisions of the TFEU also go in this direction: "the Union shall ensure consistency between its policies and activities taking **all** of its objectives into account" (Article 7 TFEU); "environmental protection requirements must be integrated into the defi-

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[19] BAQUERO CRUZ, *Between competition* p. 1; TOWNLEY, *Article 81* p. 2.

[20] TOWNLEY, *Article 81* p. 2.

[21] MONTI, *EC Competition Law* p. 21; TEORELL, *A Company's Guide* p. 8.

[22] 2010 OECD Report p. 11.

[23] HOLMBERG, *Integrate or Isolate* p. 4; TEORELL, *A Company's Guide* p. 9.

[24] HOLMES, *Climate change* p. 3.

[25] TOWNLEY, *Article 81* p. 48; TEORELL, *A Company's Guide* p. 6.

nition and interpretation of the Union policies and activities, in particular with a view to promoting sustainable development" (Article 11 TFEU)[26]. The wording of Article 11, which contains the word "must", indicates that it is policy-linking in nature: it imposes a concrete obligation to integrate environmental considerations into all EU policies and actions[27]. This obligation does not only apply to the elaboration of broad policies, but also to the concretisation of these policies and their implementation through directives and regulations. This results from the explicit inclusion in this Article of the phrase "into the definition and implementation of other Community policies"[28]. Finally, the Charter also acknowledges its importance: "A high level of environmental protection and improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

Hence, being EU competition law embedded in the EU's constitutional framework, it must be subject to the requirement of these "constitutional" Articles, including Article 11 TFEU[29]. Environmental protection is no longer an objective that can be considered "second class"[30], as is made clear by the Treaty of Amsterdam[31]: it must be integrated into all actions undertaken by the EU and Community policies. According to the principle of integration, therefore, preference must be given to any interpretation that is in line with the objectives of environmental protection[32].

In addition to such legal standing that requires environmental and sustainability considerations to be taken into account when applying the treaties as a whole -including competition provisions-, there is a moral imperative to "take them into account to the fullest extent that is legally possible", to combat the existential threat against humanity caused by climate change. Nevertheless, it appears that the transition made on 1 November 1993 from a mere "Economic Community" (under the EEC) to the establishment of the EU with a much broader concept of "Union" failed to be accompanied by the competition establishment. The latter neglects to focus on the "constitutional" provisions of the

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[26] HOLMES, *Climate change* p. 10; NOWAG, *Sustainability Gap* p. 2; NOWAG, *Sustainability & Competition Law* p. 10.

[27] HOLMBERG, *Integrate or Isolate* p. 51; TEORELL, *A Company's Guide* p. 7.

[28] NOWAG, *The sky* p. 6.

[29] NOWAG, *Sustainability Gap* p. 3.

[30] WASMEIER, *The integration* p. 159.

[31] Officially the "Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts" from 1997.

[32] WASMEIER, *The integration* p. 176.

treaties and everything that this entails for a wide range of economic, social, political and sustainability goals[33].

In summary, it is true that most important objective of competition law is to achieve a free and dynamic internal market, free of distortions of competition[34]. It would also be naïve to declare that one of the main competition law's objectives is sustainability or environmental protection. In light of the discussion above, however, the environmental protection demanded -amongst others- by Article 11 TFEU must be integrated into competition law. The Treaty demand simply (but not optionally) the respect and consideration of sustainability or environmental protection and prohibits the (deliberate) exclusion of sustainability or environmental concerns "in order to, for example, maintain the 'purity of competition law'"[35].

"Competition policy has so long been a central Community policy that it is often forgotten that it is not an end in itself but rather one of the instruments towards the fundamental goals laid out in the Treaty – namely the establishment of a common market, the approximation of economic policy, the promotion of harmonious development and economic expansion, the increase of living standards and the bringing about of closer relationship between Member States. Competition, therefore, cannot be understood or applied without reference to this legal, economic, political and social context"[36].

2.2. THE RELATIONSHIP BETWEEN COMPETITION LAW AND ENVIRONMENT PROTECTION

Competition law and environmental protection must therefore go arm in arm. In some cases where there is no conflict between competition law and sustainability, pursuing the latter is outside the scope of the competition provisions. Nevertheless, there are cases where such conflict exists; hence, there is the need to do a balancing exercise, which takes place within the boundaries set by competition provisions[37]. Where the conflict exists, how exactly the relationship between competition law and environmental protection should happen is a much-debated question. One question is whether a

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[33] HOLMES, *Climate change* p. 10.

[34] European Parliament, *Competition policy*.

[35] NOWAG, *Sustainability Gap* p. 9.

[36] SAUTER, *Competition* p. 120; TOWNLEY, *Article 81* p. 2.

[37] NOWAG, *Sustainability Gap* p. 4.

narrow or broad view of competition law should be taken[38]. If the view is minimalist, competition law only tries to avoid conflicts with other EU objectives, including sustainability. On the other hand, if there is a more maximalist view, the interpretation of competition law maximises the other EU policies[39]. This thesis prefers the second approach. Currently, there is no lack of instruments to operate in this direction at the EU level[40]. On the contrary, there are all the "constitutional" provisions of the treaties and examples in the Commission decisions and the Court supporting it[41]. Moreover, a *supportive integration* approach, meaning that "the provisions are interpreted so that measures that support sustainability are allowed"[42], would mean that whenever the benefits outweigh the restrictions on competition, a sustainability measure can be justified[43].

The relationship between competition policy and sustainability, if well planned and applied, can be mutually beneficial. A competition policy that is well functioning can make businesses more responsive to consumers' demands for sustainable products and encourage green innovation, therefore, contributing to sustainability[44]. Nonetheless, there is no clear explanation of how non-economic or public policy objectives could be taken into account in both § 1 and § 3 of Article 101 TFEU, which non-economic goals could be considered relevant and why. On the contrary, the current practice has shown that taking into account these objectives is often denied or minimised[45].

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[38] NOWAG, *Sustainability & Competition Law* p. 10.

[39] HOLMES, *Climate change* p. 16.

[40] NOWAG, *Sustainability & Competition Law* p. 10.

[41] HOLMES, *Climate change* p. 17.

[42] NOWAG, *Sustainability Gap* p. 4.

[43] NOWAG, *Sustainability & Competition Law* p. 12.

[44] HOLMES, *Climate change* p. 18.

[45] TOWNLEY, *Article 81* p. 7.

3. The current legal framework: the 2010 Horizontal Guidelines

Article 101 (1) TFEU states the principle that any agreement that has anti-competitive effects is prohibited. When agreements between companies are created and relate to certain elements such as the price of products or the aim to share markets, the market suffers because they cause a harmful distortion of competition[46]. However, there are some agreements that can be exempted (Article 101 (3) TFEU) if predetermined conditions are concretely met[47], since cooperation can also "be a means to share risk, save costs, pool know-how and launch innovation faster". Innovation is indispensable in the battle against climate change and must therefore be promoted if long-term solutions are to be found. The EU, therefore, has become aware of the need to find a balance in the legislation of competition standards: "while recognising the economic benefits that can be generated by cooperation, [the EU] has to ensure that effective competition is maintained"[48].

Currently in force, the 2010 Horizontal Guidelines provide some explanations on the application of Article 101 (1) and (3) TFEU, but not enough. As this balance is delicate and sometimes difficult to achieve, the addressees of the rule of law need clarity. Companies need to understand their range of action and, thus, what limits they can act freely within. In this respect, it is worth noting that even though they are no longer in force, the 2001 Horizontal Guidelines are nevertheless an important tool for interpretation, particularly concerning environmental agreements, as an entire chapter was dedicated to them[49]. Said chapter was not maintained in the 2010 revision, so environmental agreements currently fall under different sectors of the guidelines, depending on the competition issues that the agreement may raise[50]. On a bright note, a "sustainability agreements" chapter has recently been reintroduced in the proposed draft of the new European guidelines[51], which explain different issues we will consider in the next chapters.

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[46] CMA, *Guidance.*

[47] Holmes, *Climate change* p. 16.

[48] 2001 Horizontal Guidelines §§ 3-4.

[49] *Idem*, § 179.

[50] 2010 Horizontal Guidelines § 17.

[51] Article 101 Guidelines Draft p. 131.

3.1. ENVIRONMENT AGREEMENTS

If different companies act in the same field, offer the same or similar products and services and are on the same horizontal level, these companies are competitors. If these competitors, active in the same relevant market, start communicating and agreeing at the same levels of the distribution chain, they enter “horizontal agreements”[52]. By creating such agreements, companies may take the liberty of behaving as a monopoly, which leads to several inefficiencies such as reduced product choice or output, higher consumer prices and generally lower efficiency. Competition law, specifically Article 101 TFEU, therefore, seeks to combat this situation by aiming to eliminate existing horizontal agreements that obstruct the free market and to prevent the creation of new ones[53].

Now, more specifically, regarding environmental protection, horizontal environmental agreements are defined by the Commission as “agreements by which the parties undertake to achieve pollution reduction, as defined in environmental law, or other environmental objectives [...], including those set out in Article 174 of the Treaty”[54]. For example, businesses may agree to use packaging material that meets certain standards, thus reducing waste and facilitating package recycling, or combine expertise to make their products more energy-efficient[55].

Reference is made to Article 174 TEC, where the importance for the EU of its environmental protection policy is emphasised and which has the following objectives: “preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems”. Horizontal environmental agreements are, therefore, “agreements entered into between actual or potential competitors by which parties undertake to achieve pollution abatement, as defined in environmental law, or other environmental objectives”[56].

To make markets and industries more sustainable and durable, companies are thus setting up complex systems with environmental protection obligations between themselves and their competitors

[52] 2010 Horizontal Guidelines § 1.

[53] TEORELL, *A Company's Guide* p. 14.

[54] 2001 Horizontal Guidelines § 179.

[55] CMA, *Guidance.*

[56] TEORELL, *A Company's Guide* p. 15.

in many Member States[57]. There are multiple examples of such behaviour, for example, electricity producers who, aiming to switch to more sustainable energy solutions, have decided to close down coal-fired power plants. Another example is the production of energy-inefficient washing machines, which has been stopped by mutual agreement between washing machine manufacturers; or the effort made by the meat industry to create more sustainable conditions for meat production[58].

However, the area of horizontal agreements as means to protect environmental interests has been the subject of much discussion over the years. These agreements often synchronise market practices, increase prices or reduce consumer choice, since they are, by definition, agreements that regulate production, markets, or prices. As such, they may decrease competition, even if the aim is to find environmentally friendly solutions, promote sustainability and combat climate change in a way consistent with the EU's environmental objectives. The inevitable consequence is that they will fall within the scope of Article 101 TFEU and, more generally, EU competition law, even if any distortion of competition is only a “collateral effect” of the pursuit of their main objectives[59].

3.2. Assessment under Article 101(1) TFEU

Article 101 TFEU deals with horizontal agreements that may affect competition under European law. To establish whether this is the case, this article is divided into two parts[60]. Firstly, Article 101(1) TFEU sets out the agreements deemed to be incompatible with the internal market, i.e. the assessment of any agreement which has an anti-competitive effect and is therefore prohibited according to Article 101(2) TFEU[61]. The second part, present in Article 101(3) TFEU, concerns the further examination of such an agreement, in the sense that, if despite the anti-competitive effects of the agreement, it also presents elements in favour of the internal market with positive effects, a balancing exercise is carried out to assess whether such an agreement may nonetheless stand[62]. Generally, the Horizontal Guidelines, guidelines which explain the application of Article 101 TFEU, are structured with the so-called “division of agreements”, which means that agreements are divided into groups according to their likelihood of complying with the competition rules, mainly with refer-

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[57] 2001 Horizontal Guidelines § 181.

