

HELLENIC COMPETITION COMMISSION



COMPETITION LAW
SUSTAINABILITY

DRAFT STAFF DISCUSSION PAPER ON SUSTAINABILITY ISSUES AND COMPETITION LAW

Staff Discussion Paper

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1 Introduction

1. This discussion paper aims to provide some insights on the concept of sustainable development within the context of competition law and policy. It makes suggestions as to the different ways sustainability concerns may be taken into account in competition law enforcement and presents possible approaches to address sustainability concerns under Articles 101(1), 101(3), 102 and 106 of the TFEU with the aim to foster sustainable development goals while also curtailing anticompetitive practices. For this purpose, it explores recent literature and relevant cases at the national and the European level and offers some recommendations for public discussion.

1.1 Sustainable development and competition law: managing the conflicts

The principle of sustainable development

2. As defined in the 'Brundtland Report' (Common Future)¹, published in 1987 by the World Commission on Environment and Development (WCED), "sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs". The 'Common Future' report developed guiding principles of sustainable development and established the benchmark for the future discussions on sustainability. The essence of the concept of sustainable development is that it entails a balance of the needs of the current generations and those of the future generations taking into account the environmental, societal and economic limitations we face.

3. In 2007 EU member states agreed to reduce greenhouse gas emissions by at least 20% and to achieve a 20% share of renewable energies in EU energy consumption by 2020. The European Commission (EC)² aimed to achieve the '20-20-20' targets, including a 20% reduction in EU greenhouse gas emissions from 1990 levels, a rise in the share of EU energy consumption produced from renewable resources to 20% and a 20% improvement in the EU's energy efficiency³. The Sustainable Development Goals (SDGs)⁴ adopted by the General Assembly of the United Nations (UN), in September 2015, defined broader development targets for both developed and developing countries, encompassing all sustainability dimensions (economic, financial, institutional,

¹ The report entitled 'Our common future' and came to be known as the 'Brundtland Report' after the Commission's chairwoman, Gro Harlem Brundtland.

² Commission of the European Communities (2008). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 2020 by 2020 – Europe's climate change opportunity, COM 2008 30 final. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0030&from=EN>.

³ P. Fotis & M. Polemis, 'Sustainable development, environmental policy and renewable energy use: A dynamic panel data approach', *Sustainable Development*, 2018, 26, 726–740.

⁴ SDGs: 1: No Poverty, 2: Zero Hunger, 3: Good Health and Well-being, 4: Quality Education, 5: Gender Equality, 6: Clean Water and Sanitation, 7: Affordable and Clean Energy, 8: Decent Work and Economic Growth, 9: Industry, Innovation and Infrastructure, 10: Reduced Inequality, 11: Sustainable Cities and Communities, 12: Responsible Consumption and Production, 13: Climate Action, 14: Life Below Water, 15: Life on Land, 16: Peace and Justice Strong Institutions, 17: Partnerships to achieve the Goal.

social and environmental). This set of 17 goals addresses global challenges, including those related to poverty, inequality, climate change, environmental degradation, peace and justice, which are all part of the '2030 Agenda for Sustainable Development'⁵. The SDGs, along with the Paris Agreement on Climate Change⁶, have put in place a global framework for international cooperation on sustainable development.

4. As outlined in the reflection paper 'Towards a Sustainable Europe by 2030'⁷ published in 2019⁸, the EU has fully committed to the implementation of the 2030 Agenda through its internal and external policies. The EU's action plan includes the transition to a circular economy, ensuring sustainability from farm to fork, building a sustainable low-carbon and low-input economy, increasing resource efficiency, decreasing energy consumption, reversing the loss of biodiversity and natural resources, limiting climate change and ensuring a socially fair transition.

5. The EU has in recent years made significant efforts to translate the 'central project' of sustainability to a concrete legal framework that enables the implementation of sustainability objectives in all EU policies and actions, affecting both the public and the private sector. One could infer from these the rise of a principle of sustainable development that should be taken into account in the enforcement of various areas of EU law.

6. In particular with regard to the private sector, the EU has provided incentives for the channelling of capital flows towards sustainable investments ('sustainable finance') through the establishment of a set of harmonized criteria for determining whether an economic activity qualifies as environmentally sustainable in order to remove and prevent the future emergence of barriers to such projects.⁹ Although these criteria take a narrower perspective on sustainability than the broader sustainability objectives put forward by the European Commission's 'Sustainable Europe' Agenda, and focus primarily on environmental sustainability, they may also serve to determine sustainability concerns in competition law. They also show that it is possible to develop operational definitions of sustainability values that may work for other areas of public policy than just for private investment projects.

7. The public health crisis resulting from the pandemic of Covid-19, climate change and environmental emergencies, the rising inequalities, the fact that 'the world is quickly moving towards several tipping points'¹⁰, make the full attainment of the SDGs by 2030, a significant challenge for public authorities

⁵ See <https://sustainabledevelopment.un.org/post2015/transformingourworld>. For the basic measures of the '2030 Agenda for Sustainable Development' see, also, M. Polemis & P. Fotis, 'European Commission's Energy and Climate Policy Framework' in M. Shahbaz & D. Balsalobre (eds) *Energy and Environmental Strategies in the Era of Globalization*, Green Energy and Technology (Springer Editions, 2019).

⁶ To address climate change, countries adopted the Paris Agreement to limit global temperature rise to well below 2 degrees Celsius.

⁷ Available at: https://ec.europa.eu/info/publications/towards-sustainable-europe-2030_en

⁸ European Commission, Reflection Paper Towards a Sustainable Europe by 2030 (March 2019), available at https://ec.europa.eu/info/publications/towards-sustainable-europe-2030_en.

⁹ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, [2020] OJ L 198/13, recital 12.

¹⁰ European Commission, Reflection Paper Towards a Sustainable Europe by 2030 (March 2019), p. 10.

worldwide. As '(t)he SDGs are designed to be indivisible'¹¹, it becomes crucial to take action across all the various interconnected levels of the economy and society.

8. This puts emphasis on the need for 'policy coherence', which is 'a critical condition to ensure that we can deliver on the SDGs and ensure long-term green and inclusive growth for the EU'.¹² There are various 'interlinkages between the different sustainability challenges and opportunities', and coherence between different policy areas, sectors and levels of decision-making is essential.¹³ This may be better operationalized through the form of 'thorough impact assessments' that may facilitate any 'trade-offs between the economic, social and environmental policy objectives that need to be minimized and mitigated'.¹⁴ As with all other areas of law, EU competition law should take stock of these developments and contribute to this economic and organizational transition¹⁵.

9. Broader sustainable development objectives are firmly enshrined in the EU Treaties. The economic, social and environmental aspects of sustainable development are highlighted in Article 3 (3) of the Treaty on European Union¹⁶. Article 11 of the Treaty on the Functioning of the European Union (TFEU), refers to an effective incorporation of the requirements of environmental protection in policies and measures with the aim to promote sustainable development¹⁷. Article 7 TFEU¹⁸ sets a framework for 'consistency' between EU policies and activities and all its objectives, which is profoundly linked to the principle of policy coherence that is essential for the attainment of SDGs¹⁹. Article

¹¹Ibid. 29.

¹²Ibid. 16.

¹³Ibid., 29.

¹⁴Ibid.

¹⁵As commissioner Vestager emphasized at the Brussels Sustainability Conference held in 2019, and co-organised by the chairman of the HCC I. Lianos in his academic capacity, "*every one of us-including competition enforcers- will be called on to make a contribution to that change*".

¹⁶Art. 3 (3) TEU: "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance...*".

¹⁷Art. 11 TFEU: "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*". This article produces some binding effects. See, for instance, concerning Article 6 TEC (now Article 11 TFEU), the Opinion of AG Jacobs in Case C- 379/ 98, *Preussen Elektra* [2001] ECR I- 2099, para 231: 'Article 6 is not merely programmatic; it imposes legal obligations' and the Opinion of AG Gelhoed in Case C- 161/ 04, *Austria v Parliament and Council* [2006] ECR I- 7183, paras 59- 60, noting that Article 6 TEC 'cannot be regarded as laying down a standard according to which in defining Community policies environmental protection must always be taken to be the prevalent interest', but '[a] t most (this provision) is to be regarded as an obligation on the part of the Community institutions to take due account of ecological interests in policy areas outside that of environmental protection strictosensu'. Compare with the position of AG Cosmas in Case C- 321/ 95 *Greenpeace* [1998] ECR I- 1651, suggesting that the integration principle should have some form of direct effect. For a discussion, see T Schumacher, 'The Environmental Integration Clause in Article 6 of the EU Treaty: Prioritising Environmental Protection' (2001) 3 Environmental Law Review²⁹.

¹⁸Art. 7 TFEU: "*The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers*".

