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EU Competition Law and Sustainability: The Need for an Approach Focused on the Objectives of Sustainability Agreements

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Abstract: European Union (EU) competition legislation can potentially contribute to the achievement of sustainability objectives and the battle against climate change. This article highlights the importance of interpreting the rules of EU competition law in a way that aligns with the sustainability goals of the EU, such as the sustainable development goals (SDGs), the EU Green Deal, and related programs. Although Article 101 TFEU typically prohibits agreements between rivals, cooperative agreements among market participants with sustainability aims (known as sustainability agreements) may, under specific circumstances, be exempted from the cartel prohibition outlined in Article 101(3) TFEU.There has been a growing demand in recent years to establish clear guidelines for allowing sustainability agreements under EU competition law, particularly under Article 101(3) TFEU. This has sparked a contentious discussion among scholars, national competition authorities (NCAs), and the European Commission. This article will explore an alternative perspective on the evaluation of objectives and measures in agreements, specifically using the willingness-to-pay method. It will also propose a broader interpretation of Article 101(3) TFEU, which could facilitate the implementation of sustainability agreements. The feasibility of such a possibility will primarily rely on the specific goals outlined in the agreements. This approach may enable a thorough examination of the purposes of a sustainability agreement in certain scenarios, by concentrating on agreements that aim to achieve predetermined objectives based on international or national standards, or specific policy objectives that were not obligatory for the companies involved beforehand.

Key Words: Competition law. Sustainable development goals. Business Agreements. International Trade.

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1. INTRODUCTION:

Among other things, EU competition rules can be used to promote sustainability principles and to deal with the problem of climate change. Nonetheless, it is also contended by others that alternatives, such as regulation and taxation, serve a better purpose. However, competition law nonetheless has a major task to accomplish. There is no doubt that every aspect of law (both public and private) must make a contribution to climate change mitigation efforts. While political or financial obstacles may hamper progress in other regulatory spheres, competition law can expedite the achievement of such endeavors.

Competition law enforcement, commonly known to be the premise of a sustainable growth, ultimately leads to innovation, enhanced quality and variety of products, and special resource allocations and low production costs. Nevertheless, it also has got to be recognized that individual production or consumption patterns can have negative impacts on society, environment and other similar factors. While Article 101 TFEU prohibits cooperation between competitors, there are instances where collaboration between rivals might serve as an effective means to achieve certain sustainability goals. When a corporation decides to abruptly adopt environmentally friendly products or technology, it may face increased expenses in some instances (referred to as 'first mover disadvantage'), which discourages them from taking that initiative. By reaching a consensus with other rivals on sustainability measures, the negative impact of being the first to take action is avoided or minimized (Walters, D. E. (2022).

Some instances of sustainability agreements include those made by suppliers to increase recycling or decrease their use of plastics and packaging, to lower car emissions, to increase the efficiency of household appliances, to enhance animal welfare standards, and so on. Therefore, agreements between rivals that achieve various sustainability objectives—economic, social, or environmentally sustainable development goals—are referred to as "sustainability agreements." However, under Article 101(1) TFEU, sustainability agreements would frequently be deemed anti-competitive. For instance, the agreed-upon sustainable measures may lead to a general increase in the cost of the things that people can buy or ultimately restrict their choices (Molina-Besch, K., & Pålsson, H. (2020).

In recent years, there have been numerous debates on the permissibility of these agreements under EU competition law and, if allowed, the appropriate manner in which they should be regulated. After a heated scholarly discussion, many National Competition Authorities (NCAs) and the European Commission have recognized the controversy surrounding sustainability agreements and Article 101 TFEU. They are currently collaborating to address this issue.

As an illustration, the Commission released the proposed revised Horizontal Guidelines (referred to as proposed Horizontal Guideline) in March 2022, which includes a section specifically focused on sustainability agreements (Ibáñez Colomo, P. (2021). This article aims to highlight the critical role of competition law interpretation towards achieving the EU's sustainability objectives such as Sustainable Development Goals (SDGs) and the EU Green Deal as well as related endeavors. In this paper we will discuss the current problems with the application of the law and offer a new approach based on a broader interpretation of paragraph 3 of the article 101 TFEU that would make market sustainability agreements easier to establish. This potential would largely depend on the nature of the agreements themselves.

To back the sustainability-based understanding of the EU competition law, the analysis will start by focusing with the purposes of the EU competition law, the consumer protection concept, and the Treaties pillars. The text is going to provide a descriptive picture of the recent advancements made in the area of sustainability agreements under the scope of EU competition law with particular reference to the suggested amendments contained in the Draft Horizontal Guidelines. The assessment will concentrate on the chances for the durability agreements to meet the sustainability goals, also on the fitness of the existing assessment systems. This talk will start with the analysis of the case of 'Chicken of Tomorrow Agreement', an example that triggered hot debate about whether sustainability advantages evaluation should be involved in competition law and whether or not competition law should allow sustainability agreements. In the present instance, we will cover the feats that are felt from evaluating sustainability using the current outlooks. The alternative view on the sustainability agreements is based on the principles that set the goals prior to the talks.