[58] Chicken of Tomorrow; CECED; Energieakkoord.

[59] Teorell, *A Company's Guide* p. 15.

[60] 2010 Horizontal Guidelines § 20 ; Teorell, *A Company's Guide* p. 15.

[61] Vedder, Competition law p. 159.

[62] 2010 Horizontal Guidelines § 20; Teorell, *A Company's Guide* p. 16

ence to Article 101(1) TFEU. This division was also present for environmental agreements in the 2001 horizontal guidelines; however, it has not been maintained in the current one and neither in the new draft presented recently, which nonetheless, fortunately gives at least more in-depth explanations.

3.2.1. The rule of reason

It may be that although an agreement or conduct has a real effect on competition, the courts nevertheless find that the agreement is not subject to the prohibition of Article 101(1) TFEU. This is the result of the "rule of reason"[63], which considers the pro- and anti-competitive effects in the assessment and, when applied through a proportionality test, can allow environmental agreements to be exempted from the application of Article 101(1) TFEU[64] – without the need of an exemption under Article 101(3) TFEU. For it to be possible, it must be demonstrated that the negative effect on competition of the agreement is outweighed by the positive consequences of the public policy objectives[65]. To take environmental objectives into account when considering public policies, such a balancing act is therefore necessary and relevant[66].

In the 2002 *Wouters* case, when Dutch lawyers were prohibited from forming partnerships with other professions, the Court applied such rule of reason. It considered that in the *overall context*, the agreement that had been concluded was proportionate to the objective of promoting the quality of legal services although – it involved a barrier to production and technical development within the meaning of Article 101(1) TFEU. Thus, thanks to this rule of reason, the net effect of the agreement was established by the Court. The agreement did not constitute a restriction of competition and was beneficial to society. Hence, the examination of Article 101(3) TFEU was unnecessary, as the agreement was not found to be contrary to Article 101(1) TFEU[67].

While the rule of reason has been applied to horizontal agreements, its application to horizontal environmental agreements is unclear. So far, it does not appear that the courts have applied this rule of reason while assessing horizontal environmental agreements. Although it may be difficult to

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[63] Wouters; NOWAG, *Integration* p. 217; NOWAG, *Sustainability & Competition Law* p. 18; VEDDER, *Competition law* p. 147.

[64] NOWAG, *Sustainability & Competition Law* p. 18.

[65] TEORELL, *A Company's Guide* p. 19.

[66] Wouters; NOWAG, *Integration* p. 215; TEORELL, *A Company's Guide* p. 19.

[67] Wouters § 86 ff.

demonstrate support for the use of this rule of law in case law, it is an approach that is broad and could be applied to many other areas as well, including horizontal environmental agreements[68].

3.2.2. The consumer welfare

In applying the rule of reason, or balancing of interests under Article 101 TFEU, one of the central criteria is the "consumer welfare", which is, according to many statements and in the view of the Commission, the objective of modern EU competition policy and must therefore be protected[69]. According to Vice-President Almunia, "Competition policy is a tool at the service of consumers. Consumer welfare is at the heart of our policy, and its achievement drives our priorities and guides our decisions"[70]. According to the economic definition, consumer welfare is "the difference between what consumers would have been willing to pay for a good and what they actually had to pay"[71]. In this context, the term is therefore used as a synonym for what is the "consumer surplus", meaning the "surplus" that consumers get from buying a good[72]. Consequently, if the price increases, according to this definition, consumer welfare is reduced[73].

From this point of view, the solutions proposed by the agreements and focused on the environment are often opposed to the benefits for consumers, so the borderline between environmental protection and harm to consumers is extremely thin. Often a decrease in product variety or a price increase results from putting a product on the market that is more environment-friendly[74]. Determining what is beneficial for consumers and environmental objectives is not easy and results in differing opinions on what is "best" for the consumer and society as a whole[75].

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[68] NOWAG, *Integration* p. 221; VEDDER, *Competition law* p. 149.

[69] SVEND, *Consumer Welfare* p. 68.

[70] ALMUNIA Joaquín, Competition and consumers: the future of EU competition policy, speech at European Competition Day, Madrid, 12 May 2010.

[71] SVEND, *Consumer Welfare* p. 70.

[72] NOWAG, *Sustainability & Competition Law* p. 13.

[73] KLOOSTERHUIS / MULDER, *Dutch agreement* p. 7; 2010 OECD Report p. 11.

[74] 2010 OECD Report p. 11.

[75] SCHINKEL / SPIEGEL, *Collusion* p. 2.

3.3. Assessment under Article 101(3) TFEU

3.3.1. Introduction

If, despite the agreement being considered contrary to Article 101(1) TFEU, it also has elements in favour of the internal market with positive effects, a further balancing exercise is carried out to assess whether such an agreement can nevertheless subsist with the exemption from the prohibition of Article 101(3) TFEU[76]. Four cumulative conditions must be met for this to happen. It must be an agreement:

> "1) which contributes to improving the production or distribution of goods or to promoting technical or economic progress
> 2) while allowing consumers a fair share of the resulting benefit,
> 3) and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
> 4) and does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

These criteria are exhaustive. Therefore, the inclusion of objectives pursued by the EU and provided for in other provisions of the Treaty is only possible to the extent that they can be subsumed under one of the four conditions of this article. For environmental protection to be exempted from the prohibition, it must therefore fall within the scope of these provisions[77].

3.3.2. The objective economic benefits

According to the Commission, the criterion that can currently be considered in the assessment under Article 101(3) TFEU is that of "objective economic benefits"[78], which must therefore be economically measurable. In other words, if companies intend to stipulate an agreement which restrains competition but want to benefit from the Article 101(3) TFEU exemption, they will have to justify why and how non-cost-based efficiencies constitute an objective economic benefit[79]. The practice shows that – currently – for environmental benefits to be taken into account in the assessment of

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[76] Kloosterhuis / Mulder, *Dutch agreement* p. 1; Teorell, *A Company's Guide* p. 15.

[77] Article 81(3) Guidelines § 42.

[78] 2010 OECD Report p. 11.

[79] Article 81(3) Guidelines § 57; Teorell, *A Company's Guide* p. 21; Nowag, *Sustainability & Competition Law* p. 11.

Article 101(3) TFEU they must first be converted or calculated in economic terms[80]. The Commission explained that "the more objectively the economic efficiency of an environmental agreement is demonstrated, the more clearly each provision might be deemed indispensable to the attainment of the environmental goal within its economic context"[81]. It follows from this approach that when assessing anti-competitive agreements, most decision-makers are not able to consider non-economic concerns[82]. An environmental benefit can therefore only fulfil the first criterion if it can be transformed or converted into an objective economic benefit[83].

The objective economic advantage approach was applied in the *Chicken of Tomorrow* case[84]. The case involved an industry-wide sustainability agreement between producers and retailers. It aimed to replace the regularly produced chicken meat, part of the standard product range in supermarkets, with a more sustainable meat option. The competition authority proceeded in two steps to assess whether there was a "net benefit" to consumers. First, it conducted a market survey, inquiring about the consumer's "willingness to pay" to improve the animal welfare of chickens. The study revealed that consumers would have paid up to 0.68 euros extra per kilo of chicken. This figure was then added to the positive calculated environmental effects (previously converted into an objective economic benefit), and the total was 0.82 euros. Secondly, this was compared to the actual increase that the agreement would have caused on a kilo of chicken, i.e. 1.45 euros. The conclusion of the competition authority was that the benefits of the agreement (the 0.82 euros) did not compensate for the costs (1.45 euros). As a result, this agreement was not exempted under Article 101(3) TFEU and was found to constitute a restriction of competition within the meaning of Article 101(1) TFEU, as it did not result in "net benefits" for consumers[85].

In another case, called *Energieakkord*[86], an agreement was reached between 40 stakeholders (mostly competitors) to reduce carbon dioxide emissions and thus promote sustainable energy. The measures included the coordinated closure of eight coal-fired power plants and the reduction of

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[80] CECED; Chicken of Tomorrow; Article 81(3) Guidelines §§ 5, 24, 46; TEORELL, *A Company's Guide* p. 21.

[81] DAF/COMP(2006)30 p. 181.

[82] KINGSTON, *Greening EU* p. 30; 2010 OECD Report p. 11.

[83] NOWAG, *Sustainability & Competition Law* p. 11.

[84] *Idem* p. 12.

[85] Chicken of Tomorrow p. 6.

[86] Energieakkoord.

production capacity[87]. The objective of this agreement was to address environmental aspects; however, it was found that its coordinated restrictive behaviour caused competition problems, as it would have increased consumer prices and reduced electricity production[88]. The assessment was also made in economic terms. Thus, the competition authority used standard practice to determine the cost of polluting emissions by setting shadow prices[89]. In the second part of the analysis, the comparison was made with the price increase caused by the agreement. In this case, this increase amounted to "an average annual increase in the costs of total electricity consumption in the Netherlands for the period of 2016 – 2021 of EUR 75 million"[90]. The environmental benefits were defeated because of this comparison as the national competition authority found this agreement to be contrary to Article 101 § 1 TFEU. The exemption of Article 101 § 3 TFEU did not find a place because the positive economic effects were insufficient to compensate for the negative impact on competition[91].

The two cases just presented are national cases, but are nonetheless a good demonstration of how environmental and sustainability benefits are currently being evaluated with an essentially economic approach[92].

In the *CECED* case, an agreement made between importers and washing machines producers received an exemption from the Commission. The participants accounted for some 95% of European sales, and such an agreement led to a price increase of up to 19%, as well as the removal of one element of competition. Nevertheless, the Commission accepted it since it pursued joint energy-efficient targets, discontinuing the least energy-efficient machines and developing more environmentally friendly ones. The collective benefits for society outweighed the costs of the anti-competitive effects[93]. Also in this case, the Commission converted the efficiency gains into objective economic benefits, showing that the environmental benefits from reduced energy use alone were insufficient to meet the criteria for exemption and to allow the agreement to pass scrutiny[94]. In

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[87] KLOOSTERHUIS / MULDER, *Dutch agreement* p. 1; Energieakkoord p. 7; TEORELL, *A Company's Guide* p. 22.

[88] TEORELL, *A Company's Guide* p. 22.

[89] Energieakkoord p. 4.

[90] Energieakkoord p. 6.

[91] Energieakkoord p. 7.

[92] TEORELL, *A Company's Guide* p. 23.

[93] HOLMES, *Climate change* p. 23.

[94] CECED §§ 47-57.

this case, however, a wide variety of benefits were considered in the Commission's assessment under Article 101(3) TFEU, such as hypothetical emission reductions, future price reductions and possible research and innovation developments[95]. Furthermore, it considered that in the future, energy-efficient washing machines could be sold at a lower price[96]. This case shows that although – currently – the assessment is based only on environmental benefits converted into objective economic benefits, it can also encompass the inclusion of both immediate and prospective values. Some authors argue, however, that after this case, the Commission has been more reluctant to consider and weigh general public interest considerations in decisions on horizontal agreements[97].