¹⁹As emphasized in para 7 of the Annual Report on Competition Policy (2018/2102(INI) by the Committee on Economic and Monetary Affairs of the European Parliament: "*the fact that competition rules are treaty based and, as enshrined in Article 7 of the TFEU, should be seen in the light of the wider European values underpinning Union legislation regarding social affairs, the*

13(1) TEU also provides that the EU institutional framework ‘shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions’, which provides a broader interpretative guidance for the implementation of all areas of EU law, including competition law. One may distinguish between situations of lateral conflict which may occur because competition law enforcement can jeopardize the aims followed by these various regulatory tools, from what we can call situations of regulatory osmosis, that is, the absorption of regulatory aims in the enforcement of competition law. This process may occur as a result of the pressure to interpret and enforce competition law principles in congruence to the aims and the structure of the entire legal system to which competition law is integrated. A competition authority or a judge enforcing competition law should strive to interpret the law in accordance to the broader moral and legal principles undergirding the legal system.

10. EU competition law is therefore closely embedded in a constitutional framework. For instance, as previously noted, Article 11 imposes obligations to all EU Institutions to ‘integrate’ environmental considerations when applying EU’s policies and activities (including competition policy) upgrading the sectorial, environmental specific provisions of the Treaty of Amsterdam to horizontally applicable provisions²⁰. Article 37 of the EU Charter of Fundamental Rights stipulates that “(a) high level of environmental protection and the 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” (emphasis added). The broader framework of the principle of “social market economy” also provides some broad interpretative guidelines that may engage with some aspects of the sustainability principle, in particular its social dimension. Indeed, article 3(3) TEU provides that the Union shall establish an internal market with the goal of achieving ‘a highly competitive social market economy’, aiming at full employment and social progress.²¹ Competition law in the EU is inexorably linked to the aim of establishing a ‘social market economy’.

11. Greece has committed to implement the European Green Deal and all the UN Sustainable Development Goals.²² According to the estimations of the interim report of the Commission of experts (Pissarides Commission) set to draw a Growth plan for the Greek economy, which was published in July 2020, Greece lags behind most of the other EU member states, regarding the implementation of the European Green Deal Goals for recycling and the circular economy, as well as energy efficiency²³ and significant progress needs to be made in order to attain the aims of National Plan for Energy and the Climate (Εθνικό Σχέδιο για

social market economy, environmental standards, climate policy and consumer protection; takes the view that the application of EU competition law should address all market distortions, including those created by negative social and environmental externalities”.

²⁰ On the scope of Article 11 see J. Nowag, ‘The Sky is the Limit. On the Drafting of Article 11 TFEU’s Integration Obligations and its Intended Reach’ in S Sjafjell and A Wiesbrock (eds), *The Greening of European Business Under EU Law: Taking Article 11 TFEU Seriously* (Routledge 2014).

²¹ The concept of “social market economy” replaced the expression “open market economy with free competition” in former Article 4(1) TEC.

²²Pissarides Commission, Plan for Growth for the Greek Economy (Interim Report, July 27, 2020), available at <https://government.gov.gr/schedio-anaptixis-gia-tin-elliniki-ikonomia-endiamesi-ekthesi/>, p.32.

²³ Ibid, p. 33-34.

τηνΕνέργεια και τοΚλίμα), published in December 2019.²⁴ In particular, the Pissarides Commission suggests a Green Growth path for the transition of the economy, in particular by expanding the circular economy, taking actions to tackle climate change and ensuring biodiversity and a sustainable environment.²⁵Environmental protection in Greece is indeed a constitutional obligation of the State. Article 24 of the Greek Constitution, stipulates that “[t]he protection of the natural and cultural environment constitutes a duty of the State and the right to every person. The State is bound to adopt special preventive or repressive measures for the preservation of the environment in the context of sustainable development”²⁶.Climate emergency, in particular as it may affect social peace and the general interest could also fall within the scope of the provisions of Article 106 of the Constitution according to which the State shall plan and coordinate economic activity in the Country, aiming at safeguarding the economic development of all sectors of the national economy and take all necessary measures to utilize all sources of national wealth. Such constitutional duties to act have been found in other jurisdictions in the EU legally binding and the government can be held legally accountable for not taking sufficient action to prevent foreseeable harm, also in the long term, in view of the threat of climate change.²⁷

12. It has been argued by some that competition law may inhibit ‘socially responsible collaboration’ between competitors, in particular in order to tackle global environmental problems, such as, for instance environmental certification or ethical standards for production and agreements to preserve natural resources from overharvest and waste.²⁸ These claims of inherent conflict between competition law and public-interest oriented collective business initiatives are of course as old as competition law/antitrust exists²⁹. In any case, they have led to the development of various doctrines and tools in competition law so as to offer the necessary flexibility to achieve such public interest objectives, while at the same time preserving a degree of residual competition in markets to the benefit of consumers and the greater public.

²⁴National Plan for Energy and the Climate, Government Gazette, B 4893/31.12.2019.available at https://ec.europa.eu/energy/sites/ener/files/el_final_necp_main_en.pdf.

²⁵Pissarides Commission, p. 45.

²⁶ See official translation by Xenophon Pararrigopoulos and StavroulaVassilouni, *The Constitution of Greece, As revised by the parliamentary resolution of May 27th 2008 of the VIIth Revisionary Parliament* (Athens Hellenic Parliament editions, 2008) p 42.

²⁷ See, for instance, the recent judgment of the Dutch Supreme Court in its *Urgenda* judgment: Supreme Court of the Netherlands, 20 December 2019, ecli:NL:HR:2019:2006, English translation ecli:NL:HR:2019:2007. The Dutch Supreme Court relied on the obligation of the State to protect its residents' right to life (Article 2 of the European Convention on Human Rights – ECHR) and right to family life (Article 8 ECHR). It also noted that there is a serious risk that the threat of climate change will affect the current generation of inhabitants of the Netherlands who may suffer loss of life or a disruption of family life or both.

²⁸ See, most recently, I Scott, ‘Antitrust and Socially Responsible Collaboration: A Chilling Combination?’ [2016] 53 American Business Law Journal 97. The private sector complies to various national and international regulations regarding consumer protection, food safety and quality, imposing, for instance, the traceability of food, feed, at all stages of production, processing and distribution by establishing standards (eg organic agriculture ISO-9000) and specific codes of conduct managed by industry associations formed by competing suppliers.

²⁹ Similar arguments were made with regard to the net social benefits of an output-reducing monopoly in the presence of negative externalities, such as the extinction of animal species: see, C W Park, ‘Profit Maximization and the Extinction of Animal Species’ [1973] 81 *The Journal of Political Economy* 950.

13. This discussion has recently expanded to tackle the way competition law may address sustainability concerns.³⁰ In this context, issues to consider include:

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

14. This debate must take into account the parallel transition to new business models oriented to sustainability aims (as part of the broader shift towards corporate social responsibility), in a period characterized by disruptive innovation, important changes to consumers' and business' behaviour as a result of the Covid-19 pandemic and the looming economic crisis. It has been reported that competition law may have been a barrier to sustainability initiatives in the UK grocery sector, although it is unclear if these difficulties resulted more from the perception by stakeholders of what competition law mandated than from what can be the real scope of competition law intervention³¹. In any case, even

³⁰ See, among others, M.W. Gehring, Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law, (2006) 15(2) Review of European Community & International Environmental Law 172; S. Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press, 2011); J. Nowag, *Environmental Integration in Competition and Free-Movement Laws* (OUP, 2016); A. Gerbrandy, Solving a Sustainability-Deficit in EU Competition Law, (2017) 40(4) World Competition 539; G. Monti & J. Mulder, Escaping the Clutches of EU Competition Law Pathways to Assess Private Sustainability Initiatives, (2017) 42(5) European Law Review 635; M. P. Schinkel and Y. Spiegel, 'Can collusion promote sustainable consumption and production?' (2017) 53 International Journal of Industrial Organization 371; E. Loozen, Strict competition enforcement and welfare: A constitutional perspective based on Article 101 TFEU and sustainability, (2019) 56(5) Common Market Law Review 1265; K. Coates & D. Middelshulte, *Getting Consumer Welfare Right*: the competition law implications of market-driven sustainability initiatives, (2019) 15(2-3) European Competition Journal 318; J. Nowag, Competition Law's Sustainability Gap? Tools for an Examination and a Brief Overview (November 1, 2019). Lund University Legal Research Paper Series, October 2019, available

at SSRN: <https://ssrn.com/abstract=3484964> or <http://dx.doi.org/10.2139/ssrn.3484964>; T. Ferrando & C. Lombardi, EU Competition Law and Sustainability in Food Systems – Addressing the Broken Links (FairTrade, 2019); S. Holmes, Climate change, sustainability, and competition law, (2020) 8(2) Journal of Antitrust Enforcement 354; E. Zee, Quantifying Benefits of Sustainability Agreements under Article 101 TFEU in terms of Human Well-Being, ILE Working Paper Series, No. 31, 2020, University of Hamburg, Institute of Law and Economics (ILE), Hamburg; M.C. Iacovides & C. Vrettos, Falling through the cracks no more? Environmental degradation and social injustice as abuses of dominance under Article 102 TFEU, available at https://law.haifa.ac.il/images/ASCOLA/Iacovides_Vrettos.pdf; and the recent contributions to the special issue of Competition Policy International available at <https://www.competitionpolicyinternational.com/antitrust-chronicle-sustainability/>.