2. SETTING THE FOUNDATIONS FOR A SUSTAINABILITY-CONSISTENT INTERPRETATION OF EU COMPETITION LAW

EU competition law frequently reports its main objective as being the maintenance of consumer wellbeing. In the late 90s, the European Commission started a process of re-focusing the EU competition law onto the economics and efficiency. This involved modernizing the law and giving greater importance to economic analysis in competition cases. The method known as the 'more economic' approach has led to several advancements in the field, including a concentration on analyzing the impact of a certain practice on the market to ascertain if it is anti-competitive. Furthermore, the term 'effects on the market' pertains to the economic consequences that occur within the market. As a result, the method that is used is centered around the notion of consumer welfare, with a specific emphasis on achieving economic efficiency. Consumer welfare, defined narrowly as the capacity of consumers to gain advantages from reduced prices and increased production, has been positioned as the focal point of economic study (Whish, R., & Bailey, D. (2021).

The Commission's interpretation of Article 101(3) TFEU has consistently reflected a focus on the "more economic" approach. This clause serves as an exemption that can be utilized when the advantages outweigh the negative impact on competition caused by an agreement. Consumer detriment is commonly defined as the negative impact on consumers, which might manifest as increased prices, decreased production, limited product options, lower product quality, or restricted innovation. On the other hand, consumer benefit refers to the positive effects experienced by consumers, such as cheaper costs, increased production, expanded product options, and improved product quality. The Draft Horizontal Guidelines, while providing explanations about sustainability agreements, are primarily based on an economically-oriented analysis that focuses on the welfare of consumers (van der Zee, E. (2020).

Proponents of economic efficiency as the only role of competition law claim that it should only deal with matters concerning the economy and it should not involve subjects that have elements of arbitrariness and discretion, such as protection of public interest. Empirically, this approach has been widely adopted by the US since the 1970s and the EU since the end of the 1990s, but still faces continued debates about the objectives of competition law due to political and economical factors including inequality, populism, implementation of big tech companies, and climate change.

In the European Union, the prioritization of consumer welfare as economic efficiency has consistently faced additional difficulty due to the internal market mandate. The integration of the internal market has always been a fundamental aspect of EU competition law, and the importance of the single market is evident in numerous rulings of the Court of Justice of the European Union (CJEU) and decisions made by the Commission.

Moving on, Discussing policy maker Vestager`s recent position, she recognizes that fairness is core the EU competition law. Undoubtedly fairness itself can be integrated into the conservatively-influenced economic approach. "A fair share approach," for example, can be observed via the consideration of "sharing of efficiency gains with the maximization of consumer welfare under the Article 101 (3) TFEU. Though most of developed economies correspondingly balance their economics objectives in respect of this idea, the increased focus may appear to be an attempt to balance the competition law with society in order to jointly manage its mission and supplement the social function of the social market economy as stipulated by the society. Whether 'fairness' will be able to point the way for the gradual formation of competition law, or whether it will mostly help the Commission and the court to decide on competition enforcement, is not yet clear. (Steinbaum, M., & Stucke, M. E. (2020).

Currently, it appears that other potential aims of competition legislation are overshadowed by the primary objective of promoting consumer welfare. While Commissioner Vestager emphasized the importance of competition law in supporting the objectives of the Green Deal, she also stated that competition policy cannot take the forefront in making Europe environmentally sustainable. The rationale for this assertion is that competition legislation guarantees the presence of effective competition and consumer welfare, hence enhancing innovation, product quality, resource allocation efficiency, and other factors that contribute to sustainable development (Dejonghe, M. (2022).

Presently, lots of scholars consider the question of putting forward for people's wellbeing the objectives that are not only explained within the framework of narrow economic consumer welfare. Particularly, the observation centered on two major areas; sustainability aims and climate impact. However, the project is not limited to these areas. Guiding the concept of consumer welfare through narrow borders might be problematic amid negotiations about sustainability agreements made between parties under Article 101(3) TFEU. Such an approach would be hard to apply for "other than market-oriented" elements of benefits/interests which are shared by only some consumers different than those buying the products specifically. A majority of these people call for more advanced and up-to-date mass media that includes, among others, the products of modern film and television industries.

The TFEU provisions pertaining to competition law, specifically Article 101 and particularly Article 101(3) TFEU are formulated in a comprehensive manner and possess the capacity to accommodate evolving circumstances based on the interpretations provided by the Commission and CJEU. The articles do not explicitly endorse the notion that consumer welfare is only determined by lower prices, specifically the pricing of a particular commodity within its market. EU courts have not consistently followed this approach. In addition, the National Competition Authorities (NCAs) have not adhered to a stringent approach. Prior to the Commission addressing concerns related to competition law and sustainability, certain NCAs had already adopted their own distinct strategy in relation to the previous recommendations set by the Commission (Wouters, D. (2021).