3.3.3. The public policy objectives

In the past, case law has supported balancing public policy objectives. This has been the case, especially in the context of analysing the principle of proportionality under Article 101(3) TFEU[98]. The Court thus declared in the *Métropole Télévision* case that "[i]n the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article [101(3)] of the Treaty"[99]. Here the Court did not consider that public policy objectives should be assessed in economic terms to be taken into account under Article 101 § 3 TFEU[100]. In this way, a precedent was set for using public interest considerations to obtain an exemption. Unfortunately, since the guidelines were modernised in 2004[101], non-economic environmental benefits have never outweighed economic efficiency[102].

This approach is no longer sustainable today. Environmental protection must be seen as an element of the common market and considered even when it interferes with the achievement of economic objectives[103]. While this is not an easy task, it does not mean that a new way of balancing interests should not be pursued. Union law should "be interpreted in a way that renders it consistent with en-

[95] CECED §§ 48-56.

[96] CECED §§ 52-53.

[97] SCHINKEL / SPIEGEL, *Collusion* p. 2.

[98] TOWNLEY, *Article 81* p. 65.

[99] Métropole Télévision § 118.

[100] HOLMBERG, *Integrate or Isolate* p. 50; TEORELL, *A Company's Guide* p. 24.

[101] European Commission, *Modernisation*.

[102] HOLMBERG, *Integrate or Isolate* p. 49.

[103] WASMEIER, *The integration* p. 1.

vironmental protection requirements, respectively with the objective of protection of the environment"[104].

3.3.4. The four conditions of the exemption

a. The first condition

To be exempted by Article 101 (3) TFEU, the agreement has to improve "*the production or distribution of goods or to promot[e] technical or economic progress"*. In the context of the efficiency defence analysis, the benefits must be defined in terms of technical or economic progress, production or distribution[105]. The agreement will thus have to contain efficiencies that can be of two categories: cost efficiencies and qualitative efficiencies[106]. The latter include better product quality, greater product variety and better product distribution[107]. Therefore, the interpretation of this condition is fundamental in determining how environmental factors should be considered: do environmental benefits constitute a "promotion of technical or economic progress" or an "improvement in the production or distribution of products"?[108].

Another critical question is whether the notion of efficiency gains can also include public interests[109]. The answer to this question can take several forms. A narrow approach, based on a literary interpretation of the paragraph[110], would imply that an agreement must cause benefits that improve distribution or production, or benefits that can be converted into economic or technical progress[111]. Hence, if environmental integration cannot be defined as either of these forms, the first criterion for exemption under Article 101(3) TFEU will not be met. Thus, the analysis will close at this point, without even considering the other three cumulative conditions for exemption.

However, this approach does not necessarily have to be followed and applied on different grounds. Firstly, although the case law is limited, some examples, such as the *Metropole* case, demonstrate

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[104] WASMEIER, *The integration* p. 164.

[105] 2010 OECD Report p. 11.

[106] NOWAG, *Sustainability & Competition Law* p. 18.

[107] Article 81(3) Guidelines, § 59; KLOOSTERHUIS / MULDER, *Dutch agreement* p. 4.

[108] HOLMBERG, *Integrate or Isolate* p. 44.

[109] KLOOSTERHUIS / MULDER, *Dutch agreement* p. 4.

[110] NOWAG, *Integration* p. 232.

[111] Article 81(3) Guidelines § 59.

that public interest can also be seen as an efficiency gain. In this case, the public interest was to enable everyone to have equal access to a wide range of television programmes, and the General Court held that public interest considerations could indeed be taken into account by the Commission when granting an exemption under Article 101(3) TFEU.

Secondly, the improvement of the environment was considered by the Commission in its XXVth report as being a factor for improving production or distribution or promoting economic or technical progress[112]. The 2001 Horizontal Guidelines supported this view[113].

Thirdly, in the *CECED* case, the Commission considered environmental improvements technical progress[114]. There was an improvement in production, which in turn contributed to economic or technical progress[115]. While considering that the agreement would be prohibited under Article 101(1) TFEU, as it reduced consumer choice and caused prices to rise, in assessing the agreement, the Commission stated that "washing machines which consume less energy are objectively more technically efficient"[116]. A close link between technical development and energy efficiency was thus been established. In conclusion, therefore, this agreement has been exempted under Article 101 § 3 TFEU.

The fourth and last argument is that environmental aspects can, according to the 2010 Horizontal Guidelines, lead to an improvement in product quality[117]. Thus, if production emissions are halved, even though all other elements remain the same, this improves environmental quality. Although there are arguments that support the idea that the quality of a product is improved by an enhancement in its environmental performance, the criterion being subjective, the "quality" of a product depends on the extent to which it meets the needs of the consumer[118]. Therefore, environmental performance will be considered an improvement in product quality for some, while for others, it will not. If environmental quality is an improvement of the product, the analysis of the agreement can continue with the other conditions. However, it is unclear whether non-economic benefits, such as

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112 XXVth Report § 85; TEORELL, *A Company's Guide* p. 26.

113 2001 Horizontal Guidelines § 193.

114 VEDDER, Competition law p. 210.

115 Exxon/Shell §67–68; NOWAG, *Integration* p. 226 ff.

116 CECED § 48

117 2010 Horizontal Guidelines § 308.

118 NOWAG, *Integration* p. 233.

the protection of natural resources or the preservation of endangered species and biodiversity, can be included in the assessment. For this to happen, they would have to be translated into objective economic benefits[119].

b. The second condition

The second condition requires that the agreement allows "consumers a fair share of the resulting benefit". The determination of what constitutes a "fair share" is done case-by-case. Indeed, according to the ACM, "what is fair is by nature context-specific and cannot be defined by a hard and fast rule applicable in all circumstances". Although it is not required a full compensation by the text of the law[120] – currently – the Commission requires the benefits of the agreement to be at least proportional to the cost to consumers[121]. Moreover, the guidelines require that the individuals who have been adversely affected by the restrictive measures of the agreement and those who benefit from its advantages have to be identical[122]. The consequence of current practice is that even when it is accepted that an agreement leads to benefits, as often the efficiencies occur in a different market than the one affected by the disadvantages of the agreement, it is not certain that the consumers affected by the disadvantages are the same consumers who profit from the benefits[123].

This requirement for the two groups of consumers to be the same is a consequence of a narrow approach to benefits. However, taking a slightly broader approach, the question also arises whether other groups of people affected by the benefits, which do not necessarily correspond to the consumers of the product, may come into play. For example, society could come into play or different consumer groups. The answer, according to the guidelines, is negative: positive effects in one market cannot normally outweigh negative effects in another unrelated product or geographic market[124]. The only way to consider benefits that occur in a market different from the one affected is to have for both markets a group of impacted consumers that is "substantially the same"[125].

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119 VEDDER, Competition law p. 46; TEORELL, *A Company's Guide* p. 27; NOWAG, *Sustainability & Competition Law* p. 18.

120 ACM, *Legal memo*.

121 2010 Horizontal Guidelines § 49.

122 SVEND, *Consumer Welfare* p. 80.

123 KLOOSTERHUIS / MULDER, *Dutch agreement* p 6; ACM, *Legal memo* p. 1.

124 Article 81(3) Guidelines § 43.

125 Article 81(3) Guidelines § 43; TEORELL, *A Company's Guide* p. 28.

There are different ways of interpreting the exact definition of "substantially the same". In several cases, where the consumers who had benefited from an agreement were not substantially the same as those affected, the agreement still passed the assessment of Article 101(3) TFEU[126]. These include joint ventures, R&D agreements or purchasing agreements. These agreements aim to develop new products and are more likely to affect future consumers or create new markets rather than those affected by the restriction[127]. According to the surprising statement of the Commission in its guidelines, a time lag in the pass-through of effectiveness does not necessarily exclude the application of Article 101 (3) TFEU. It is true that if the time lag is considerable, the demonstration of a high level of efficiency must be equally important[128].

The Commission in the *CECED* case distinguished individual benefits for consumers from collective benefits for the environment[129]. The washing machines still sold were more energy-efficient as they reduced the costs of detergent, water and electricity for the consumers[130]. Regarding the reduction of sulphur dioxide, nitrogen dioxide and carbon dioxide emissions, i.e. the collective environmental benefits, the Commission found that the economic value was seven times higher than the increased purchase costs of more energy-efficient washing machines. The conclusion was as follows: "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"[131]. Based on this reasoning, a broader interpretation of the group of consumers (in this case, society) seems to have been adopted by the Commission. In this case, the collective benefits have been demonstrated economically and considered sufficiently important. In conclusion, a holistic interpretation of Article 11 TFEU is thus necessary when discussing the group of consumers affected[132].

c. The third condition

If the first two conditions are met, the question shifts to whether the agreement does not "impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives". This is an indispensability test: if another measure that is less restrictive or less burden-

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[126] NOWAG, *Integration* p 234; *GlaxoSmithKline* § 248.

[127] NOWAG, *Integration* p. 234; NOWAG, *Sustainability & Competition Law* p. 19.

[128] Article 81 (3) Guidelines § 87.

[129] CECED §§ 52-57.

[130] *Idem* §§ 22, 52.

[131] *Idem* § 56.

[132] VEDDER, *Competition law* p. 173.

some can be used to achieve the same result, then that agreement will not pass the test. The objective is to determine that the solution chosen to achieve the benefits is the least restrictive and that equivalent benefits cannot be achieved by a more permissive measure. According to KINGSTON, many agreements have not been exempted from the ban because the proposed solution included disproportionate restrictive measures[133].

In the conditions analysis, the first and the third seem to be closely correlated. Indeed, before measures considered to have an anti-competitive effect are compared with other (less) restrictive measures, they must be assessed against the beneficial effects of the first criterion. Therefore, if the restrictive element changes, it will affect the assessment of both criteria[134]. For example, it was suggested in the *Energieakkord* case by the competition authority that if less restrictive measures could be put in place, this could lead to a reduction of negative price effects and the outcome of the examination under Article 101(3) TFEU could thus be different[135]. TOWNLEY considers that the notion of "less restrictive measures" should be interpreted narrowly – thus including even direct regulation in the analysis of all possible measures to achieve the objective[136].

d. The fourth condition

Finally, according to the fourth and last condition, the agreement must not "afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question". Thereby, there is a guarantee that the agreement will not eliminate competition and that competition will remain to a certain extent in the relevant market. It is a reminder that environmental protection should not be an excuse to form cartels or illegal agreements[137]. This is because "ultimately, the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements"[138]. KINGSTON has pointed out that it would be difficult to conceive of a situation in which it would be essential to achieve environmental objectives by eliminating competition[139].

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[133] KINGSTON, *Greening EU* p. 282.

[134] Energieakkoord p. 6.

[135] Energieakkoord p. 6.

[136] TOWNLEY, *Article 81* p. 312; TEORELL, *A Company's Guide* p. 29.

[137] NOWAG, *Sustainability & Competition Law* p. 5.

[138] Article 81(3) Guidelines, § 105; TEORELL, *A Company's Guide* p. 29.

[139] KINGSTON, *Greening EU* p. 288; HOLMBERG, *Integrate or Isolate* p. 49.

3.4. CONCLUSIONS

For horizontal environmental agreements analysed under Article 101 TFEU; there are two routes to follow to ensure that an agreement is not prohibited. Firstly, when different undertakings decide to form an agreement, they may, if possible, favour a form that does not constitute a restriction of competition or can be allowed by the application of the "rule of reason". This requires, *inter alia*, that the agreement either leads to the creation of new markets, has no effect on product or production diversity, or does not provide for individual obligations for the parties but only for vague commitments[140]. The second possibility is the exemption route which should result in the analysis of the efficiencies at stake, the public policy objectives outweighing the possible market restrictions and negative market effect, allowing consumers their "fair share" of the benefits, in a proportionate way and not eliminating the competition completely.