³¹ Fairtrade Foundation, Competition Law and Sustainability A study of industry attitudes towards multi-stakeholder collaboration in the UK grocery sector (2019), available at <https://www.fairtrade.org.uk/wp-content/uploads/legacy/doc/Competition%20Law%20and%20Sustainability%20-%20Fairtrade%20Report.pdf>.

ill-conceived perceptions and uncertainty over what is the space for legitimate business collaboration may affect the incentives of undertakings to enter into collaborative sustainability-driven initiatives. To these difficulties, one may add recent organizational changes that may expand possible tensions between competition law and business activities. Collaborative innovation pushes firms to experiment new models of collaboration, while they position themselves as part of a 'fluid ecosystem of value creation'.³² Companies are shifting from hierarchical structures, which are black boxes for competition law,³³ to 'more networked and collaborative models', sharing assets and establishing platforms that partly operate as collaborative eco-systems to which also contribute some of their competitors.³⁴ Industry convergence through the digital transformation of the economy and the blurring of the digital, physical and biological dimensions, will also inevitably transform the competitive positioning of companies, bringing them in close competition with former suppliers or customers, in particular as they try to develop economically sustainable business plans and respond to the new challenges of climate change and the circular economy, as well as other sustainability objectives.

Sustainability as competitive advantage

15. The transition towards a sustainable economy and a 'Green Growth' agenda, are perceived as an important source for market opportunities and economic development in the future, unlocking more than €10 trillion of value across different economic areas, such as food and agriculture, energy, materials, cities, health and well-being, and millions of new jobs.³⁵ The new 'European industrial Strategy' relies on two pillars, 'Digital transition' and 'Green transition', the latter englobing initiatives in order to support a climate-neutral industry and expand the circular economy.³⁶ This new industrial policy framework conceives sustainability not as a burden or a regulatory cost to be incurred, but as an opportunity to acquire a 'competitive advantage' that may provide EU-based industries a significant advance towards their global competitors.³⁷ The investment of the private sector in attaining the SDGs aims should be massive and measured in €trillions so as for sustainable products and services 'to become the most affordable ones'.³⁸ Consequently, businesses should integrate sustainability goals in their competitiveness and growth strategy, thus playing a

³² K Schwab, *The Fourth Industrial Revolution* (World Economic Forum, 2016), 56.

³³Case 15/ 74, *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc*[1974] ECR 1147 [*Centrafarm I*]; Case 16/ 74, *Centrafarm BV and Adriaan De Peijper v. Winthrop BV* [1974] ECR 1183 [*Centrafarm II*]. ; Case C- 73/ 95 P, *Viho Europe BV v Commission* [1996] ECR I 5457.

³⁴ K Schwab, *The Fourth Industrial Revolution* (World Economic Forum, 2016), 58.

³⁵ European Commission, Reflection Paper Towards a Sustainable Europe by 2030 (March 2019), 14; A European Green Deal (December 11th, 2019), available at https://ec.europa.eu/commission/presscorner/detail/e%20n/ip_19_6691 ; Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic Committee and the Committee of the Regions, The European Green Deal, COM(2019)640 final; The Recovery Plan for Europe, available at https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/recovery-plan-europe_en.

³⁶ Communication from the Commission to the European Parliament, the European Council, the Council, the European and Social Committee and the Committee of the Regions, A New Industrial Strategy for Europe, COM/2020/102 final.

³⁷ European Commission, Reflection Paper Towards a Sustainable Europe by 2030 (March 2019), 16.

³⁸Ibid., 25.

'vital role' in the sustainability transition.³⁹ Public policies should provide the right incentives mix to generate this additional private investment. In particular, the various national strategies to be followed will depend on the resources and capabilities, technical and financial, of existing businesses and the openness of the specific economy to foreign direct investment.

16. The Greek economy is characterized by the relative small size of businesses and their low productivity, which denies them the opportunity to benefit from economies of scale and the capability to invest in new (more sustainable) technologies. Hence, their organic growth or collaboration on specific projects relating to SDGs, both in terms of funding/design and operation, may become necessary, if Greece is to achieve its sustainability goals. Public and private funding should be channeled to those businesses that are sustainable, but most importantly the vast majority that are unsustainable, but are willing to invest in their transition and accept to be monitored according to the EU taxonomy for sustainable investments⁴⁰. It is also important to acknowledge the fact that 'competition is an important part of the overall policy mix and of the sustainability transition', not only because it 'leads to a more efficient allocation of resources' and drives innovation, but also because of its social dimension, as 'it contributes to "economic democracy" and equality' and 'enables affordable prices, quality and choice', as well as it limits 'entrenched economic power not maintained on the merits'.⁴¹ This 'social' dimension of competition law is reinforced by the fact that it 'relatively favours poorer households over richer households'.⁴² Hence, to the extent that SDGs also integrate a social dimension, competition law is fully compatible with the sustainability principle and cannot in principle enter in conflict with sustainability-oriented business initiatives.

17. The considerations above justify calls for the development of a sustainability-driven competition law and policy.

1.2 Towards a sustainability-driven competition law and policy ?

18. The various dimensions of sustainability may lead to different approaches in competition law standards and enforcement. First, environmental concerns may be conceptualized as broader externalities or social costs that may be taken into account in competition law enforcement. Second, sustainability concerns may impact on the goals of competition law and policy. Third, they may frame the various standards and tests applied in the context of competition law enforcement.

Integrating environmental concerns as broader externalities to take into account in competition law enforcement

³⁹Ibid., 26.

⁴⁰ P. Koundouri, N. Pittis, P. Samartzis, 'Never Waste a Good Crisis: COVID-19, Macroeconomic Effects and the Way Forward, Perspectives on the Economics of the Environment in the Shadow of Coronavirus' (2020) 76 Environmental and Resource Economics 447.

⁴¹ European Commission, Reflection Paper Towards a Sustainable Europe by 2030 (March 2019).

⁴²Ibid. See also, I. Lianos, Competition Law as a Form of Social Regulation, (2020) 65(1) The Antitrust Bulletin 3.

19. In the context of fulfilling SDGs objectives, collective agreements related to environmental schemes, involving companies and other stakeholders, can produce substantial benefits from an environmental perspective, while at the same time they may have the potential to limit competition (such examples include agreements to increase the collection of plastic waste, agreements to improve the efficiency of washing machines⁴³, attempts to promote sustainable production methods and ‘animal welfare’⁴⁴, supermarkets developing systems to increase recycling). In such cases the question is whether it is possible to adjust the issues causing competition concerns without harming the sustainability objectives, thereby attaining the goals of the different policy areas involved. Joint commitments or other collective initiatives by industry players may be necessary in order to achieve meaningful change in key sustainability areas, and can be examined under both Art. 101(1) and Art. 101(3) TFEU.

20. One may in this case combine two approaches: First, that of environmental economics, which emphasizes the broader social welfare, rather than, as it is the case with competition economics, the welfare of the consumers of the relevant market, and seeks to correct market distortions emerging from the inability of designing economic incentives that enhance sustainability goals and intergenerational welfare. The prevailing view in environmental economics would be to internalise negative externalities, taking fully into account the social costs and monetizing them in the cost-benefit analysis in order to normalize social preferences and achieve socially optimal results⁴⁵. Second, ecological economics, which studies the interactions between ecosystems and human economies, treating individual preferences as just one element of the various normative criteria to be considered⁴⁶.

21. The Tragedy of the commons⁴⁷ outlines the inherent problems in designing appropriate incentives for the preservation of natural resources. At the very least we cannot always rely on markets to provide a Pareto optimum⁴⁸ solution in the absence of clearly defined property rights. Other issues may result from entrenched inequalities about entitlements or an unequal initial allocation of property rights that make even a Coasean bargaining framework⁴⁹ unfair.

⁴³ See CECED (Case COMP IV.F.1/36.718) Commission Decision 2000/475/EC (2000) OJ L 187/47. In this case the Commission took into account the ‘collective environmental benefits’ arising by an agreement between washing machine manufacturers to cease production and importation of less energy efficient machines.

⁴⁴ The case known as the ‘Chicken of Tomorrow’ refers to a joint initiative by organizations from the poultry sector and supermarkets to introduce a sector wide sustainability policy. This initiative was disrupted by the Dutch Competition Authority (ACM). See ‘ACM’s analysis of the sustainability arrangements concerning the ‘Chicken of Tomorrow’ dated 26 January 2015.