The views (points) that are (is) put across in the literature on the long course is (are) the fundament of achieving the target/s of the EU competition law. Notably, these days, the green l optimal targets set by the EU law enforcement officials triggered the heated debate on the respective principles and rules of EU competition law. Nevertheless, without delving further into the argument, which is beyond the focus of this piece, I shall align with other colleagues in emphasizing the need for urgency about the climate issue and the imperative for prompt action.

Competition legislation should utilize all available means, and considering the growing influence of private entities, sustainability agreements should be a significant instrument. For the Treaties to be consistently interpreted in accordance with their 'constitutional' requirements, it would be necessary for it to be so.

One of the primary goals of EU law, according to the EU Charter of Fundamental Rights and the Treaties on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), is sustainability. First, according to Article 37 of the Charter, environmental quality and protection must be guaranteed in line with the sustainable development principle and incorporated into all EU policies (Półtorak, N. (2022).

According to Article 3(3) of the Treaty on the European Union (TEU), the European Union's objective is to develop an eco-friendly economic environment inside the European Union. As well, Article 3(5) of the TEU also claims that Union has responsibility not only for the European Union but also for the planet as a whole and that Union has to support principles of free and fair trade. In terms of implementation, Article 7 TFEU describes the EU as a unifying institution, which should act with all of its objectives in mind when planning its policies and activities. It is stated in Article 9 TFEU that health of the people should be a fundamental factor in the decision-making process of the Union when it formulates and puts into effect its net of policies and activities. Moreover, according to Article 11 TFEU of the Union environmental protection requirements should be included into the definitions and interpretations of all policies and activities, and dependent upon the goal of promotion of stable development. Such limitations have not dampened concerns that sustainability or other matters of public interests may be objectives of EU competition law; however, the heightened importance of environmental issues, especially because of the significance of climate change, cannot be ignored when dealing with the Treaties and Article 101 TFEU.

Therefore, the endeavor to achieve sustainability should not be opposed to the endeavor to promote consumer well-being. The issue may indeed stem from a limited comprehension of the notion of 'customer welfare' as a sole criterion for evaluation. We should reassess the rationale behind the limited focus on consumer well-being. Although it is easier to quantify and understand short-term pricing effects in practice, they should not be overemphasized due to their measurability and predictability. If the objective of competition legislation is to promote consumer welfare, then it should be integrated into a forward-thinking economic and legal framework, rather than being disconnected from reality.

3. ARTICLE 101(3) TFEU AND SUSTAINABILITY AGREEMENTS: CURRENT UNDERSTANDING IN THE EU

Article 101(3) TFEU prevails as the most successful and broadly accepted route of legalizing sustainability agreements in the context of EU competition law. According to Article 101(3) of the Treaty on the Functioning of the European Union (TFEU), agreements, decisions, or concerted practices that are deemed anti-competitive under Article 101(1) TFEU may be exempted if they meet the following criteria: A. They help to raise the productivity level of manufacturing or transportation by improving the progress (technical advancement) or by promoting economic achievements (efficiency gains). This is a guarantee that buyers get a piece of the cake that comes with such developments. To get the desired objectives, the conditions of the agreement are indispensable; 4. However, there still remains this healthy competition in the industry. In the case of sustainability agreements, the core of the research encompasses the first two objectives, which are firstly increasing efficiencies and secondly ensuring fair share. The subject at hand involves the question of whether "non-economic" benefits or frequently called sustainability benefits should be taken into account when assessing efficiency gains. So, what methods can be used to qualitatively measure these goals? What is definitely a 'fair share' for consumers, after all? Is one allowed to make evaluations of advantages that matter to the whole society or a different group of people who do not have to be customers but if they lower customer's welfareness, or benefits that will take place over the significant period of time? Here the European Commission presents how the concerns were approached in the earlier years and the corrections that follow in the draft guidelines (Campo Comba, M. (2022).

As the European Commission conforms to its recent discourse that focuses on the objectives of competition law and consumer/economic welfare, it has appeared to adopt a restrictive view of Article 101(3) with regards to environmental agreements. Pursuant to the Rules set by the Commission, especially the 2004 Guidelines on Exemption and the 2010 Guidelines on Horizontal Mergers, the estimation of efficiency gains, efficiency losses, and consumer welfare is performed. If the costs exceed the advantages, the agreement is usually considered as breaching EU competition law. It is already mentioned that competition law is against violating agreements or competitiveness on the basis of economic efficiency making no or little attention to non-economic purposes. The EC requires the users to be regarded as a collective body in every market and its repair, as a whole, is crucial. Besides the above mentioned directions, there are also instances where the Commission should demand public welfare (paragraph 85 of the Exemption Guidelines 2004). For example in the CECED (Conseil Européen de la Construction d'Appareils Domestiques) case the Commission examined the welfare advantages of individual washing machine consumers as well as the environmental gains for society as a result of the agreement among washing machine manufacturers for no longer producing the least energy-efficient models. On the other hand, the conclusion proved to be reached from a point of view that the users as part of the relevant market were fully rewarded. With such a narrow scope of compliance for such compensatory measures, and with the complete restoration of negative impacts as a mandatory requirement, then the space for environmental self-regulation agreements focused on sustainability dramatically lessens. (Dunne, N. (2020).