What causes the most uncertainty and is the most difficult part of the examination is determining what an "advantage" is and what weight to give to it, also considering the impact on consumers. Case law already provides examples in this sense, such as in the *CECED* case, where environmental considerations were considered in the conditions for exemption. However, at present, to benefit from the exemption under Article 101(3) TFEU, these objectives must still be translated into economic benefits[141]. For this analysis, it will be necessary to look at the notion of "technical and economic progress" in the first condition and "consumers" in the second. The benefits will have to accrue to the same group of consumers who suffer the negative consequences of an agreement if this notion is interpreted narrowly. With a slightly broader approach, it may be that the benefit of the agreement only affects another group of consumers or even society as a whole, the "net" positive effect being sufficient to allow the exemption. The Commission should consider both individual and collective benefits, following the approach of the *CECED* case. So far, however, the only accepted approach is based on economic terms for balancing and evaluating benefits. This means that environmental benefits - be it improved quality of life for animals, reduced gas emissions, etc. - must be converted into economic terms and then weighed against the restriction's costs.

In competition law, it is not always clear how those non-economic factors of environmental protection will be assessed. There appears to be a current exclusion of environmental considerations from

[140] TEORELL, *A Company's Guide* p. 30.

[141] NOWAG, *Sustainability & Competition Law* p. 18.

the analysis of benefits in Article 101 TFEU, contrary to what is required by Article 11 TFEU. Thus, it is inevitable that from a business perspective, it is difficult to foresee and constitute a horizontal environmental agreement that is legal and compliant with Article 101 TFEU[142]. Therefore, we welcome the new draft of the Guidelines which does consider non-economic factors and explain how the authorities will do their weighting.

[142] TEORELL, *A Company's Guide* p. 30.

4. A NEW HORIZONTAL CO-OPERATION AGREEMENTS GUIDELINE

"The narrow interpretation of Article 101 of the TFEU by the Commission's horizontal guidelines has increasingly been considered an obstacle to the collaboration of smaller market players for the adoption of higher environmental and social standards"[143].

The current interpretation and application of Article 101 TFEU by the Commission, supported by the 2010 Horizontal Guidelines is unsustainable from the point of view of the urgency of environmental action. This chapter focuses on some aspects of the 2010 Horizontal Guidelines that we consider unsatisfactory and need to change. Thankfully, the new draft presented recently on the Horizontal Guidelines does address most of the issues raised.

4.1. ASSESSMENT UNDER ARTICLE 101 (1) TFEU

The 2010 Horizontal Guidelines do not give enough guidance; such lack of clarity, together with an unnecessary restrictive view, are the main reason in favour of a new revision. For the EU to be the world leader in fighting climate change, the updated version of the guidelines must contain again a chapter on sustainability agreements that encourage their development, setting out a clear roadmap[144]. While the legal basis to allow environment agreements is present, no guide is given to companies on how such assessment would be made, what the criteria are, and the weight given to each element.

4.1.1. The division of the agreements

The 2001 Horizontal Guidelines had divided environmental agreements into agreements that were "not likely", "may" or "almost always" restrict competition[145]. This division has not been maintained in the new guidelines, and the Commission has considered that each agreement would fall into one of the groups of the Guidelines depending on the issues raised. However, a lack of examples and definitions of where competition law draws the line creates a lack of clarity and uncertainty about what is allowed or what would contravene EU law. According to this thesis, this division should therefore be explicitly inserted again in the new guidelines, as it would provide a good first point of reference to determine the compliance of possible horizontal agreements for companies

[143] Annual report 2018 n. 48.

[144] HOLMES, *Climate change* p. 19. Annual report 2018 n. 48.

[145] 2001 Horizontal Guidelines §184

wishing to collaborate to protect the environment[146]. The Netherlands Authority for Consumers and Markets (ACM) has also underlined the usefulness of such demarcation of agreements in its recent Draft guidelines "Sustainability Agreements". The ACM remarked how fundamental it is to exemplify agreements that are permitted or not permitted to give better guidance to companies[147]. Moreover, the British Competition & Markets Authority (CMA) also published new guidance on sustainability agreements and competition law[148], which proves once more that addressees of the rule of law need more instruction to act. In this chapter by taking the example of the 2001 guidelines, the Netherlands Draft guidelines "Sustainability Agreements" and the British Guidance on Environmental sustainability agreements and competition law, it will be illustrated how the new guidelines should give a guide on the assessment of horizontal environmental agreements.

a. Agreements that do not fall under Article 101(1) TFEU

The first explanation that could be added to the new Guidelines are the agreements that are not considered anti-competitive and do not harm the market. Agreements, that allow businesses to act without any fear of sanctions. In this sense, by applying the rule of reason, it is unlikely that an agreement causes a restriction to competition in different scenarios, some of which were already explicitly mentioned in the 2001 Horizontal Guidelines.

- First, "if no precise individual obligation is placed upon the parties or if they are loosely committed to contributing to the attainment of a sector-wide environmental target".
- Second, "agreements setting the environmental performance of products or processes that do not appreciably affect product and production diversity in the relevant market or whose importance is marginal for influencing purchase decisions"
- Finally, if the agreement "gives rise to genuine market creation"[149].

In addition to these agreements, others might fall into this category of non-restrictive ones. Example can be taken of the Netherlands Authority for Consumers and Markets (ACM), which in its draft guidelines "Sustainability Agreements", explained that joint agreements to comply with the laws of

[146] NOWAG, *Integration* p. 73.

[147] ACM, *More opportunities*.

[148] CMA, *Guidance.*

[149] 2001 Horizontal Guidelines § 185-187.

other countries, such as illegal logging or prohibition of child labour, or agreements to introduce certain quality marks and labels, are allowed since competition is not restricted[150].

Moreover, the British Competition & Markets Authority (CMA) also included that, providing that businesses do not have market power, grouping for research and development or for purchasing common inputs is considered a beneficial form of cooperation that does not harm competition[151]. According to the CMA, "a business will usually have market power if it is able to raise and maintain prices or reduce the quality, quantity or variety of its goods or services in circumstances when losing sufficient customers to competitors makes it unprofitable to do so"[152].

Case law can be used to add examples of the different types of agreements and thus illustrate completely legally safe conduct for companies. Examples of agreements falling into these categories not deemed contrary to Article 101(1) TFEU are the *EUCAR*[153], *ACEA*, and *JAMA and KAMA* cases[154]. The "European Council for Automotive Research and Development" (*Eurocar*) was an agreement concluded among several groups of automobile manufacturers in the EU. Its goal was to "strengthen the parties' research efforts concerning economic, technological and environmental challenges". One of the main objectives was to enhance environmental sustainability[155]. The sharing of new intellectual property between the manufacturers and the development of new inventions were some of the elements included in the agreement. The Commission qualified the agreement as a "loose commitment" and therefore unlikely to restrict competition[156]. Another flexible agreement was concluded among car manufacturers also in the cases of *KAMA and JAMA*[157], which dealt with the reduction of emissions among car manufacturers while leaving free the choice of the method used to pursue such a goal, hence, no obligation of methods to achieve the reduction was present in the agreement[158]. As in the *EUCAR* case, this agreement was not considered to be anti-competitive and pun-

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[150] ACM, *More opportunities*.

[151] CMA, *Guidance.*

[152] CMA, *Guidance.*

[153] EUCAR Notice; NOWAG, *Integration* p. 74.

[154] XXVIIIth Report; NOWAG, *Integration* p. 74.

[155] EUCAR Notice.

[156] NOWAG, *Integration* p. 74; TEORELL, *A Company's Guide* p. 17.

[157] XXIXth Report.

[158] HOLMES, *Climate change* p. 19.

ishable under Article 101 §1 TFEU[159]. Finally, in the German *DSD* case, the Commission accepted even an agreement that established exclusivity and fixed prices[160]: the *DSD* initiative planned to impose an obligation to collect and recycle plastic waste through contractors. Until then, in Germany there was no market for the recycling of plastic waste[161]. Hence, this initiative gave rise to a new plastic waste management market. The Commission found that the agreement was pro-competitive and therefore did not fall under the prohibition of Article 101(1) TFEU[162].

These are just some of numerous examples that doctrine and case law provide. There can also be numerous self-assessed agreements that may not fall within Article 101(1) TFEU[163]. However, practice has shown that most companies avoid making agreements fearing competition law sanctions[164]. Thus, a chapter containing these and other examples and cases from the case law of non-restrictive agreements should be reintroduced in the new horizontal guidelines. Companies will have the certainty that, by following these guidelines, when considering similar agreements or agreements with the same impact on the market, it would most likely not be found to be contrary to Article 101(1) TFEU, despite its horizontal collaborative nature. This indication would already motivate companies to work together to safeguard the environment and hopefully would inspire companies to contract similar environmental-aimed agreements.

b. Agreements that may fall under Article 101(1) TFEU.

The second category that should be illustrated in the new Guidelines concerns those agreements that cause a restriction on competition but can nonetheless be allowed whenever certain conditions are fulfilled. The parties will then know that there still are some routes and examples to follow when the only option to pursue an environmental objective is to conclude an agreement that does have some anti-competitive issues which can however compensated by the positive effects. Since the limits may be difficult to establish and businesses may find hard to self-assess if their agreement has enough positive elements to compensate the negative ones or if they have gone too far, the more example and explanations there are in the new guidelines, the better. The examples allow business

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[159] NOWAG, *Integration* p. 74; TEORELL, *A Company's Guide* p. 17.

[160] DSD; NOWAG, *Integration* p. 76.

[161] VEDDER, *Competition law* p. 150.

[162] DSD; NOWAG, *Integration* p. 74; HOLMES, *Climate change* p. 19.

[163] FERRANDO / LOMBARDI, *Broken Links*; HOLMES, *Climate change* p. 19; NOWAG, *Sustainability & Competition Law* p. 15.

[164] CMA, *Guidance.*

to adapt their agreements based on the ones that were or not allowed by the Guidelines in this grey zone. These guidelines must therefore illustrate several points.

First, examples of the said agreements that “may fall under Article 101(1) TFEU”, explaining -*inter alia*- that whenever an agreement substantially limits how the parties manufacture their products or their ability to define their characteristics and features, the agreement will influence the parties’ production and sales, hence it will be likely to restrict competition. The same result will be achieved whenever the third parties’ production is substantially affected[165]. Other three examples of agreements susceptible to infringe Article 101(1) TFEU can be found in the 2001 Horizontal Guidelines. The first concerns an agreement that significantly influences a substantial proportion of the parties' sales of their product or production process. The second concerns agreements where the parties allocate individual pollution allowances to each other. Finally, an agreement is considered anti-competitive if the parties designate one company as the exclusive provider of recycling and/or collection services for their products, while in the market there are other actual or realistic potential providers[166]. These examples could be completed in the new guidelines by other possible scenarios and agreements coming also from the case law.

Second, another issue regarding Article 101(1) TFEU and the susceptibility of an agreement to be contrary to competition law, is that it automatically applies when the parties in question have a “significant share” or “significant proportion” of the market[167]. The consequence is that it will then require an individual analysis of whether the advantages of such collaboration can still outweigh the disadvantages. However, what is an important or significant share has not yet been specified by the Commission who gave no indication on this threshold. This is a criterion that should be made explicit in the new guidelines, or at least, made clearer through examples and illustrations of agreements that did or did not exceed this threshold[168].