⁴⁵ G. Geoffrey, The Rule of Ecological Law: The Legal Complement to Degrowth Economics, Sustainability 2013, 5, 316-337.

⁴⁶ C. Michael & S. Sigrid, *Ecological Economics* (Cambridge University Press, 2012).

⁴⁷ G. Hardin, ‘The Tragedy of the Commons’, (1968) Science 162 (3859), 1243. The ‘tragedy of the commons’ refers to situations of over-congestion due to overconsumption in a shared-resource system, and ultimately depletion of a common pool, for lack of investment, as each individual user acts independently, according to her/his own self-interest and contrary to the common interest of all users whose collective action may have avoided the depletion of the resource.

⁴⁸ Simply put, Pareto optimum refers to a win-win change, when no further changes in the economy can make one person better off without at the same time someone worse off.

⁴⁹ The Coasean bargaining framework refers to the situation of a bargaining process among relevant property holders, on the assumption that property rights are well defined and that there are no transaction costs. According to Ronald Coase such a framework of private bargaining may

Different forms of taxes ensure that common goods, such as a clean environment, are given an economic value in order to equalize private and social costs and therefore preserve these common goods in the long-run. For the purposes of regulating such markets, cost benefit analysis has sought to accommodate such externalities by allowing for dynamic efficiency concerns to be acknowledged through the translation of future values in present discounted values.

22. In order to evaluate non-market environmental assets, environmental economists usually measure the Total Economic Value (TEV) of the assets comprising a biological ecosystem. In environmental economics TEV appears as aggregation of the values provided by ecosystem, including both its non-use and use values⁵⁰. The Total Economic Value has three components, the *actual use value* or simply the *use value* that represents the direct use of the environmental resources, the *option value* that reflects the value people place on a future ability to use the environment and the *non-use value* that describes the value people are willing to pay for the preservation of resources that they will never use. The revealed preference method specifies a procedure by which individual preferences can be ascertained by observing an individual's market behaviour. The approach focuses on observed behaviour of individuals in markets, this being presumed to reveal this individual's preference, as under the consistency principle, a single observed choice reveals a stable preference⁵¹.

23. Competition law assessment relies on the price-based revealed preferences model, the prices being revealed in the market, or alternatively, if markets do not exist or are distorted, by estimating an implicit value based on an individual's behaviour in a real life situation in which this individual has to face a trade-off between two competing consumption alternatives. If market prices are not available, the contingent valuation method⁵² aims to calculate the value of a consumer gain or loss, through a survey of a sample of consumers, by testing their 'willingness to pay' (WTP) when they are faced with a hypothetical consumption choice-set. WTP analyses tend to transform even complex assessment of options into a one-dimensional monetary valuation, the crucial benefit of this process being the facilitation of decision-making.

24. A common characteristic of these approaches is that they focus on the price parameter, which explains the success they enjoy among competition authorities. This however ignores other dimensions of the decision-making process, such as aesthetic, societal or ethical values, which cannot be easily 'evaluated' using a price-based approach such as WTP. Stated preference methods and other methods, such as, *inter alia*, the Hedonic Pricing Methods⁵³, have also been devised in order to place an economic value on non-market goods and services. Other economic tools drawn from financial economics to measure

overcome the problem of externalities: R.H. Coase, 'The Problem of Social Costs', (1960) 3(1) *Journal of Law and Economics* 1.

⁵⁰M. L. Pant, A. Lehtinen, L. Uusitalo, & R. Venesiarvi, 'How to value biodiversity in environmental management', *Ecological indicators*, 2015, 55, 1-11.

⁵¹P. A. Samuelson, 'A note on the pure theory of consumer's behaviour', (1938) 5(17) *Economica*, New Series, 61; P. A. Samuelson, 'Consumption Theory in Terms of Revealed Preference', (1950) 15 *Economica*, 243.

⁵² M. Hanley, D. MacMillan, E. R. Wright, G. Bullock, I. Simpson, D. Parisson & B. Crabtree, (2008) 'Contingent valuation versus choice experiments: Estimating the benefits of environmentally sensitive areas in Scotland', *Journal of Agricultural Economics*, 2008, 49(1), 1-15.

⁵³S. Rosen, 'Hedonic prices and implicit markets: product differentiation in pure competition', *Journal of Political Economy*, 1974, 82(1), 34-55.

option values may be devised⁵⁴, but what needs to be emphasized is that there are ways to monetize environmental benefits of products and services, through carefully designed willingness-to-pay surveys that will encompass dynamic processes and will address all affected interests. Market and non-market valuation methods of ecosystem services and natural capital may be integrated in the notions of economic dynamic efficiency, incorporating measurable elements of risk related to information asymmetry across stakeholders but also across generations.

25. It is however also important to acknowledge the difficulties of a WTP framework. It has been argued that "(o)ne of the implicit assumptions of revealed preferences theory is that the behaviour of the agent is consistent when exercising her/his choice in the marketplace", this assumption "been largely questioned by recent work in behavioural economics", but, also "work noting the 'conflicting preference maps' that most of us have, when acting as consumers in the marketplace, and as citizens in the political sphere"⁵⁵. Hence, "(e)nvironmental economists have long noted the tension between the 'utilitarian preference based' approach used by the price-based revealed preferences approach and contingent valuation analyses, which focus on consumer *wants* as utility maximisers, and the 'Kantian (principle-based)' approach on what '*we ought* to do as a society'"⁵⁶.

26. One may also criticize over-reliance to revealed or stated preference approaches on the basis of legal hermeneutics and constitutional arguments. It is possible to question the appropriateness of revealed preferences approach in assessing citizen preferences, as opposed to consumer interests, and the scope of application of the method of cost benefit analysis.⁵⁷ As any other area of law, competition law has by purpose and by design a normative content, and it is not clear why it should only limit itself to preferences revealed in the marketplace by consumer behavior. Why should it not consider preferences expressed by citizens, in particular when they design the constitutional framework regulating their social interactions, that is, the rules of the various overlapping games each of them participates in?⁵⁸ Surely, social judgments and public decisions must depend, on the aggregation of individual preferences, broadly understood, as these are expressed in a transparent social process, but there is no reason to consider that the marketplace is the only transparent social process available.⁵⁹

27. It becomes therefore essential to consider the broader constitutional and regulatory context that in a democratic system makes explicit the specific polity's collective preferences over certain values. In EU environmental regulation, three

⁵⁴For such economic tools see, *inter alia*, P. Fotis, 'Financial Analysis Social-Economic Investment Appraisal', Ch. 12 (Propobos Editions, 2014).

⁵⁵ I. Lianos, 'Polycentric Competition Law', (2018) Current Legal Problems 161.

⁵⁶ M. Sagoff, 'Aggregation and deliberation in valuing environmental public goods: a look beyond contingent pricing', (1998) Ecological Economics 213.

⁵⁷ See the discussion in, *inter alia*, S. W. Orr, 'Values, preference, and the citizen-consumer distinction in cost-benefit analysis', (2007) 6(1) Politics, Philosophy & Economics 377.

⁵⁸The concept of 'overlapping games' was suggested by Bowles and Gintis with the aim of understanding the relationship between different spheres of social life and the 'irreducible heterogeneity' of distinct areas of society, such as family, state, the economy and one may add the economic, political and cultural spheres: S Bowles and H Gintis, *Democracy and Capitalism* (Basic Books 1986).

⁵⁹ I. Lianos, 'Polycentric Competition Law', (2018) Current Legal Problems 161.

basic principles prevail, *prevention*, *precaution* and the *pollutant pays principle*. The first one dictates that preventive measures must be taken in order to prevent activities that entail a well-defined risk for the environment or human health. The precautionary principle demands for action to be taken against undefined, uncertain risks. Policies tailored to the precautionary principle are criticized for leading to socially undesirable regulatory results, especially when uncertainty is emphasized in the hierarchy of competition objectives versus environmental objectives. However, uncertainty for environmental effects can be modeled as uncertainty in other realms of mainstream economic theory, such as financial markets, and could be accommodated to economic efficiency concerns.

28. Of course, some important policy choices remain. With regard to integrating economic, climate and natural resource models, there is still an on-going debate as to what is the proper discount rate⁶⁰, what is the importance of governance and institutions for sustainable use of common property resources⁶¹ and how can one define and measure inclusive wealth⁶². Furthermore, additional questions may concern the measurement of the aggregate wealth of society, eventually including the value of natural capital along with the values of human capital, manufactured capital and social capital. This raises distributional issues as to who benefits, and who does not, from additional economic growth.

29. The challenge also remains to combine what natural sciences dictate for achieving sustainability goals in terms of natural resource preservation, energy saving and waste disposal with the complex economic, political and social forces that refrain the attainment of sustainable outcomes.⁶³ The role of the broader legal system, including competition law, becomes an essential piece in this complex puzzle.