For the past decade, there is a considerable debate over the relationship between competition law and sustainability policies, which calls for the clarity of the rules on sustainability agreements and Article 101 TFEU of the Treaty on the Functioning of the European Union. Uncertainty about the anti-competitive nature of these agreements could deter companies to becoming involved with them. Not only are the NCAs and the European Commission acknowledging and refining the concept of sustainability agreements but they also refer to Article 101(3) of the TFEU. (Genovese, A., & Pansera, M. (2021).

Multiple NCAs implemented the enforcement measures even before the Commission's actions. The Dutch competition authority (ACM) is the driving force of this discourse. The ACM, the Dutch Authority for Consumers and Markets, has a lot of experience in the area of sustainability agreements, like the Energieakkoord (2013) and Chicken of Tomorrow (2015). The updated Dutch ACM Draft Guidelines on sustainability agreements, released on 26th of January 2021, clearly recognize that companies can jointly exert effort towards attaining the public sustainability goals. TFEU's Article 101(3) is interpreted by the ACM in a pragmatic and quite forward-looking way. Moreover, the HCC has been involved in the discussion on this issue and it has printed a staff discussion paper on sustainable development and competition law. Austrian competition law has recently been amended to incorporate a new sustainability exemption which shows Austria's dedication to carving its own niche.(Guidi, M. (2022).

The European Commission has assessed and appraised the Horizontal Guidelines at the European Union level. Subsequently, the Commission has released the updated Draft Horizontal Guidelines that are scheduled to take effect in January 2023. The updated recommendations include a dedicated section on sustainability agreements and address certain inquiries related to these agreements and Article 101(3) TFEU.

Chapter 9 of the Draft Horizontal Guidelines is specifically dedicated to sustainability agreements. Within this chapter, Section 9.4 specifically focuses on the examination of sustainability agreements under Article 101(3) of the Treaty on the Functioning of the European Union (TFEU). Efficiency benefits must be supported by evidence that is objective, tangible, and can be verified (paras 577-579). The importance is given to the indispensability requirement (the third requirement of Article 101(3)): parties must show that the agreement is reasonably required for the alleged sustainability advantages (paragraphs 580-587). When it comes to measuring efficiency improvements and ensuring a fair distribution to consumers, a thorough evaluation is necessary unless the situation is clearly evident (Malinauskaite, J. (2022).

The Draft Guidelines make a distinction between 'benefits of individual use value' and 'benefits of individual non-use value'. The former refers to the identical benefits that can arise from other agreements, such as price and quality, which in this particular scenario also lead to positive externalities. The Commission defines the latter as indirect advantages that arise from consumers' recognition of the influence of their sustainable consumption on others. These benefits are to be quantified using a willingness-to-pay approach. For example, in the guidelines, there is a case study called example 4. It discusses an agreement among furniture producers to create a 'green tree label' for furniture made from sustainably grown wood. This case requires an assessment of willingness-to-pay because the potential efficiencies are related to the improved sustainability of wood production and harvesting (Lopez-Becerra, E. I., & Alcon, F. (2021).

The Draft Guidelines mention 'collective benefits', which are benefits that impact a broader segment of society, regardless of individual consumer opinions. Efficiencies gained in distinct markets can be considered when two markets are interconnected, as long as the group of consumers impacted by the limitation and benefiting from the efficiency gains is largely identical (paragraph 602). When evaluating an agreement for sustainable cotton that aims to decrease the use of pesticides and water in its cultivation, the benefits cannot be deemed collective due to the lack of overlap between clothes consumers and the local residents of the cotton cultivation area.

As to the Draft Guidelines, such benefits are classified as 'individual non-use value benefits' and can only be taken into account if consumers are ready to pay for them (para 604). Furthermore, paragraph 606 outlines precise requirements for collective benefits. In this regard, information derived from publications issued by public bodies or renowned academic groups would be very valuable (Carius, F., & Job, H. (2021).

The last two scenarios involving advantages categorized as non-value use benefits and collective benefits are typically the contentious sustainability agreements, which are now being debated for their effectiveness and equitable distribution to consumers. Under the current amended standards, most sustainability agreements are not exempted under Article 101(3) TFEU, unless willingness-to-pay research demonstrates that consumers value the advantages enough to outweigh the negative effects on competition. In the following part, we will examine whether this strategy is sufficient to guarantee that sustainability agreements can effectively accomplish sustainability goals.