Third, concerning the advantages and disadvantages, it is also necessary for the recipients of the rule of law to know how they will be assessed. The most common disadvantage is increased prices

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[165] TEORELL, *A Company’s Guide* p. 18.

[166] 2001 Horizontal Guidelines § 191.

[167] 2001 Horizontal Guidelines § 190; TEORELL, *A Company’s Guide* p. 18.

[168] NOWAG, *Integration* p. 74.

for consumers, while the advantages could include reduced carbon emissions. The new guidelines must therefore clearly explain how these benefits will be balanced against the disadvantages[169].

c. Agreements that almost always fall under Article 101 § 1

Finally, the new Guidelines should include an indication about the agreements that (almost) always fall under Article 101 (1) TFEU, which are those that do not have as a real objective the protection of the environment or the improvement of innovation, the reduction of emissions, etc[170]. These objectives are only a pretext for forming a cartel and limiting the production of products, excluding real or potential competitors, fixing prices or allocating markets, all of which are prohibited[171]. The list of agreements that are not acceptable is concise in the 2001 Guidelines and does not contain any details or concrete examples. The new Horizontal Guidelines should further develop this aspect to illustrate as comprehensively as possible when an agreement could be considered anti-competitive and sanctioned by competition law. Knowing the limits will allow companies to adapt their agreements to comply with the law while seeking solutions to the current climate crisis.

4.1.2. The consumer welfare critique

The second issue concerning the 2010 Horizontal Guidelines concerns the restrictive utilization of the consumer welfare criterion. As seen in the chapter about the current assessment under 101§1 TFEU, this is a core concept in competition law and is often the main -if not the only- criterion used in the assessment of agreements made by the Commission. The current approach often restricts the possibilities to environmental action; therefore a new interpretation and use must be integrated in the new horizontal Guidelines. The reasons for a broader application of such concept are multiple.

Firstly, the term "*consumer welfare*" is nowhere to be found in the constitutional or competition provisions of the treaties. *A fortiori*, there is no basis anywhere in EU law for adopting a narrow "consumer welfare" test. Second, if we retain that "consumer welfare" is the correct legal standard, nothing prevents it from being analysed with a new perspective[172].

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[169] ACM, *More opportunities*.

[170] 2001 Horizontal Guidelines § 188.

[171] CMA, *Guidance*; NOWAG, *Sustainability & Competition Law* p. 5.

[172] HOLMES, *Climate change* p. 11.

Granted that welfare means: “the general health, happiness and safety of a person, an animal or a group”[173]; welfare does not entail solely economic and monetary considerations. As stated by the goals presented in Article 3(1) of the TFEU, according to which, “the Union’s aim is to promote […] the well-being of its peoples”[174], this concept is capable of encompassing concerns such as having clean air to breathe, having enough food to eat, and producing goods using fewer resources. Thus, considerations of sustainability issues must be considered as much as narrow financial considerations[175]. A natural reading of the word “welfare” would therefore be much more appropriate, fitting both the “emerging concepts of measures of national well-being (such as “happiness”) instead of, or as a complement to, GDP”; and the goals of the SDGs (The Sustainable Development Goals). Such reading would also be more in line with the progressive thinking on the economy as a whole and would avoid today’s disputes between consumer welfare and public interest/public policies (or “well-being” and “fairness”) considerations[176].

In addition, from the definition of consumer welfare, a good does not have to have a market price to enter the consumer welfare function. The quality of water or air, for example, are goods that are not traded on markets, yet consumers may be willing to pay for them. Hence, consumer welfare may also be positively or negatively affected if the quality of such goods without market price increases or decreases. In conclusion, the existence or absence of a market price does not fundamentally affect the economic analysis of costs and benefits -although it undoubtedly makes it more difficult to include non-priced goods in economic analyses- allowing for consideration of broader elements such as environmental aspects[177].

Currently however, it appears that although “most economists would deny that consumer welfare is just about short-term price effects”[178], in practice the Commission takes a very narrow view which excludes non-economic factors in the balancing of competitive restrictions against efficiency gains, as demonstrated in documents such as the W*hite Paper on the Modernisation of the Rules Implementing Articles [101 and 102] of the Treaty* and the 2010 Horizontal Guidelines[179].

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[173] https://www.oxfordlearnersdictionaries.com/definition/english/welfare?q=welfare

[174] Holmes, *Climate change* p. 11.

[175] 2010 OECD Report p. 11.

[176] Holmes, *Climate change* p. 12.

[177] Kloosterhuis / Mulder, *Dutch agreement* p. 7.

[178] Holmes, *Climate change* p. 12.

[179] Kingston, *Greening EU* p. 263.

A way to allow a restriction of competition in favour of environmental protection seemed to have been opened by the Commission, which "recognised that it may not always be possible to secure public environmental benefits without affecting the degree of competition in the market" in the OECD policy *Environmental Regulation and Competition* of 2006. Unfortunately, the same document also contains a statement by the parties that unnecessary restrictions of competition in favour of environmental integration should not be allowed[180]. Hence, contrary to the Treaty intentions, it seems that competition objectives have priority over environmental policies, although – theoretically – there should be no hierarchy within the EU's objectives[181].

Although it must be admitted that the legal standard is consumer welfare which has not been extended to an unqualified total welfare standard, this does not mean that only the benefits incorporated in the product – which is the subject of the agreement – should be considered. From the welfare economic point of view, it is not possible to consider the different aspects of the production of a good such as electricity separately: one must consider not only the utility that consumers derive from it but also what effects consumption may have on the availability of other valuable goods, such as clean air[182].

Environmental protection is a key value, as demonstrated by the *CECED* and *DSD* cases, which must be considered along with market integration, economic freedom and efficiency[183]. Consumer welfare in its narrow interpretation of *consumer surplus* has no reason anymore to be the only criterion; at most, it should only be a part of "a much wider set of goals focusing on both the competitive process and the core goals of the treaty […], including for present purposes, sustainability"[184]. Environmental aspects ought to be considered when evaluating agreements, even if the analysis may be complex. The *Energieakkord* case has already shown that this is possible, even if it is not undisputed. In fact, in the antitrust community, there is a concern that the consistency, effectiveness, and predictability of antitrust policy could be undermined by taking into account so-called "non-efficiency", "non-economic", or "non-competition" considerations[185]. Nonetheless, a broad interpretation of consumer welfare goes back to the 1920s with Pigou's work on welfare and eco-

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[180] DAF/COMP(2006)30 p. 10.

[181] Nowag, *The sky* p. 12

[182] Continental/United/Lufthansa/Air Canada; KLOOSTERHUIS / MULDER, *Dutch agreement* p. 20.

[183] MONTI, Article 81 EC p. 1075.

[184] HOLMES, *Climate change* p. 13.

[185] KLOOSTERHUIS / MULDER, *Dutch agreement* p. 19.

nomics[186]. A century has passed, and, since then, many techniques for assessing environmental effects have been developed, e.g. the standard procedures in infrastructure projects to include environmental effects in analyses[187].

4.1.3. New criteria: true costs of production

After adapting its "consumer welfare" criterion in the new Guidelines to allow environmental factors to be taken into account when analysing agreements, another criterion could and should be considered: the true costs of production. This brings us back to the context of one of the main current problems of companies seeking to become greener that we mentioned earlier, namely the "first-mover disadvantage". The latter, as a reminder, causes a price inequality due to an internalization of external pollution costs by some companies, which thus suffer in their competitiveness.

From a welfare-economic point of view, environmental damage is an externality that arises during the production processes that, in the absence of public regulation, is not considered by producers. It is in the public interest to reduce such damage[188]. Currently, the external cost of a product or service is not being borne by buyers, consumers, or producers of such product or service but more generally by either taxpayers, third parties or even future generations. For example, whenever a polluted river needs to be cleaned up, the cost is supported by the taxpayer (where the government bears the cost of cleaning), not by the consumers of the product which production caused the damage. Other externalities are borne "either by identifiable third parties (such as underpaid workers in off-shore factories); […] by society as a whole (eg in the case of air pollution) or future generations (eg in the case of the production of greenhouse gases)[189]. It is therefore likely that the company that tries to internalise an "external cost", such as air pollution, faces inevitably extra costs that entail significant "first mover" disadvantages whenever the company is the only one carrying out such task[190].

In this optic, the only way to level the playing field is to have horizontal competitors agreements based on the costs that "reflect the true costs of production" (normal cost of production plus the cost of internalising pollution, for example). This would not result in a restriction of competition, but, on

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[186] PIGOU, *The economics of welfare*.

[187] KLOOSTERHUIS / MULDER, Dutch agreement p. 19.

[188] *Idem* p. 2.

[189] NOWAG, *Sustainability & Competition Law* p. 18.

[190] HOLMES, *Climate change* p. 17.

the contrary, it would be a pro-competitive attitude as it would encourage others to compete on the same basis, namely, the true cost basis. Finally, once these costs are internalised, there would be a much greater incentive for companies to innovate to lower them – an innovation that entails progress for both competition and the environment[191].

4.2. ASSESSMENT UNDER ARTICLE 101(3) TFEU

If the agreement is not allowed under Article 101(1) TFEU, then the next solution is to fulfil the conditions of Article 101(3) TFEU and benefit from an exemption from the prohibition, by showing that the benefits outweigh the disadvantages[192]. However, what is in principle possible according to the existing provisions, in practice it is made unnecessarily difficult first because of the said emphasis on the narrowly conceived "consumer welfare" test which often restricts the consideration of non-economic aspects, second because even when the strict consumer welfare criterion could be fulfilled, there's a lack of clarity on how to do it, discouraging businesses from acting. In this sense, the new Guidelines should explain clearly how the four conditions of Article 101(3) TFEU can be fulfilled specifically in the context of horizontal environmental agreements[193].

4.2.1. The first condition

The first condition is about "improvements and progress". According to Article 101(3) TFEU, the agreement must "contribute to improving the production or distribution of goods or to promoting technical or economic progress". Some of its aspects ought to be noted.

Firstly, again, there is no reference to "consumer welfare". Second, there are four options given by Article 101(3) TFEU, economic progress being only one of them. Therefore, it is hardly sustainable the need to translate all progress and improvements into "economic" terms. *A fortiori,* there is no reason to reduce them to narrow financial considerations. Without any doubt, when carrying out a proportionality analysis, in many instances, it may be useful to put an economic value on a benefit, but the application of Article 101(3) TFEU is not restricted by it[194]. Third, even if the criterion used is economic progress, it is still possible that many sustainability agreements fall within this requirement. For example, as the Commission agreed, "machines providing the same service with less

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[191] HOLMES, *Climate change* p. 17.

[192] CMA, *Guidance.*

[193] HOLMES, *Climate change* p. 22.

[194] 2010 OECD Report, p. 11.

indirect pollution are more economically efficient"[195]. In the same sense, the OECD recognised innovation, cost savings, improved quality and efficiency as "direct economic benefits" – which are usually accepted in competition law analysis[196]. Finally, the classification of environmental benefits as "non-economic" is legally erroneous. "Contrary to the misleading conception about Article 101(3) TFEU and the fact that it balances pro-competitive against anti-competitive effects, the letter of the article does not refer to such 'pro-competitive effects'"[197].