High-impact low probability events and the quest for systemic resilience as a goal of competition law and policy

30. The goals of competition law should also be revisited in view of the sustainability principles. 'High-impact, low-probability events' (HILP)⁶⁴, or 'black swans'⁶⁵, are an important element to consider, in view of the increasing interconnectivity between social, economic, political and environmental spheres

⁶⁰ See W.D. Nordhaus, 'Critical assumptions in the Stern Review on Climate Change', (2007) 317 Science 201; S., C. Taylor, 'Climate change: Risk, ethics, and the Stern Review', (2007) 317 Science 203; M.L. Weitzman, 'On modeling and interpreting the economics of climate change', (2009) 91 Rev. Econ. Stud. 1.

⁶¹ E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge Univ. Press, 1990); E. Ostrom, 'Beyond markets and states: Polycentric governance of complex economic systems', (2010) 100 Am. Econ. Rev. 641.

⁶² World Bank (2011) *The Changing Wealth of Nations: Measuring Sustainable Development in the New Millennium* (World Bank, Washington, DC). K. Arrow et al., 'Sustainability and the measurement of wealth', (2012) 17 Environmental Development Economics 317; P. Dasgupta 'Measuring the wealth of nations', (2014) 6 Annu Rev. Resour. Econ. 17; S. Polasky et al, 'Inclusive wealth as a metric of sustainable development', (2015) 40 Annual Review of Environment & Resources 445.

⁶³ K. Raworth, *Doughnut Economics* (Random House, 2017).

⁶⁴ B. Lee, F. Preston & G. Green, 'Preparing for High-Impact, Low Probability Events' (Chatham House, 2012) available at https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/r0112_highimpact.pdf

⁶⁵ N. Taleb, *The Black Swan: The Impact of the Highly Improbable* (Penguin, 2008).

of life. In a networked globalised society, important ‘cascade effects’ may easily be divulged across the various spheres of economic activity, but also more broadly to the social, political and cultural spheres, as well as geographically⁶⁶.

31. One should not forget that complex systems, such as the World economy, are prone to disruption, as they are easily destabilized by both internal and exogenous shocks. These are often characterized by negative cascade effects (“the domino effect”) caused by the non-linear interaction of the various parts and subsystems of a complex system.⁶⁷ The economic interdependency created by global trade and global supply chains may become factors increasing the severity of the impact of these events. Modern supply chains strive for efficiency and tend to cut costs implementing just-in-time policies, but simultaneously they actually increase vulnerability to exogenous shocks. The maximum tolerance for disruption in supply systems working under the just-in-time principle is one week. Unexpected disruptions in the global production of agriculture commodities and supply chain can therefore lead to shortages of supply (on the regional or even global levels) thus driving up prices and causing financial shocks and social unrest. This brings to the fore systemic resilience as an important aim for public policy, including for competition law⁶⁸, in particular in times of crisis, such as the current pandemic.

Adapting competition law standards and tools

32. In the context of the recent COVID-19 pandemic, competition authorities had to act proactively and reactively in order to address competition issues related to business cooperation as a response to the increasing coordination costs in global value chains, as well as abuses by undertakings exploiting consumers when these are the most vulnerable.⁶⁹ In this context, the European Commission adopted a Temporary Framework Communication⁷⁰, setting out the main criteria that will be followed when assessing cooperation projects aimed at addressing a shortage of supply of essential products and services during the COVID-19 outbreak. The document foresees the possibility of providing companies with *ad hoc* comfort letters on specific cooperation projects falling within the scope of the Temporary Framework. It is noted that on this basis, the Commission issued on 8 April 2020 a comfort letter to ‘Medicines for Europe’, an association of pharmaceutical manufacturers, and participating companies in relation to a voluntary cooperation project to address the risk of shortages of critical hospital medicines for the treatment of coronavirus patients⁷¹.

33. Such ‘guidance’ may perhaps be regarded useful, in order to assist firms to pre-evaluate risks related to collective agreements that address sustainability issues, also in view of the broader regulatory compass that has been put in place at the EU, but also national, levels in order to attain the SDGs. Sustainability

⁶⁶ G. Zucarro, D. De Gregorio & M. F. Leone, Theoretical model for cascading effects analyses, (2018) 30 International Journal of Disaster Risk Reduction 199.

⁶⁷ C. Perrow, *Normal accidents: Living with high risk technologies-Updated edition*, (Princeton University press, 2011).

⁶⁸ For such an argument, see, I. Lianos, The Poverty of Competition Law: The Short Story in D. Gerard & I. Lianos (eds.), *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (CUP, 2019), 45, 85.

⁶⁹ See, https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.

⁷⁰ Available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=uriserv:OJ.CI.2020.116.01.0007.01.FRA&toc=OJ:C:2020:116:I:TOC>.

⁷¹ See: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_618.

concerns, as these are defined by the existing regulatory framework, can thus be conceived as forming part of a broader goal of systemic resilience that should frame the consideration of competition law enforcement priorities, but also efficiency gains and other forms of objective justifications for *prima facie* anticompetitive conduct.

34. This broader interpretative guidance may be quite relevant for the interpretation of the non-price elements of competition, such as product quality, product variety and innovation⁷², which may offer some policy space to competition authorities in order to take into account these broader social impacts. For instance, competition authorities already focus on innovation concerns and IP rights, especially with regard to assessing the possible effects of mergers on innovation. The Commission examines innovation competition both at the level of ‘innovation spaces’ where the merging parties’ lines of research and early pipeline products overlap and the overall industry level. The principle of sustainability may play a role in the way “optimal” innovation is eventually assessed. In particular, “considering the (preferred) direction of innovation and when this is socially valuable” may provide more texture to the concept of innovation competition.⁷³ In the recent *Dow/Dupont* merger decision⁷⁴ the Commission made an effort to explain why innovation in crop protection is of crucial importance ‘both from the perspective of farmers and growers’, the consumers affected by the merger, as well as ‘from a public policy perspective’ in view of the increased effectiveness of crop protection and its positive impact to food safety, environmental safety and human health.⁷⁵ Although the Commission did not explain under which legal basis these public policy concerns were integrated in the merger analysis, and did not refer to the horizontal integration clauses in the EU Treaties, such as Article 11 TFEU, it effectively followed these recommendations and framed accordingly the theory of harm in this case.⁷⁶ One may take a similar approach in framing the quality parameter of competition for products that comply with the SDGs.

2 Sustainable development considerations under Article 101 TFEU and Art 1 Law 3959/2011

35. Usually, competition authorities are not required to intervene in order to pursue sustainability concerns, but are more often asked not to intervene in order to prevent agreements promoting sustainability goals. The EU and its Member States actively promote the attainment of SDGs through different means: (i) direct (command and control) regulation based on coercive measures such as permits, zoning, regulatory standards; (ii) incentive regulation with the use of taxes and/ or charges to induce sustainability friendly behaviour from corporations; (iii) the promotion of self- regulation by undertakings; (iv) mixed intervention, such as voluntary agreements, that is, formal, bilateral commitments between the authorities and industry which set forth sustainability objectives and the means to achieve them; and (v) inter- company agreements concluded by undertakings without being coerced or induced by the

⁷²Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/97, para. 16.

⁷³ I. Lianos, ‘Polycentric Competition Law’, (2018) Current Legal Problems 161.

⁷⁴European Commission, Case M.7932 *Dow/Dupont*(2017).

⁷⁵Ibid., paras 1977, 1979 & 1980.

⁷⁶ I. Lianos, ‘Polycentric Competition Law’, (2018) Current Legal Problems 161.

State. Article 101 TFEU (and Art. 1 Law 3959/2011), on its own, may catch anti-competitive practices resulting from categories (iii), (iv), and (v), as the undertakings involved in voluntary agreements are not coerced by the State to restrict competition, but act as autonomous entities on the market.

36. A broader public interest criterion for intervention would have allowed competition authorities to consider a wider range of benefits related to sustainability when examining the compatibility, from a competition law perspective, of agreements between competitors. However, it may be possible to also take into account sustainability concerns in the context of the narrower standard of the existence of a restriction of competition, as is currently the case in the context of Article 101 TFEU. In the light of the currently conducted evaluation process by the Commission of two block exemption regulations and the guidelines on horizontal cooperation agreements⁷⁷, a framework for horizontal co-operation to pursue environmental and societal objectives remains a critical area for reform. Some National Competition Authorities have already taken initiatives going towards that direction. For instance, the Netherland Authority for Consumers and Markets (ACM) is about to introduce guidelines on sustainability and competition. This will provide guidance on the application of competition law to business-to-business sustainability agreements by clarifying which joint private sector sustainability initiatives may be allowed under Article 101(1) and (3) TFEU.