4. ACHIEVING SUSTAINABILITY OBJECTIVES THROUGH SUSTAINABILITY AGREEMENTS IN EU COMPETITION LAW

4.1. The Potential of Sustainability Agreements to Achieve Sustainability Objectives:

This section examines the efficacy of sustainability agreements in attaining sustainability goals, beginning with the contentious Chicken of Tomorrow case. This case sparked intense discussions on whether competition law should permit or prohibit such agreements, as well as how to evaluate the "sustainability benefits" they offer. In 2014, the Dutch competition authority (ACM) deemed the self-regulation agreement known as the Chicken of Tomorrow ('Kip van Morgen') case to be anti-competitive. The ACM's review of the Chicken of Tomorrow case concluded that the efforts to enhance chicken welfare were insufficient, and so the agreement did not qualify for the national comparable exception of Article 101(3) TFEU. This particular instance from 2014 is particularly noteworthy for our topic due to two primary factors. In 2020, the ACM conducted a comparison between the animal welfare measures specified by the agreement and the improvements obtained by other private initiatives that comply with competition law. The purpose was to see if the same objectives were accomplished through alternative methods. Furthermore, the updated Draft Horizontal Guidelines suggest that the Commission would now adopt a comparable interpretation to deem such an agreement as anti-competitive. The ACM's assessment, together with the subsequent 2020 Memorandum, is further studied. In the Memorandum, the ACM concludes that chicken welfare was more effectively enhanced through private initiatives, so confirming that the 'anti-competitive' arrangement was unnecessary (Lelieveldt, H. (2020).

In 2014, the ACM determined that the sustainability agreement made between producers and retailers to enhance chicken welfare was considered anti-competitive, as stated in Section 6, paragraph 3 of the Dutch Competition Act, which is the Dutch equivalent of Article 101(3) TFEU. The ACM research primarily focused on two key factors: efficiency improvements and fair share. To assess whether the benefits of the agreement outweighed the negative impact of competition limitation, the study conducted a willingness-to-pay analysis. Based on the willingness-to-pay test, it was found that consumers were not willing to pay the higher price for the suggested improvements. Consequently, the ACM determined that the current design of the sustainability arrangements did not provide any net advantages for consumers and were thus considered anti-competitive. Based on the existing Draft Horizontal Guidelines, it seems that the Commission will now adopt a comparable line of reasoning. The chicken welfare measures can be considered as indirect advantages, similar to the concept of a 'green tree label' for furniture built from sustainable wood as mentioned in the previous section's recommendations. In these instances, the Commission likewise relies on the willingness-to-pay evaluation as the sole method to determine whether the advantages of such an arrangement would surpass the negative effects on competition as seen by consumers (Comba, M. C. (2022).

Years later, in a Memorandum released in 2020, the ACM assessed the situation. The ACM examined the welfare of chicken sold in supermarkets in this report and came to the conclusion that current standards are higher than those mandated under the Chicken of Tomorrow agreement. According to the report, achieving the stated goals for animal welfare could have been accomplished without the anti-competitive agreement. The memo makes a comparison between the parameters of animal welfare specified in the Chicken of Tomorrow agreement and the circumstances that exist in 2020. The Better Life Label, which has one, two, or three BLK stars, and the Organic chicken label are examples of market-wide certification labels. Other non-anti-competitive private regulation initiatives are the chicken welfare initiatives of specific supermarkets, such as Ah Chicken from Albert Heijn and NieuweStandaard Kip from Jumbo. The comparison is made between the conditions for the welfare of chickens under the Chicken of Tomorrow and these other initiatives. The ACM comes to the conclusion that these efforts either satisfy or surpass the requirements of the Chicken from Tomorrow, with a few notable exceptions. Nonetheless, a few crucial points need to be mentioned. There is an unknown share), which may have concurrently engaged in the higher standards projects in addition to the Chicken of Tomorrow requirements (indicating that a company's competitive strategy can still include improved animal welfare). Information about a number of topics (see the lifespan or ongoing darkness of certain supermarket projects), and some conjecture is made. Furthermore, the analysis appears to overlook the fact that this is only a portion of the chicken that the supermarkets offer, whereas the Chicken of Tomorrow initiative included all of the chicken products that the participating supermarkets (high market share) offered. These supermarkets could have simultaneously participated in the higher standards initiatives in addition to the Chicken of Tomorrow standards, demonstrating that a company's competition strategy can still include improving animal welfare (Hey, T., & Trefethen, A. (2020).