Therefore, the new guidelines must show businesses how the Commission will include in its analysis the progress and improvements that an agreement can bring. It has to explain which goals and effects will be comprehended as contributing to production or distribution of goods or to promoting technical or economic progress. It would be helpful to have examples of environmental advantages that can be assessed under each one of the four options given by Article 101(3) TFEU. On the other hand, it would be useful to illustrate which ones will not be considered as contributing to the first condition. Finally, the Guidelines should also explain how these advantages will be assessed without translating them to economic terms.

4.2.2. The second condition

The second condition, according to Article 101(3) TFEU, is that an agreement must allow "consumers a fair share of the resulting benefits". To fulfil this condition, there are two elements to consider: "consumers" and "fair share of the resulting benefit". Two notions must therefore be clear and precise for companies to be able to self-assess whether their agreement also fulfils this condition for exemption. Currently, the way these notions are interpreted by the 2010 Horizontal Guidelines and the Commission is not satisfactory. However, as we shall see, this is not the only possible interpretation.

a. Consumers

In the wording of Article 101 § 1 TFEU, there are no particular requirements as to which group of consumers is to receive the "fair share of the resulting benefits". Nevertheless, the 2010 Horizontal Guidelines have interpreted the notion restrictively and therefore require the group of consumers who suffered the disadvantages of the agreement to be identical to the group benefiting from the

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[195] HOLMES, *Climate change* p. 22 ; CECED § 48.

[196] 2010 OECD Report, p. 11.

[197] HOLMES, *Climate change* p. 23.

advantages[198]. The result of this narrow approach is that the benefits of an environmental protection agreement are not considered in their full extent, i.e. over the whole of society, which would allow the advantages of the agreement to outweigh the disadvantages. Since only the proportion of the benefits concerning consumers affected by the agreement is considered, the advantages are not sufficient to allow the agreement to stand.

Nevertheless, this is not the only possible approach to the letter of the law. The concept of consumers can also take into account other relevant aspects. In fact, by relating not only to improvements in the distribution or production of the goods but also much more generally to economic or technical progress, Article 101(3) TFEU also concerns agreements where a group of purchasers is not easily identifiable[199]. Moreover, agreements that have environmental benefits do not advantage only a narrow group of purchasers, but they benefit society as a whole[200]. On the same sense, the 2004 Exemption Guidelines stated that "society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources"[201]. Moreover, it is possible to find in the judgments of the European Courts an extension of the consumers definition by considering "every other market on which the agreement in question might have beneficial effects", thus not only the relevant market[202]. Accordingly, the General Court in the *Compagnie Generale Maritime* held that "regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market […], but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement"[203].

In the *CECED* case, an agreement caused a competition restriction affecting some consumers who were not "substantially the same" as those who benefited from the "collective environmental benefits" due to the reduced pollution from electricity generation. The Commission nevertheless recog-

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[198] ACM, *Legal memo* p. 1.

[199] HOLMES, *Climate change* p. 24.

[200] ACM, *Legal memo* p. 2.

[201] HOLMES, *Climate change* p. 25 ; Article 81 (3) Guidelines § 85.

[202] GlaxoSmithKline § 248.

[203] Compagnie Générale Maritime and others § 343.

nised that "environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers"[204].

Furthermore, when assessing who is considered a consumer, especially in the context of the fight against climate change, there is the question of whether *future* consumers ought to be comprehended in the notion[205]. The Commission considered future consumers in the 2004 Exemption Guidelines – although discounting for the fact that the benefits are in the future[206]. Such approach is fundamental since future consumers and future generations are a core concept in the context of climate change. Whether an agreement focuses on environmental issues (such as the need to preserve an ecosystem), sustaining a global food system, preserving biodiversity, or climate change per se, future generations must be considered[207].

The last debatable question concerns the geographic area. In this sense, although it is obvious that the benefits of environmental agreements promoting -among others- sustainability and reduction of pollution improve the general welfare of everyone on the globe, it is still not yet legally clear if consumers outside the EU can also be considered. Since the effects of global change are world-wide, and the companies that most cause pollution often do operate on an international level, there is no reason why consumers outside the EU should not be comprehended in the assessment. Such individuals suffer the same consequences of climate change and enjoy the same improvements that the agreements on the matter bring. In this sense, a recent decision of the Dutch Supreme Court was more than cheered. In fact, in the *Urgenda* case, it was advocated that there is an obligation for the EU authorities to consider the effects on consumers beyond the EU's borders[208]. The court held: "states have […] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment beyond the limits of national jurisdiction"[209].

Therefore, a broader interpretation of the notion of consumers is not only possible from the letter of Article 101 § 1 TFEU but is also supported by the case law. It is interesting to remark that some member states have already started to adopt a broader approach. In the new Guidance of 2021 made

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204 HOLMES, *Climate change* p. 26.

205 NOWAG, *Sustainability & Competition Law* p. 18.

206 Article 81 (3) Guidelines § 87-88.

207 HOLMES, *Climate change* p. 27.

208 *Ibidem*.

209 *Idem*, footnote n° 58.

by the British Competition & Markets Authority on environmental sustainability agreements and competition law, there is no reference to the need for the group of consumers harmed by the agreement and the one benefiting from its benefits to be identical, nor to the need for these two groups to overlap[210].

Another very good example of how this currently narrow view of the Commission could be broadened is that of the Dutch Consumer and Markets Authority (ACM). To increase the possibilities for competing companies to work together to achieve environmental and climate change objectives, the ACM considers the benefits to society as a whole and not just to a specific group of consumers since objectives such as reducing carbon emissions will be easier to achieve if companies have more opportunities to enter into agreements. Thus, an agreement is permitted when the benefits to society (as a whole) are greater than the disadvantages of a possible competition restriction[211].

To illustrate their rationale, the ACM proposed the following example: if a number of producers agree to make their production completely carbon neutral, this will increase production costs and, as a result, also lead to a price increase for consumers. The price increase is therefore the disadvantage. However, not only the product users will benefit from the reduction of carbon emissions, but also the non-users. Since reducing carbon emissions is included in the law and treaties as one of the objectives, the agreement between the companies has also a public policy objective. According to the current rules, in particular those of the Commission, for the agreement to be permitted, the disadvantages for the users of the product (i.e. the increase in prices) must be at least counterbalanced, if not outweighed, by the benefits for the users of the product (i.e. the reduction in carbon emissions). If the analysis is carried out this way, most likely, the benefits will not be sufficient – as was the case with *Chicken of Tomorrow*. However, with the new rules proposed by the ACM, the trade-off is different: "the benefits for society as a whole must be equal to or greater than the disadvantages for users". Thus, where the benefits that are weighed up relate to society as a whole, it is much more likely that the agreement will be allowed to stand, as the benefits will quickly outweigh the disadvantages. The agreement contributing to the government's objectives, society will benefit, and therefore it will be allowed[212].

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210 CMA, *Guidance.*

211 ACM, *More opportunities.*

212 *Ibidem.*

The new Horizontal Guidelines should therefore only require that the group of costumers affected by the restriction should at least overlap but must not be "substantially the same" to the group benefiting from the efficiency gains[213]. However, for the EU to be the leader in the fight against climate change, the new Guidelines should not only consider a broader group of consumers, such as the whole society, but also future generations who suffer and/or benefit from the decisions we make.

b. Fair share of the resulting benefit

Having demonstrated that the notion of the consumer must be expanded, we now look at what "fair share of the resulting benefit" means. It is worthwhile to note that there is no requirement that the consumers benefit from a lower or "fair" price for the condition to be fulfilled. A fair share of the resulting benefit is not a narrow concept and thus allows to consider also wider aspects such as sustainability benefits. Hence, there are no elements that suggest the necessity to quantify or reduce the benefits to narrow financial considerations[214].

In accordance with this broader approach, in the *CECED* decision, collective environmental benefits had been taken into consideration and more importantly, the Commission stated that the "environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers"[215]. It explained also that the benefits to consumers can "take the form of qualitative efficiencies such as new and improved products creating sufficient value for consumers to compensate for the anti-competitive effects of the agreement, including a price increase"[216]. Likewise, it also stated that a value judgement is required to make such assessment since it is difficult to assign "precise values to dynamic efficiencies of this nature"[217]. Finally, even when an agreement results in an increased price for consumers, an assessment based on value judgement must be made[218].

As we can see in cases such as *Exxon/Shell*, the European courts and the Commission have admitted the benefit to consumers of external factors – without reducing them to narrow financial considera-

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[213] HOLMES, *Climate change* p. 26.

[214] NOWAG, *Sustainability & Competition Law* p. 12.

[215] HOLMES, *Climate change* p. 25; CECED.

[216] Article 81 (3) Guidelines § 102.

[217] HOLMES, *Climate change* p. 28.

[218] Article 81 (3) Guidelines § 104.

tions [219]. Furthermore, other aspects of the products (such as environmental qualities of the products) have often been recognised as parameters of competition[220]. In fact, in 2018, the Commission even investigated a possible collusion because it "may have denied consumers the opportunity to buy less polluting cars, despite the technology being available to the manufacturers"[221]. The harm of preventing consumers from buying less polluting cars unequivocally shows that considerations of improving the environment are part of consumer interests and are therefore susceptible to prejudice. The necessary conclusion is that environmental factors are a parameter of competition. Therefore, in the assessment under Article 101(3) TFEU, environmental factors' improvement must be considered also as benefits to consumers and therefore "a fair share of the resulting benefit"[222].

The assessment of a "fair share of the resulting benefits" should be done objectively by considering various available elements, circumstances and evidence in their analysis. Nevertheless, this does not exclude (subjective) preferences expressed by particular consumer groups, which will then be taken into account as one of many elements but not as the decisive one[223]. The new draft explained that consumers - whether due to lack of knowledge or information - are not able to "objectively balance the future benefits they obtain from an agreement, against the immediate harm they suffer from the same agreement" [224].

Furthermore, in determining whether consumers received a "fair share", the criterion mentioned earlier, the true costs of production, should also be included. This would also consider the fact that individual production and consumption decisions can have negative effects ("negative externalities"), which are not sufficiently taken into account by the economic operators or consumers that cause them. Luckily, the new draft seems to go in this direction[225].

Finally, the Commission with the new Guidelines should revaluate how every element is weighted: having as many products as possible at the lowest price should no longer be considered the main, and only, goal of consumers. Breathing clean air, keeping ecosystems alive, allowing animals to

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[219] Exxon/Shell.

[220] HOLMES, *Climate change* p. 28.

[221] European Commission, *Investigation.*

[222] HOLMES, *Climate change* p. 29.

[223] *Ibidem*.

[224] Article 101 Guidelines Draft p. 140.

[225] *Idem,* p. 132.

have a better life, are all advantages that consumers seek and that can be brought by horizontal environmental agreements, thus allowing such consumers to receive their "fair share".

4.2.3. The third and fourth condition

Expression of the proportionality principle in EU law, Article 101(3) TFEU also requires that an agreement do not "impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives". Although it is true that multiple environmental agreements failed to be exempted from Article 101 TFEU because of this condition, the proportionality principle remains fundamental. In fact, it invites consideration of other ways to achieve sustainability goals which may be less restrictive[226].

The fourth and last condition is that an agreement "must not afford such undertaking the possibility of eliminating competition in respect of a substantial part of the products in question". This condition does not impose much problem and rarely prevents a sustainability agreement to meet the conditions of Article 101(3) TFEU, as it is possible to see in the *CECED* Decision[227].