37. The relationship between sustainability and competition law and policy can be mutually beneficial⁷⁸. Mainstream competition law focuses on consumer welfare, through allocative efficiency and more specifically on the consumer (and producer) surplus emerging primarily from competitive prices and output (quality and diversity have usually been considered as secondary variables), innovation has been assessed on its own only in recent merger cases while it nearly always ignores and only occasionally allows a marginal role for the non-price dimensions of competition.

38. Sustainability issues may bring competition law enforcement beyond its usual comfort zone, closer to a 'polycentric model'.⁷⁹ This model takes into account additional dimensions of competition that affect social welfare such as the protection of the environment, the promotion of social mobility, the harnessing of socially valuable disruptive innovation, or the mitigation of technological and natural risks, *to the extent* that these have become parameters of the competitive game in the specific market or field of economic activity..

39. It is largely the private sector, within the context of corporate social responsibility, which is called upon to act for these wider socio-economic goals and this can be further facilitated through companies working together or agreeing on various standards⁸⁰. Free-riding problems where a firm invests in a

⁷⁷ Commission Regulations (EU) No 1217/2010 (Research & Development Block Exemption Regulation - 'R&D BER') and 1218/2010 (Specialisation Block Exemption Regulation - 'Specialisation BER'), together referred to as the 'Horizontal block exemption regulations' (or 'HBERs'); and the Commission Guidelines on horizontal cooperation agreements ('HGL').

⁷⁸ See S. Holmes, Climate change, sustainability, and competition law, (2020) 8(2) Journal of Antitrust Enforcement 354.

⁷⁹ I. Lianos, Polycentric Competition Law, (2018) Current Legal Problems 161.

⁸⁰ As Commissioner Vestager observed at the Brussels Sustainability Conference, (October 24th, 2019), available at <https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014->

sustainable strategy from which competitors benefit at no cost, and the first-mover disadvantage where a firm withdraws an unsustainable product or production process, letting its competitors benefit from an increasing market share for unsustainable products, are problems that may be solved with the negotiation of a carefully designed agreement between competitors.

40. Firms may find it efficient to join forces with competitors, as well as with civil society organizations, in order to achieve more sustainable production lines. This may give rise to horizontal industry-wide initiatives towards human, animal and environmental sustainability goals. Such agreements may lead to higher prices (among other things), e.g. through internalizing externalities but fairly distributing increased costs or through the promotion of more sustainable yet more expensive modes of production. Such sustainability agreements are not in principle and ought not to only aim at increasing firms' short-term profits. Rather, they are meant to pursue morally upstanding goals, which also enhance economic efficiency at the medium and long-term, and often enjoy widespread popular and even governmental support. They pursue, in competition law jargon, non-economic goals.

41. Competition law must be equipped with the instrumental but also the institutional tools to distinguish between restrictions of competition in order to pursue some well-established public interest aims from other restrictions. The pursuit of public policy objectives by private economic actors is a difficult puzzle and should be dealt as such, with various decision procedures in competition law.

42. The case law on this rather new breed of privately-led agreements pursuing non-economic goals has only been scattered throughout time and is rather non-consistent in determining exactly how non-economic interests, such as social and environmental sustainability, measure up against the familiar economic interests, such as price effects and in deciding at the end on the conditions that such agreements can be cleared under different dimensions of competition law.

43. Two strategies have been followed. First, a crucial question is to what extent agreements between companies – and possibly other stakeholders – to enhance the social and environmental sustainability of their supply chains are, can or should be **excluded** from the scope of the prohibition principle for anticompetitive agreements. It is not always clear from the outset what is allowed and what is not when it comes to collective agreements to enhance sustainability. Second, it is important to explore if the benefits of a specific agreement to sustainability **trade off** its costs, in terms of less competition and higher prices. This assessment very much depends on how the European Commission and National Competition Authorities value the sustainability improvements and weigh these against the possible reduction in competition. The first obstacle to override, in order to encompass sustainability goals in competition law enforcement, is the wording and the relevant interpretations of the competition law provisions, both at the EU and national levels. The second difficulty is the methodology for the evaluation and the weighing of these different concerns.

2019/vestager/announcements/competition-and-sustainability_en 'business has a vital role in helping to create markets that are sustainable in many ways...and...sometimes business can respond to that demand [for more sustainable products], if they get together'.

44. The interplay of paragraphs 1 and 3 of Article 101 TFEU is also particularly interesting in order to design optimal legal tests for the occasion. While the burden of proof for Article 101 TFEU is on the plaintiff, the specific NCA or the Commission, the evidential and legal burden shifts to the defendant under Article 101(3) TFEU. The same applies with regard to the interplay between Art. 1(1) and Art. 1(3) Law 3959/2011. The design of legal tests, some restrictions being by their nature anticompetitive, while others requiring a more detailed effects-based analysis, also often depends on a careful consideration of error costs, for over-enforcement or under-enforcement. The weight of each type of error, which should also form part of the calculus, may however vary significantly, if one takes a static framework focusing only on some price-related aspects of consumer welfare, from a more dynamic framework that integrates broader categories of social costs through time. Assuming that some effects are linear may also have different implications as to the design of legal tests than if this assumption is changed to non-linearity, with cascade effects and tipping points.

2.1 Sustainability agreements under Article 101 (1) TFEU and Art. 1 Law 3959/2011

45. The existing case law on Article 101 TFEU [and Art. 1 Law 3959/2011] offers some degree of flexibility for collective actions by the private sector to implement the SDGs.

2.1.1 Sustainability agreements may be excluded from the scope of Article 101(1) TFEU prohibition

46. Sustainability agreements with the potential to restrict competition may escape the prohibition of Article 101(1) TFEU if they are mandated by regulation. Regulation or when the State ‘acts in the exercise of official authority’ does not constitute in principle an economic activity and thus might be exempt from the application of Article 101 and 102 TFEU, as the entity in question will not be considered as an ‘undertaking’.⁸¹Purely environmental protection activities have also been found not to satisfy the conditions of an economic activity, subject to competition law provisions, but as activities of an exclusive social nature, and therefore non-economic.⁸²Furthermore, EU competition law has developed a State compulsion defence for the finding of an agreement under Article 101(1) TFEU, according to which, if ‘anti- competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles [101] and [102] do not apply’. Indeed, in such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings’.⁸³ However, if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-

⁸¹ Case C- 343/ 95, *Diego Cali & Figli Srl v Servizi Ecologici Porto di Genova SpA* [1997] ECR I- 1547 (noting that the anti- pollution surveillance for which the specific entity was responsible in the oil port of Genoa is a task in the public interest which forms part of the essential functions of the State as regards the protection of the environment in maritime areas).

⁸² Case T-347/09, *Federal Republic of Germany v European Commission*, ECLI:EU:T:2013:418, paras 31-32. For a discussion, see J. Nowag, *Environmental Integration in Competition and Free-Movement Laws* (OUP, 2016), 63-64.

⁸³ Joined Cases C- 359 and C- 379/ 95 P, *Commission of the European Communities and French Republic v Ladbrooke Racing Ltd* [1997] ECR I- 6265, paras 33- 4. See also Case T- 513/ 93, *Consiglio Nazionale degli Spedizionieri Dognanali v Commission* [2000] ECR II- 1807, para 42.

competitive conduct, those undertakings remain subject to Articles 101 TFEU (and 102 TFEU).⁸⁴ Hence, the possibility to exclude the application of competition law provisions in this context may be limited for restrictions that do not directly result from command and control regulation. The same principles apply *ipso facto* to Article 1 Law 3959/2011.

47. Note however that State regulation that interferes with ‘undistorted competition’ may fall under the joint application of Article 4(3) TEU and Articles 101/ 102 TFEU.⁸⁵ The case law of the EU Courts has condemned as contrary to a combination of, what was prior to the Treaty of Lisbon, Article 3(1)g (now Protocol No 27), in conjunction with Articles 4(3) TEU and 101 TFEU, government measures that require, favour, or reinforce agreements that infringe Article 101.⁸⁶ It has gone further and condemned national measures that delegate to a private firm or trade association the fixing of terms on which outsiders may trade.⁸⁷ Article 4(3) TEU and Article 101 TFEU however could not apply where the alleged restrictions of competition occur ‘with due regard for the public-interest criteria defined by law and the public authorities do not delegate their rights and powers to private economic operators’.⁸⁸ Hence, where an alleged restriction of competition is mandated by government based on advice from industry, this does not amount *ipso facto* to collusion between undertakings and it becomes important to examine whether the advisors were looking to criteria set by the State rather than to their own interest. Further action against anti- competitive regulation must probably be left to measures of harmonization under Article 114 TFEU, and to Article 106 TFEU, which empowers the Commission to take action against State monopolies. Note also that National Competition Authorities are obliged from the direct effect and primacy of EU law to disapply national legislation that requires undertakings to act so as to restrict competition when this may affect trade between Member States.⁸⁹ This is a possibility that has not been widely used by competition authorities in the EU and is, of course, subject to their priorities-setting.