Furthermore, the ACM acknowledges that it is impossible to predict the potential outcome of the agreement being approved, and it cannot be dismissed that chicken welfare may have improved to a greater extent or at an earlier time. Moreover, it must be disregarded that the ACM's ruling may have had a deterring impact on the animal welfare practices of the implicated corporations. Furthermore, the deterrent impact could potentially discourage other companies from pursuing a similar strategy in relation to different sustainability goals. Furthermore, several reasons may have influenced the circumstances that resulted in the enhancement of the measures suggested in the agreement, including the increasing recognition of animal welfare issues within society, as well as the use of sustainability as an effective marketing strategy (Huang, F., Kwak, H., & An, J. (2023, April).

Although private initiatives, such as voluntary market labels or individual efforts, can lead to improvements, as demonstrated by the ACM in this study, the presence of these initiatives does not exclude the possibility of sustainability agreements. Sustainability agreements are a distinct mechanism with a unique scope that might yield additional benefits and outcomes. The compulsory nature of self-regulation agreements and their extensive scope within the industry have the capacity to generate broader outcomes and exert a more substantial influence in the market, since they enforce obligatory minimum standards for all parties involved. As previously stated, the Chicken of Tomorrow initiative had an impact on all chicken items sold by the supermarkets that participated in the program. These retailers also held a significant portion of the market share. Furthermore, this agreement did not prevent participants from engaging in volunteer activities that have more stringent standards (Campo Comba, M. (2022).

The Chicken of Tomorrow case sparked a vigorous discussion over the incorporation of sustainability agreements inside Article 101(3) TFEU, which persists to this day. Upon evaluating the efficiency gains of the agreement, the ACM determined that the stated objectives of the agreement were insufficient. Through a willingness-to-pay analysis, it was found that consumers were only willing to pay a minimal amount for the measures outlined in the agreement. Furthermore, the additional costs associated with these measures exceeded the amount consumers were willing to pay. The crucial component is the precise measures and objectives outlined in the agreement. The assessment of whether the aims of sustainability agreements are sufficient is vital, and it is necessary to determine if the existing interpretations of the regulations adequately consider the importance of these objectives.

4.2. Ensuring the Potential of Sustainability Agreements within the Current Competition Law Rules

In competition law, the determination of whether those aims are sufficient to satisfy the public interest aim is made by evaluating whether the benefits of sustainability to consumers outweigh the harm produced by the restriction of competition. The emphasis is on agreements that fall outside the scope of Article 101(3) TFEU, unless the willingness to pay study can demonstrate that consumers value the benefits enough to offset any harm to competition. This includes sustainability agreements that have collective benefits, typically environmental damage agreements, which aim to address the market failure caused by unsustainable consumption and its negative impact on others.

Applying Article 101(3) TFEU generally presents two major challenges: Firstly, there are several obstacles when evaluating the advantages of sustainability in order to determine improvements in efficiency: By employing a direct evaluation approach, such as the willingness-to-pay method utilized by the ACM in the Chicken of Tomorrow case and the one selected by the Commission to evaluate 'non-value use benefits' or 'indirect benefits', it becomes feasible to assess goods that would otherwise pose challenges in terms of valuation. Nevertheless, this approach presents challenges. For example, the outcomes can be affected by the selected format of a survey or the phrasing of the inquiries. Furthermore, research has demonstrated that the real willingness-to-pay often diverges from the expressed willingness-to-pay due to the limited rationality of consumers. There is a possibility of biases or lack of understanding when weighing the future benefits against the immediate expenses, as well as when evaluating the preferences of customers for a trade-off of impacts. The Draft Horizontal Guidelines from the Commission acknowledge that implementing such an approach presents challenges (para 598) (Kivi, N. (2022).

There are several assessment techniques that can be employed. Nevertheless, it has been shown that the correlation between the expenses incurred to avoid negative externalities and the real loss in utility is quite weak. Consequently, the actual harm caused by externalities may deviate from the estimated avoidance costs.

In addition to the inherent drawbacks of a particular approach, the presence of multiple methods poses a practical challenge as different evaluation methods may be employed to address various sustainability objectives. Uncertainties develop when the chosen approach affects the variability of the results, making the assessment fragile. Furthermore, it is not always feasible to accurately measure the economic value of all components of sustainability objectives, such as the assessment of intergenerational equity. It is crucial to consider the constitutional requirements when integrating sustainability policies into the implementation of EU policies. The principle of proportionality should be applied to assess the importance of the values at stake. Conducting a quantitative evaluation of the advantages gained via sustainability agreements is a challenging endeavor, and the associated uncertainties may discourage businesses from participating in such arrangements. Specific standards are outlined in the amended Draft Horizontal Guidelines to guarantee the correctness of the willingness-to-pay investigations that the enterprises concerned present. But given the unknowns surrounding it, we can question if this is a sufficient instrument to effectively use the potential of such agreements to accomplish particular goals (Bibri, S. E. (2021).