4.3. CONCLUSIONS

The current approach to competition law is a narrow one. However, this point of view is not inevitable or the only one. On the basis of the treaties, a broader approach is justified and in accordance to the "constitutional laws" of the EU. More importantly, the narrow approach shows to be damaging from an environmental and sustainability perspective. In addition, it is also holding back initiatives that are crucial to the fight against climate change. Insofar as a new approach is not adopted, competition law will continue to be part of the problem. Fortunately, no long, time consuming, legislative process is needed: we can still make it work with the laws we already have. Competition law has already the tools to foster sustainability; it only needs to change how said laws are understood and applied[228].

First, the new guidelines must have a chapter especially dedicated to sustainability to facilitate collaborative action in those areas[229]. Fortunately, the draft presented recently does have it, and it en-

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[226] KINGSTON, *Greening EU* p. 280-287.

[227] HOLMES, *Climate change* p. 31; CECED.

[228] NOWAG, *Sustainability Gap* p. 3.

[229] HOLMES, *Climate change* p. 53.

courages businesses to act, as the consequences of their action are foreseeable, and the sanctions can be avoided. In general, it is unfortunate that the explanations provided by the previous Guidelines of 2001, where the Commission provided examples and made a distinction between the agreements that were “not likely to”, that “may” or that “almost always” restrict competition[230], were not maintained in the current ones.

Second, the point of view of the Commission and the competition authorities on consumer welfare has to change. The interpretation of such term should not be narrow, understood only as “consumer surplus”, but it should encompass *all* the true interests of consumers, namely a healthier life, better conditions for animals, etc. Its assessment should be focused on the “net consumer welfare”, comprehending, therefore, also the non-economic factors in the efficiency gains.

Third, authorities must either consider non-economic elements per se, or, if necessary, use the numerous economic techniques to transpose them into economic terms even when such transposition might be challenging. It is no longer possible to ignore the benefits of horizontal environmental agreements by claiming that it is difficult or too complex to include such non-priced goods in the economic analyses. The new Horizontal Guidelines should explain how to include non-economic elements, their weight, and how this will be assessed. In the latter, the true costs of production must also be considered, so to include the producers’ actual environmental harm, and the consumers’.

Regarding the allowance of the exemption under Article 101(3) TFEU, some changes must be made too. First, the Guidelines should facilitate the comprehension of environmental benefits under the requirement of “improving the production or distribution of goods or to promoting economic progress”. More options and examples of how actions against climate change can be considered as promotion of technical and economic progress will stimulate the businesses to act as they know their possibilities. Second, the definition of consumers should be broadened and comprehend not only a larger group than the one affected by the agreement, i.e. the society, but also future generations – which will be the ones suffering or benefiting from the environment related decisions taken today. Third the new Guidelines should admit that a fair share of the resulting benefits does not mean full compensation and that the assessment of the benefits will be objective and will take into consideration multiple aspects of the agreement, not only the economic ones. Finally, there must be an adjustment of the way in which elements are weighed: the benefits of environmental protection

[230] 2001 Horizontal Guidelines § 184.

must be given more weight in the analysis and the importance of price increases must be relativized, as they are no longer the main focus of either competition or consumer law.

With these changes (most of which are already present in the new draft proposed by the EU), the battle against climate change will have an extra powerful tool and businesses will be able to coordinate and propose environmental actions.

4.4. THE NATIONAL GUIDELINES

Some European countries have already started to move in the right direction. In particular, the Netherlands Authority for Consumers and Markets (ACM) has favoured this approach. In fact, recently, the ACM expressed in favour of two initiatives where competitors worked together. While acknowledging the importance of horizontal cooperation, ACM argued that these initiatives were not in contradiction with competition rules but were particularly important as they contributed to making the energy sector more sustainable. The first initiative concerned the use of a uniform price for CO_2 by distribution network operators in calculation models for network investments. After considering that a reduction in CO_2 emissions benefitted all energy users, the authority concluded that the sustainability gains outweighed the potential costs to users even with a higher CO_2 price. Furthermore, it remarked that to realise this benefit, according to the third and fourth conditions, cooperation was necessary and that there still would have been sufficient market competition. Hence, the cooperation was permitted as it fell under the exemption from the horizontal agreements ban. The other initiative concerned the permitted agreement between different companies and organizations to jointly purchase electricity from a wind farm. To assess both agreements, the ACM used its recent "draft guidelines regarding sustainability agreements"[231].

The position of ACM is clear: "Businesses are allowed to join forces to realize sustainability goals. The Dutch Competition Act does offer such opportunities. We are happy to help businesses that have questions about such collaborations. Various organizations have already approached us with initiatives that contribute to the transition towards sustainable energy and other sustainability goals. We welcome that"[232]. Hopefully, the Commission will follow its example also because the ACM's approach is not an aggressive one that would foster fear of action in the companies. In fact, the ACM explained that in cases where an agreement does not meet all the conditions, while the com-

[231] ACM, *Collaborations*.

[232] *Ibidem*.

panies have followed the guidelines in good faith, there will be no fines; the authority will simply ask the agreements to be amended to comply with the legal framework[233].

One applauded decision made by the ACM in its guidelines, is to consider both future consumers and future benefits by using the standard social-cost-benefit tool[234]. Thus, by means of so-called environmental or "shadow" prices, avoided environmental damage are monetized and included in the analysis of sustainability benefits[235]. Even more extensively, the ACM decided to also consider not only the benefits of society as a whole, but also the effects outside national markets. In this sense, it made a distinction between environmental and social benefits. Thus, because consumers, producers and Dutch citizens could rep environmental benefits, the latter would be taken into account even when occurring abroad (as opposed to social benefits)[236].

The British Competition & Markets Authority (CMA) published on 27 January 2021 a Guidance on Environmental sustainability agreements and competition law. In this Guidance, multiple points of its assessment of horizontal agreements were explained. First the authority gave an overview of all the legal aspects that business should be aware of when entering into sustainability agreements. Such overview included some general explanations about collaboration between businesses, the existence of exemptions from competition rules, the steps one should follow to comply with the law, and forbidden behaviours. The Guidance then explains the meaning of "by object" restrictions, business cartels, and the dangers of sharing sensitive information. In the second part, detailed information is given about markets share thresholds. Companies now have instructions on assessing their market share and determining if the agreement may benefit from special competition law allowances. Moreover, the CMA does not automatically sanction an agreement made by parties with market shares exceeding the indicated thresholds. The Guidance explains that in this case, "the potential effect of such agreements and the benefits they may create will need to be assessed on a case-by-case basis"[237].

Useful information is given also on the possibilities to benefit from an exemption from the prohibition. It starts by recalling the possibility of an exemption in cases where the sustainability initiatives

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233 ACM, *More opportunities.*

234 NOWAG, *Sustainability & Competition Law* p. 19.

235 ACM**,** *Draft guidelines* § 50.

236 *Idem* § 40-41.

237 CMA, *Guidance.*

fall into one of the general categories of agreements, such as specialization or research and development agreements. The agreement would therefore benefit from what is referred as "block exemption". It clarified also that business located in England continue to benefit from EU Block Exemption Regulation following the end of the Transition Period (31 December 2020)[238]. Whenever the exemption cannot be given because the agreement does not fall into any of the categories of the block exemption, the CMA gives the possibility to companies to demonstrate that the conditions for an individual exemption are met. The conditions are the same ones of Article 101 § 3 TFEU.

Finally, an interesting addition is the "framework for assessment" flowchart[239]. It gives companies an easy and straightforward method to self-assess their intended agreement by answering punctual questions. This is the clarity that the Commission should aim.

4.5. THE EUROPEAN DRAFT OF NEW HORIZONTAL GUIDELINES

On the bright side, it appears that the Commission was made aware of the extensive critics and decided to take action. Very recently, on the 1st of March it published a draft of the revised Horizontal Guidelines for consultation until the 26th of April 2022 to gauge the opinion of all citizens, organisations, and public authorities on the changes it proposes, addressing the issues identified in the evaluation of the current rules. According to many, if the new Guidelines were to be adopted, businesses in Europe will have more opportunities for collaborations to achieve sustainability objectives. In the draft, the Commission made it clear that competition rules do not constitute any barrier to many forms of collaboration between businesses that promote environment protection and sustainability objectives. Businesses will welcome this clarification and hopefully engage in more agreements without the fear of violating competition rules[240]. The draft is getting support from various parties, including the Netherlands Authority for Consumers and Markets. Some of its aspects will be briefly analysed.

First, the choice to reintroduce chapter on sustainability agreements is celebrated. The Commission explicitly acknowledged that "sustainable development is a core principle of the Treaty on EU and a priority objective for the Union's policies"[241]. Consumer welfare appears to be still the main crite-

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[238] CMA, *Guidance.*

[239] *Ibidem.*

[240] ACM, Response.

[241] Article 101 Guidelines Draft p. 131.

rion on which the Commission will base its analysis; however, there is a new awareness that "individual production and consumption decisions can have negative effects ("negative externalities")" on the environment, and that these are "not sufficiently taken into account by the economic operators or consumers that cause them"[242]. Hopefully this means that the Commission will be considering in the assessment of the agreements, the criteria explained in this thesis: "the true costs of production".

The Commission also has noticed that businesses were deterred from making sustainability agreements because of the lack of clarity and guidance. To counteract this, it decided to give detailed guidance on the assessment of the Article101 § 3 TFEU and provide the requirements for individual exemptions. One of these is the explanation of when sustainability benefits can be considered as qualitative or quantitative efficiency gains in the assessment under Article 101(3) TFEU[243]. The division of agreements that "do not", "may", and "always" fall under Article 101 § 1 TFEU was not brought back in this new draft; however, the draft explicitly indicates agreements that do not raise any competition concern and illustrates them with a list of examples (which is not exhaustive and therefore can always be completed by case law). The draft then proceeds by explaining sustainability standardisation agreements, viz. one of the categories under which the environmental or sustainability agreements may fall. The principle from the 2010 Horizontal Guidelines where the environmental agreements fall under different sectors of the guidelines, depending on the competition issues that the agreement may raise is maintained, although now there is a better understanding and guidance of which direction the agreement may take and for which category what the requirements are for an exemption. For example, for sustainability standardisation agreements, the draft states that they have similarities with the (general) standardization agreements; however, they also have features that are atypical for, or less pronounced in, those standardisation agreements. It then describes what those differences are. Comparing to the 2010 Horizontal Guidelines, more details are given to the addressees of the law.

Another welcoming point regards the scope of the analysis that the Commission will carry out. The draft now considers also out-of-market benefits in the form of collective benefits, which by broadening its analysis and taking into consideration the benefits of sustainability agreements to a larger group of consumers and even society as a whole, the assessment will allow more agreements to be

[242] Article 101 Guidelines Draft p. 132.

[243] *Ibidem*.

made whenever their advantages are more important than the disadvantages. For those collective benefits to be taken into account the guidelines require the fulfilment of four criteria[244]. Nevertheless, the draft could have pushed a little further and allowed for a comprehensive assessment encompassing the main group of consumers who will profit from the agreements: the future generations[245].

Moreover, the opinion of the consumers is not the determining criterion: "an agreement may also be necessary in cases where the parties can show that the consumers in the relevant market find it difficult, due to, for example, lack of sufficient knowledge or information about the product itself or the consequences of its use, to objectively balance the future benefits they obtain from an agreement, against the immediate harm they suffer from the same agreement and that, as a result, they overestimate the importance of the immediate effect". Therefore, if an agreement demonstrates that the measure is necessary and proportionate, even if the consumer does not understand and welcomes the changes, the agreement is allowed[246].