48. The interplay of these rules may create a ‘safety zone’ for state-mandated sustainability agreements, even those of the self-regulatory type.

2.1.2 Sustainability agreements are unlikely to restrict competition

49. Not all sustainability agreements will restrict competition. The Commission has already accepted that some sustainability agreements may fall outside the scope of the prohibition of Article 101(1) TFEU. One may refer to the JAMA and KAMA agreements concerning emission reductions amongst car producers, which nevertheless did not impose a precise obligation as to the methods of

⁸⁴ Case C- 280/ 08 P, *Deutsche Telekom AG v European Commission* [2010] ECR I- 9555, para 82.

⁸⁵ Case 13/ 77, *INNO v ATAB* [1977] ECR 2115.

⁸⁶ See, for instance, Case 136/ 86, *BNIC v Aubert* [1987] ECR 4789 ; Case C- 198/ 01, *ConsorzioIndustriaFiammiferi (CIF) v AutoritàGarantedellaConcorrenza e del Mercato*[2003] ECR I- 8055; Joined Cases C- 94/ 04 & C- 202/ 04, *Cipolla*[2006] ECR I- 11421.

⁸⁷ See, for instance, Case C- 35/ 96, *Commission v Italy* [1998] ECR I- 3851; Case C- 35/ 99, *Arduino* [2002] ECR I- 1529.

⁸⁸ Joined Cases C- 427/ 16 & C- 428/ 16, *CHEZ Elektro Bulgaria v YordanKotsev*, ECLI:EU:C:2017:890, para. 43.

⁸⁹ Case C- 198/ 01, *ConsorzioIndustriaFiammiferi (CIF) v AutoritàGarantedellaConcorrenza e del Mercato*[2003] ECR I- 8055.

achieving this aim⁹⁰. Another example is provided by the practice of the UK Office of Fair Trading concerning the non-application of Article 101(1) TFEU regarding an agreement between major producers of yogurt which agreed with major packaging suppliers to develop and implement a voluntary initiative to make yogurt pots from recycled plastic⁹¹. A non-binding code of conduct promoting sustainability-conscious business practices, for instance, regarding environmental or climate compatible certification standards, may escape the prohibition of Article 101(1) TFEU and/or Art. 1 Law 3959/2011. It is possible that numerous other sustainability agreements have been self-assessed as not falling within the prohibition of Article 101(1) TFEU.⁹²

50. According to the European Commission's old 2001 Horizontal Guidelines, an environmental agreement⁹³ would be unlikely to restrict competition if: a) it does not place any precise individual obligation upon the parties 'or if they are loosely committed to contributing to the attainment of a sector-wide environmental target',⁹⁴ b) the agreement sets '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'⁹⁵, or c) it gives rise to genuine market creation⁹⁶. The Commission's 2011 horizontal cooperation guidelines do not however include a separate section on 'environmental agreements'.

51. In line with the above, the Netherlands ACM's Draft Guidelines on sustainability arrangements allow three types of sustainability agreements that do not restrict, distort or eliminate competition⁹⁷. The guidelines specify that the sustainability agreements that fall under this category are those that a) stimulate undertakings to make a positive contribution to a sustainability objective, without being mandatory for the individual undertakings, b) concern codes for environmentally-conscious or climate-conscious market behaviour (usually related to common standards, quality labels, transparency about the use of raw materials, production methods, etc) c) are aimed at improving the sustainability of products, thus leaving the variety of products to be produced or sold unaffected, d) create new sustainable products or markets, as well as cases where a joint initiative is needed in order to have sufficient production materials

⁹⁰JAMA and KAMA XXVIII the Report on Competition Policy (1998).

⁹¹ OECD, Horizontal Agreements in the Environmental Context, DAF/COMP(2010)39, p. 100.

⁹² See also the analysis in ACM, Draft Sustainability agreements (July 2020), <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>, paras 14-23.

⁹³ The European Commission's 2001 Horizontal Guidelines, para. 179 defined environmental agreements as 'agreements by which parties undertake to achieve pollution abatement, as defined in environmental law, or other environmental objectives...in particular those set out in Article 174 of the Treaty [of the EC]. This provision [now Article 191 of the TFEU] states that Union Policy on the environment shall contribute to the pursuit of the following objectives:

- preserving, protecting and improving the quality of environment;
- protecting human health;
- prudent and rational utilisation of natural resources;
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change

⁹⁴Ibid., para.185.

⁹⁵Ibid., para. 186.

⁹⁶Ibid., para. 187.

⁹⁷ See ACM, Draft Sustainability Agreements (July 2020), <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf> [hereinafter ACM Sustainability Agreements Guidelines]

or to reach sufficient enough a scale and e) are intended only to ensure that the undertakings concerned, their suppliers and/or their distributors comply with the laws of the countries in which they do business⁹⁸.

52. However, it is not clear whichare the specific analytical steps in the assessment of horizontal agreements with broader sustainability goals under article 101(1) TFEU and whether there is some form of balancing exercise between the harms and benefits of such agreement at this stage.

53. This may relate more to a form of counterfactual test that is performed. This test assesses the possibilities of competition, in the absence of the alleged agreement in question. It is only if it is found that, in the absence of the agreement in question, there would be possibilities of actual or potential competition, that the likelihood of a competition law infringement is further explored (potential competition counterfactual).⁹⁹Another version of the counterfactual test compares the competitive situation resulting from the specific contractual restraint and the situation that would have existed in its absence, in terms of specific outcomes with regard to the situation of consumers (restriction counterfactual). The first type of counterfactual test(potential competition counterfactual) examines the ability of another undertaking to enter the market, while the second one (restriction counterfactual) also explores its incentive to do so under the specific circumstances. One may also distinguish between a more static analysis, that focuses on the competitive outcome now, in the presence (and absence) of the specific agreement or restraint to, for instance, the level of pricing in the relevant market, and a more dynamic analysis that explores in more detail how the situation would have evolved in the medium and long term, which may fit better the kind of harms that the SDGs cater for. The analysis may thus evolve from anintuitive balancing that would take into account possible harms and benefits, actual and/or potential, for the consumers of the relevant market, to a broader prospective/foresight analysis taking into account the interests of all stakeholders (including inter-generational interests).

54. Competition law enforcement targets agreements between undertakings, which are actual or potential competitors, that with their actions 'replace the rules inherent in the *normal* competitive process'¹⁰⁰ and consequently 'reduce or remove the degree of uncertainty as to the operation of the market in question'¹⁰¹. Genuine sustainability arrangements primarily aim to resolve different kinds of risk and uncertainty, relating to the broader social costs of high impact, (and in some cases low probability) events that may emerge out of structural changes in the biosphere. From this perspective, the assessment of eventual counterfactuals, if one focuses on well-being rather than the process of competition as such, becomes extremely complex. Hence, an argument can be made that the management of risk and uncertainty in this context of systemic change through inter-company agreements may not be presumed, *ipso facto*, as problematic, from a well-being focused competition law perspective. However, to the extent that there are other cooperation optionsto reduce this genuinely systemic uncertainty, such as self-regulation, voluntary agreements or, as we

⁹⁸ See chapter 4 of the ACM Draft Sustainability Agreements Guidelines.

⁹⁹ See, for instance, Case T- 360/ 09, *E.ON Ruhrgas and E.ON v Commission*, ECLI:EU:T:2012:332 .

¹⁰⁰ See, for instance, Case T- 472/ 13, *H Lundbeck A/ S and Lundbeck Ltd v Commission*, ECLI:EU:T:2016:449, para. 429 (emphasis added).

¹⁰¹Case C- 238/ 05, *Asnef- Equifax, Servicios de InformaciónsobreSolvencia y Crédito, SL v Asociación de Usuarios de ServiciosBancarios(Ausbanc)*[2006] ECR I- 11125, para. 51.

suggest in Section 5, a ‘sustainability sandbox’, which are all subject to some degree of regulatory supervision, these inter-company arrangements may not be the most effective option, as there may be other means to promote sustainability, while also avoiding the removal or significant reduction of competition that comes with this type of arrangements.¹⁰²

2.1.3 Sustainability agreements may fall outside Article 101 (1) TFEU and/or Art. 1(1) Law 3959/2011 either as ancillary regulatory restraints or under the objective necessity doctrine

55. In the '*Albany*' case, the Court of Justice of the EU (CJEU) decided that Article 101 TFEU does not apply to collective bargaining agreements, in view of 'the broader aims pursued by the EU and its Member States regarding improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combatting of exclusion'¹⁰³. The Court held that 'it therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article [101](1) of the Treaty'.¹⁰⁴ A similar approach may be adopted with regard to certain SDGs in view of the existence of the horizontal integration clauses of the Treaty, such as Article 11 TFEU, and the presence also of a Treaty provision establishing at least a minimal competence of the EU in this area.