Furthermore, in order to apply the exception of Article 101(3) TFEU, it is necessary that the users of the product receive an equitable portion of the advantages derived from the agreement. Put simply, consumers should receive compensation for the negative effects resulting from the lack of competition, such as higher prices and less product options. There has been extensive debate on whether the requirement solely pertains to benefits for users within the relevant market of the product and if complete compensation for them is essential, or if the scope can be more expansive. This matter is crucial within the framework of sustainability agreements, as the adverse side effects that a sustainability agreement seeks to prevent, or the advantages it tries to achieve, will typically have an impact on society as a whole (such as reduced pollution, improved health, etc.) (van der Zee, E. (2020).

The Commission evaluated both the individual economic benefits for washing machine users and the collective environmental benefits for society as a whole in the CECED case, which involved the agreement between washing machine manufacturers to cease production of the least energy-efficient washing machines. Nevertheless, the result was predicated on the finding that market participants received full compensation. The recently amended Draft Guidelines reaffirm the CECED case's perspective, contrary to previous years when it appeared that the Commission's more pragmatic approach would adopt a limited one. When parties present evidence of the benefits they claim, they must consider the overall advantages for the group. This includes defining who will benefit, showing that the consumers in the relevant market largely overlap with the beneficiaries, and demonstrating how much of the collective benefits outside of the relevant markets are received by the consumers of the product in the relevant market. Evidence derived from reports issued by public agencies or established academic groups will carry significant significance, as stated in paragraphs 606 and 607. The Commission's amended Draft Horizontal Guidelines (example 5, para 621) present a case that closely mirrors the circumstances and findings of the CECED case (Monti, G. (2020).

Similarly, the Dutch ACM, in the Draft Guidelines on

Sustainability Agreements (second draft version, January 2021), argues that when it comes to agreements addressing environmental damage, it is important to consider the benefits for individuals other than the users. This is because the demand for the products in question, which is the root cause of the problem, has a societal impact. Therefore, it may be justifiable to not fully compensate users for the harm caused by the agreement. According to the ACM, these users receive equivalent advantages to those of society. In order for the more comprehensive interpretation of environmental damage agreements to be valid, the ACM stipulates in the Draft Guidelines that the agreement must effectively contribute to the achievement of an international or national standard or specific policy aim (Campo Comba, M. (2022).

Based on these readings, it appears that out-of-market advantages can be included as long as users of the relevant market receive a significant portion of those benefits, but this only applies to agreements related to environmental damage. However, this does not apply to other types of sustainability agreements, specifically those that are considered by the Commission to provide 'indirect benefits' in the form of individual non-use value benefits. In these cases, the analysis of willingness-to-pay is focused on the consumers of the particular product, and the assessment is typically restricted to consumers within the relevant market. Nevertheless, we believe that this technique can be used to sustainability agreements in a broader sense. The ACM, in its justification for environmental damage agreements, acknowledges the duty to enforce competition rules in a manner that aligns with the objectives of the Treaty. These arguments do not necessitate a differentiation between environmental damage agreements and other agreements, but they can justify the implementation of the comprehensive 'fair share' interpretation for both scenarios (Dolmans, M. (2020).

Considering this, along with the challenges associated with quantitatively evaluating sustainability advantages (particularly given the challenges and debated effectiveness of the willingness-to-pay approach), it may be worthwhile to explore a more extensive use of qualitative assessment. Greater emphasis should be given to the fact that specific agreements are intended to pursue predetermined objectives based on international or national standards, or specific policy goals, which are not obligatory for the enterprises participating. Although the benefits resulting from the agreement must be founded on existing studies and be objective, it is also important to prioritize the objectives of the agreement. The sustainability objectives pursued by contemporary society are broadly outlined in the SDGs and Paris Agreement, along with its associated strategies. Furthermore, at a more regional level, these objectives are further defined in the EU Green Deal and its corresponding policies. A wider application of a qualitative assessment could be encouraged when the agreement aims to achieve predetermined public goals, and where the benefits of the agreement can be objectively supported (Kakadellis, S., & Harris, Z. M. (2020).

This strategy could be particularly valuable when the predetermined goals (and the necessary actions to achieve them) are unlikely to be accomplished in the foreseeable future through governmental legislation. As an illustration, the European Commission has announced, in response to a European Citizens' Initiative (ECI), its intention to gradually eliminate and ultimately ban the practice of caged animal husbandry. As part of the farm to fork strategy, the Commission will modify the current animal welfare legislation with the goal of implementing it by 2027. The European Food Safety Authority will enhance the current scientific evidence to ascertain the requirements for eliminating and banning cages. The Commission will evaluate the socio-economic and environmental consequences of these measures, as well as the advantages for animal welfare, through an impact assessment. The financial obstacles associated with such a change for farmers are significant. In this scenario, a sustainability agreement could serve as a means to initiate the improvement of animal welfare standards and gradually eliminate the use of cage systems for one of the animals under consideration. This agreement would be based on predetermined objectives and supported by forthcoming studies, which would provide justification for these measures and their impact on consumers, including potential price increases. These campaigns can help raise consumer awareness and potentially pave the way for future public regulations, which may or may not be implemented soon.