The decision not to use a narrow concept of objective efficiencies, allows for "a broad spectrum of sustainability benefits resulting from the use of specific ingredients, technologies, production processes to be taken into account as efficiency gains"[247]. The draft also mentions the existence of "positive externalities," viz., the reduction of negative externalities such as pollution that will be taken into consideration in the assessment.

Another interesting addition is the inversion of the order of the second and third condition in the analysis of the agreement. Thus, the criterion of "fair share to consumers" will only be examined if the agreement is proportionate, in other words, if the agreement does not impose restrictions, that are not indispensable to the attainment of the benefits brought about by it[248]. A suggestion also brought up by the ACM in its response to the draft consultation was to admit and explain in the document that consumers should receive a fair share and not necessarily full compensation[249].

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[244] Article 101 Guidelines Draft p. 133.

[245] ACM, *Response* p. 2.

[246] Article 101 Guidelines Draft p. 140.

[247] *Idem* p. 138.

[248] *Idem* p. 139.

[249] ACM, *Response* p. 2.

Finally, the draft states that "the involvement of governmental or local authorities in the process of conclusion of sustainability agreements, or the knowledge of those authorities of the existence of such agreements, is not in itself a reason to consider such agreements compatible with the competition rules", which is reasonable. It continues then by giving different examples of this rule[250].

4.6. EXCURSUS: STANDARDISATION AND R&D AGREEMENTS

Briefly, one of the possibilities given to businesses to create horizontal agreements legally, is in the form of standardisation or Research & Development (R&D) agreements. According to the 2010 Horizontal Guidelines, "standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply"[251], while R&D "range from outsourcing certain R&D activities to the joint improvement of existing technologies and co-operation concerning the research, development and marketing of completely new products"[252]. Many sustainability agreements could be exempted from Article 101 TFEU if they were categorised as standardisation or R&D agreements[253]: agreements where competitors agree to set standards on the production processes, the environmental performances of products, or the resources used in production as well as sharing technology or intellectual property[254]. What is necessary is to explain in more detail which agreements would meet the exemption conditions of Article 101(3) TFEU, and which would fall outside Article 101(1) TFEU, thus escaping its prohibition. The reasons to push for such regulation are multiple.

First, the form of standardisation agreements is, or could be, often used for sustainability agreements[255]. To display: had the arrangements in the "Chicken of Tomorrow" case been framed as a standardisation agreement, many of the objectives concerning animal welfare could have been achieved[256]. The 2010 Horizontal Guidelines already contain a specific standardisation agreements chapter. In it, there are some interesting elements. For example, the Guidelines note that may escape Article 101 completely even those agreements involving high market shares, being categorized as

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[250] Article 101 Guidelines Draft p. 145.

[251] 2010 Horizontal Guidelines, paragraph 252.

[252] 2010 Horizontal Guidelines, paragraph 111.

[253] NOWAG, *Sustainability & Competition Law* p. 16.

[254] CMA, *Guidance.*

[255] 2010 OECD Report p. 11.

[256] HOLMES, *Climate change* p. 32.

standardisation agreements[257]. Furthermore, it gives an example of an environmental agreement that meets the condition of Article 101(3) TFEU[258]. Providing certain conditions are met, it is possible for business -without breaking competition rules- to unite to agree standards for sustainable products.

What is to be noted is that there is no need to change the basic competition rules (Articles 101 and 102 TFEU) for environmental agreements to be possible. It is necessary that companies understand the opportunities offered to them and how they can work together for sustainability, which is why the horizontal guidelines had to be revised[259].

The British Competition & Markets Authority included in its Guidance *Environmental sustainability agreements and competition law* specific guidelines for a legal use of fair standard-setting process. The authority chose to make a checklist allowing companies to self-assess their intended agreements and be guided in making new ones. First, it explicitly indicated what steps should businesses follow to comply with competition law. Second, it explained the limits by indicating the forbidden behaviours.

According to the ACM, on the one hand, businesses should, through the publication of regular updates in dedicated journals or other means, make information about upcoming, ongoing and finalised standardisation work accessible. Moreover, it is required that participation in the standard-setting process is open to all competitors in the markets affected as well as the possibility to join the agreement. The access to the standard must be non-discriminatory, fair and reasonable to every business complying with its requirements. In addition, the access to intellectual property rights has to be made in a fair, reasonable and non-discriminatory way by the participants whenever the intellectual property rights are essential to implementating the standard. Finally, the members of the standard-setting must not be precluded to develop products that do not comply with the agreed standard or alternative standards[260].

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[257] NOWAG, *Sustainability & Competition Law* p. 16.

[258] HOLMES, *Climate change* p. 32; 2010 Horizontal Guidelines §§258; 277; 290; 300.

[259] HOLMES, *Climate change* p. 32.

[260] CMA, *Guidance.*

On the other hand, businesses are not allowed to exchange or disclose sensitive information that does not relate and is not necessary for standard-setting. Moreover, no obligation should be imposed on businesses that do not wish to participate regarding the standard, code of conduct or label[261]. Developing products that do not comply with the standard or an alternative standard must not be made more difficult or hindered[262]. Finally, it should not be an instrument to prevent competitors or technology from entering the market[263].

By giving these guidelines, the British authority lays a path that businesses can follow and conclude successfully horizontal agreements, more specifically standardisation agreements that promote sustainability and the protection of the environment. To promote the environment protection at a larger scale, the Commission should provide similar clarifications.

[261] CMA, *Guidance.*

[262] 2010 OECD Report p. 12.

[263] CMA, *Guidance.*

5. CONCLUSIONS

> *"Climate Change is an existential threat. Competition law must be part of the solution and not part of the problem"*[264].

This thesis repeatedly highlighted one crucial point: the current application and interpretation of competition law are unsuitable for today's environmental challenges. The fight against climate change needs big actors such as worldwide companies to act immediately; however, competition law represents an obstacle.

For a horizontal environmental agreement to be allowed by competition authorities, there are two routes: a permission granted directly by Article 101(1) TFEU or the exemption route of Article 101(3) TFEU. Today, both paths present too many uncertainties and obstacles, making the choice to pursue them too risky. On the one hand companies are hampered by the narrow views of competition authorities, on the other hand there is a lack of information to the addressees of the law. The positive aspect is that to improve this situation, the current legal framework does not have to be fundamentally changed, just its application. This is where the new Guidelines come to play and must substantially differ from the 2010 Horizontal Guidelines.

A specific environmental chapter must be reintroduced and the division of agreements, a great tool for companies in the 2001 Horizontal guidelines, should be brought back in an even more detailed form, with additional examples and further case law. By illustrating what agreements do not fall, may fall, and always fall under the prohibition of Article 101 § 1, the authorities will be giving the addressees of the rule of law more security – thus encouraging sustainable oriented agreements.

Moreover, the understanding of the criteria of consumer welfare and the meaning of "fair share to consumers" are outdated; both must be broadened in the draft. The analysis made by competition authorities cannot be limited to mere financial or economic issues and must encompass the whole range of positive effects the agreement can bring by comprehending not only a specific group of consumers but the entire society.

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[264] HOLMES, *Climate change* p. 2.

Finally, since there is the possibility for agreements to be exempted from the prohibition by taking the form of standardisation and R&D agreements, businesses must be made aware of it. Therefore, instructions and guidance specifically concerning the environmental aspects of such agreements must be comprehended in the new Guideline.

Most of the required changes have already been implemented by some member states locally, showing clearly that such a path is possible and desirable. Following its examples, some improvements have also been brought by the new draft of the Horizontal Guidelines. Hopefully, this is only the beginning of a more environmentally conscious legal practice.

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ABSTRACT

Die menschliche Bevölkerung steht kurz vor dem Punkt des Klimawandels, an dem es kein Zurück mehr gibt. Wir müssen uns für den Umweltschutz einsetzen. Vor allem die Unternehmen müssen ihr Geschäftsmodell ändern und nachhaltigere Methoden in ihrer Produktion einsetzen. Der Kern des Problems besteht darin, dass ein Unternehmen, das allein so handelt, Nachteile als *First Mover* hat und seine Wettbewerbsfähigkeit einbüßt. Um diese zu vermeiden, sind horizontale Vereinbarungen mit konkurrierenden Unternehmen erforderlich, die auf den Umweltschutz und die Senkung der CO2-Emissionen abzielen. Der derzeitige Rechtsrahmen und die Praxis der Europäischen Kommission erschweren diese Vereinbarungen jedoch. Einerseits behindert die strenge Auslegung der gesetzlichen Bestimmungen durch die Kommission die Zusammenarbeit zwischen konkurrierenden Unternehmen, indem sie die meisten Vereinbarungen sanktioniert, da der Begriff des «*Consumer Welfare*» mechanisch verwendet wird und nichtwirtschaftliche Elemente bei der Prüfung der Rechtmäßigkeit einer Vereinbarung nicht berücksichtigt werden können. Andererseits schreckt die mangelnde Klarheit der derzeitigen horizontalen Leitlinien die Unternehmen davon ab, zu handeln und Vereinbarungen zu treffen, da nicht klar ist, was nach dem Wettbewerbsrecht zulässig ist und was nicht.

Ziel dieser Arbeit ist es, der derzeitige Rechtsrahmen und die Art und Weise der Überprüfung horizontaler Umweltvereinbarungen kritisch darzustellen. In einem zweiten Schritt werden die wichtigsten Probleme und Hindernisse aufgezeigt und Lösungsvorschläge für jeden der identifizierten Kritikpunkte unterbreitet. Diese Arbeit kommt zu dem Schluss, dass die derzeitige Rechtsgrundlage nicht unbedingt geändert werden muss, sondern dass ihre Anwendung und Auslegung revidiert werden müssen. Dies gilt insbesondere für die horizontalen Leitlinien, die dringend eine bewusstere Berücksichtigung von nichtwirtschaftlichen Elementen wie dem Umweltrecht erfordern - eine Umsetzung, die einige Mitgliedstaaten bereits begonnen haben und die die Europäische Union hoffentlich einführen wird.

ABSTRACT

The human population is on the brink of the climate change no-return point. We must strive for environmental protection. In particular, companies must change the way they do business and implement more sustainable methods in their production. The core of the issue is that, when acting alone, a company faces a first mover disadvantages and loses its competitiveness. To avoid these, horizontal agreements with competing companies that aim at environmental protection and reduction of CO2 emissions are necessary. However, the current legislative framework and the Commission practice impedes these agreements. On the one hand, the Commission's strict interpretation of the provisions of the law hinders cooperation between competing companies by sanctioning most agreements, due to the mechanical use of the notion of "consumer welfare" and the inability to take non-economic elements into account when analysing the legality of an agreement. On the other hand, the lack of clarity of the current horizontal guidelines discourages companies from acting and creating agreements because of the lack of transparency as to what is or is not allowed under competition law.

This thesis aims is to critically expose the current legal situation and how horizontal environmental agreements are analysed. In a second step, having noted the main problems and obstacles, there I propose solutions for each identified criticality. This thesis assesses that the current legal basis does not necessarily have to be changed, but its application and its interpretation must be reviewed. This is particularly the case with regarding to horizontal guidelines that urgently need a more conscious actualisation of non-monetary values such as environmental law – an actualisation that some countries have already started to promote and that the EU will hopefully proceed to carry out.