Another instance may be observed in the ACM's Draft Guidelines on sustainability agreements, which contemplate a comparable alternative in the context of environmental damage agreements. It pertains to the specific policy objective of the government's plan to diminish CO_2 emissions on Dutch territory by a certain percentage (Y%) by a particular year (X). It is widely recognized that private players can play a significant role in enhancing regulatory efforts.

Therefore, establishing a provision that allows for exemptions in cases where agreements are formed to achieve predetermined goals (based on international or national standards, or specific policy objectives that are not obligatory for the participating companies) and to guarantee tangible advantages, can enhance the effectiveness of self-regulation agreements within the framework of competition law. An evaluation conducted by the Commission or National Competent Authorities (NCAs) would still be necessary, but it can focus on qualitative aspects rather than a more rigorous and complex quantitative evaluation of efficiency improvements.

5. CONCLUSION

EU competition legislation should fully consider sustainability factors and has the capacity to do so.

Although there are ongoing debates about the objectives of competition law, it is evident that the Treaty foundations mandate that EU policies consider sustainability factors. If the primary aim of competition law is to protect consumer welfare, then this notion should be interpreted within a forward-thinking economic and legal framework that remains grounded in reality. Therefore, it is necessary to make efforts to utilize the existing mechanisms of competition law in order to promote sustainability. Sustainability agreements are a type of instrument.

Article 101(3) of the document The Treaty on the Functioning of the European Union (TFEU) is currently the most viable approach to enable the inclusion of sustainability agreements within the framework of EU competition legislation. The recent efforts by the NCAs and the Commission to provide clarity on the compatibility of sustainability agreements with Article 101(3) TFEU, after prolonged scholarly debates and repeated requests for clarification, are commendable. Undoubtedly, it was crucial to establish legal certainty in this matter to avoid discouraging businesses from engaging in these agreements. The Draft Horizontal Guidelines permit agreements that include benefits that are considered indirect or non-value use, provided that willingness-to-pay research demonstrates that consumers attribute sufficient value to these benefits to offset any harm to competition. In addition, they permit the inclusion of agreements that encompass collective advantages, provided that specific criteria are met.

The 'Chicken of Tomorrow' case, as examined by the Dutch ACM, employed a willingness-to-pay analysis. This study revealed that consumers did not place a high value on the animal welfare measures resulting from the agreement. Furthermore, they were not inclined to pay the additional cost associated with these measures. Therefore, the Dutch ACM determined that the methods and aims sought by the sustainability agreement did not meet the criteria to be designated an exception under Article 101(3) TFEU. This case has generated significant uncertainty regarding the meaning of Article 101(3) and the suitability of the willingness-to-pay technique for assessing the advantages of such agreements. In 2020, the Dutch ACM released a memo that emphasized the enhancements introduced by private activities, such as voluntary market labels or individual efforts. Nevertheless, the extensive market potential of sustainability agreements and the enforcement of obligatory minimum standards for all players would probably generate a more significant influence in the sector and result in broader outcomes. Essentially, the crucial aspect is in the goals and criteria enforced by the agreement. Nevertheless, there has been doubt over the accurate evaluation of the aims and measures of the agreements, such as by the utilization of the willingness-to-pay technique.

Although the willingness-to-pay method presents challenges, such as those associated with consumer behavioral research, it is not always feasible to economically measure all aspects of sustainability objectives. The assessment of the advantages of environmental damage agreements through environmental damage prices is not without difficulties, even from a mathematical perspective. The ambiguities surrounding the quantitative evaluation of advantages derived from sustainability agreements may discourage enterprises interested in entering into such arrangements. The extent or range of the advantages is also a topic of contention. Out-of-market advantages may be considered if consumers in the relevant market obtain a significant portion of those benefits. However, this only applies to agreements defined as 'collective benefits' such as environmental damage settlements. However, when it comes to agreements that provide individual non-use value benefits, the examination of willingness-to-pay is focused on the consumers of the particular product, and the evaluation is typically restricted to the customers in the relevant market.

This article suggests an approach to address these challenges by focusing on sustainability agreements that aim to achieve specific objectives based on international or national standards, or policy objectives that are not mandatory for the companies involved. To address the challenges associated with a quantitative evaluation, it may be possible to exclude such evaluation when the agreement in question aims to achieve predetermined objectives based on international or national standards or specific policy goals. These objectives should have clear and measurable benefits that are supported by existing studies. Instead of relying on quantitative measures, a qualitative assessment can be used. This exception could enhance the prevalence of these specific agreements over other sustainability agreements and contribute to the realization of the potential that self-regulation agreements hold within the framework of competition law.

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