56. Public interest concerns, such as those related to SDGs may also provide justification for alleged restrictions of competition under Article 101(1) TFEU. The Court has excluded the application of art. 101(1) TFEU in the *Wouters*¹⁰⁵ case, concerning a decision of the Dutch Bar Association to ban multi-disciplinary practices, a restriction of competition which was deemed necessary for the proper practice of the legal profession. The Court held that Article 101(1) TFEU is not applicable for restrictive practices as long as there is a 'legitimate objective' pursued which is of a public law nature and aiming at protecting a

¹⁰² Although it is important to assess these arrangements in their legal and economic context, it becomes important to make a targeted application of eventual exceptions to the prohibition principle for arrangements that may indeed achieve sustainability objectives at the lowest cost for the competitive process and consumers. See the findings of M. P. Schinkel and Y. Spiegel, 'Can collusion promote sustainable consumption and production?' (2017) 53 International Journal of Industrial Organization 371 (observing that coordination of investments in sustainability generally leads to lower investments and harm consumers, while if firms choose investments in sustainability before choosing output or prices, 'coordination of output choices or prices boosts investments in sustainability and may even enhance consumer surplus when products are sufficiently close substitutes and the marginal cost of investment in sustainability is relatively low').

¹⁰³ Case C- 67/ 96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I- 5751, para. 57.

¹⁰⁴ *Ibid.*, para. 60.

¹⁰⁵ Case C- 309/ 99, *JCJ Wouters, JW Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap* [2002] ECR I- 1577.

public good¹⁰⁶. In addition to pursuing a legitimate objective, the proportionality standard must be satisfied, i.e. the restriction must be reasonably necessary to safeguard the specific legitimate interest. In these cases it is the State that empowers professional associations to safeguard the public good provided by their members, which nevertheless limits further the scope of the objective necessity test.

57. As long as there are legally binding obligations related to sustainability goals, the abovementioned case law could clear up sustainability agreements. Given the outright reference to the ‘protection and improvement of the quality of the environment’ and ‘sustainable development’ in the TFEU, as well as related national legislation, there is scope to address such agreements, to the extent of course that these do not impose restrictions on dynamic competition in terms of entry and exit barriers, innovation and other important parameters of competition. This assessment takes place in the context of Article 101(1) TFEU and/or Art. 1 of Law 3959/2011.

58. Consequently, there is no reason why this permissive approach to the enforcement of Article 101(1) TFEU and/or Article 1 Law 3959/2011 should not also apply in the case of sustainability agreements with inherently proportionate restrictions, without which the agreement would not have been concluded, and with restrictions necessary to carry out the SDGs.

2.1.4 Framing sustainability agreements as standardisation agreements

59. Another possibility to overcome unnecessary scrutiny under art 101(1)TFEU and/or Art. 1 Law 3959/2011 is to frame the sustainability agreement as a standardisation agreement.¹⁰⁷ Standardization agreements may restrict competition by object, in particular if the standard is used as part of a broader restrictive agreement aimed at excluding actual or potential competitors, in particular by using norms and standards in order to prevent or delay the introduction of new technology¹⁰⁸ Setting a standard and putting pressure on third parties not to market products that do not comply with the standard may also constitute a competition law infringement.¹⁰⁹ However, the assessment of the restrictive effects of standard-setting should take into account their legal and economic context with regard to their actual and likely effect on competition. It is first in this context that sustainability concerns may enter into the picture. Additionally, the EU Horizontal restraints guidelines offer a safe harbour finding that standard-setting agreements may also escape prohibition if ‘participation in standard-setting is *unrestricted* [...] the procedure for adopting the standard in question is *transparent*, standardisation agreements [...] contain *no obligation to comply* with the standard and provide *access to the standard on fair, reasonable and non-discriminatory terms*’.¹¹⁰ These are considered as not ‘normally’

¹⁰⁶See also, Case T-23/09, Conseil National de l’ Ordre national des pharmaciens v Commission, EU:T:2014:1049; Case C-519/04P, Meca-Medina v Commission, EU:C:2006:492; Case C-1/12, Ordem dos Tecnicos Oficiais de Contas (OTOC) v Autorida de la Concorrencia, EU:C:2013:127.

¹⁰⁷ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal co-operation agreements [2011] OJ C 11/ 1, para.257 et seq.

¹⁰⁸Pre- insulated pipes (Case COMP IV/ 35.691) Commission Decision 1999/ 60/ EC [1999] OJ L 24/ 1, para 147.

¹⁰⁹Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal co-operation agreements [2011] OJ C 11/ 1, para. 273.

¹¹⁰Ibid., 280.

restricting competition within the meaning of Article 101(1). If it falls within the scope of Article 101(1) TFEU, the standard setting arrangements may be justified under Article 101(3) TFEU.¹¹¹

60. With regard to the assessment of a standard-setting agreement under Article 101(3) TFEU, in case the first safe harbour mentioned above does not apply, the Guidelines also highlight the positive effects of the development of standards on quality, safety and environmental aspects of a product to consumer choice and product quality, as well as their role for innovation, in particular by reducing the time it takes to bring a new technology to the market and by allowing companies to build on top of agreed solutions.¹¹² In order to achieve those efficiency gains the information necessary to apply the standard must be effectively available to those wishing to enter the market. Note, however, that restrictions in a standardization agreement making a standard binding and obligatory for the industry are in principle not indispensable and therefore may not be covered by Article 101(3) TFEU.¹¹³ The assessment of the condition of the likely passing on of the efficiency gains to the consumers involves, in this context, examining whether the procedures are used to guarantee that the interests of the users of standards and end consumers are protected. The passing on is presumed for certain types of standards, such as those facilitating technical interoperability¹¹⁴, while for others, it is necessary to make an assessment on a case- by- case basis and in the relevant economic context whether these are likely to be passed on to consumers.¹¹⁵ To the extent that one adopts a broad view of the ‘user’ to cover not only the consumers of the specific relevant market affected, it could be possible to argue that the presumption of passing on should also apply for standard-setting agreements that implement SDGs

61. A high profile and recent example of a business seeking to address climate change through the use of standards is the private agreement between four carmakers, Ford, Honda, BMW and VW and the state of California to adhere to higher standards for exhaust pipe emissions than those favoured by the US Government.¹¹⁶ This is a classic example of the ‘first mover disadvantage’, since no one of the abovementioned car makers would have unilaterally reduced its exhaust emission, thus being in a competitive disadvantage with regard to the other car makers. Such standards increase the complying firms’ costs, not necessarily their prices.

62. The persistent focus of competition authorities on a narrowly conceived ‘consumer welfare’ test without taking into account the above mentioned considerations may jeopardise the consideration of broader ‘non-economic’, public interest’ or ‘non – competition’ concerns if the specific agreement enters into the scope of Article 101(1) TFEU and needs to be assessed under Article 101(3) TFEU and/or the equivalent national provision (Art. 1(1) and 1(3) Law 3959/2011). Although the intuitive balancing test under Article 101(1) TFEU may be conceived broadly enough to encompass sustainability concerns, Article

¹¹¹See, Section 2.2.

¹¹²Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal co-operation agreements [2011] OJ C 11/ 1, para. 308.

¹¹³Ibid., para. 318.

¹¹⁴Ibid., para. 321.

¹¹⁵Ibid., para. 323.

¹¹⁶ See, <https://www.wsj.com/articles/justice-department-launches-antitrust-probe-into-four-auto-makers-11567778958>.

101(3) TFEU imposes more rigid criteria. It is in this context that the sustainability gap is most often referred to. The main issue is whether sustainability benefits as such may be enough to satisfy the conditions of Article 101 (3) TFEU and/or Art. 1(3) Law 3959/2011, without necessarily the agreement in question to provide any benefits to the consumer of the relevant product market (or the 'user' of the product in question). This raises the question of how broad the interpretation of 'benefits for the consumers' should be or alternatively if the concept of 'user' should be read more broadly than 'consumer'.

2.2 Sustainability under Article 101 (3) TFEU and Art. 1(3) Law 3959/2011

63. Articles 101 (3) and 1(3) Law 3959/2011 require an agreement to meet cumulatively four conditions in order to be exempted. Some of these conditions may render more difficult, and in some cases improbable, the exemption of certain sustainability agreements. Hence, they need to be re-interpreted in view of the broader constitutional framework in EU law resulting from the horizontal integration clauses of the Treaty and the Charter of Fundamental Rights.

2.2.1 Conditions of Article 101 (3) TFEU and/or Art. 1(3) Law 3959/2011

a) Improvements and economic progress

64. The first condition of Article 101(3) and/or Art. 1 Law 3959/2011 is that the agreement must contribute to improving the production **or** distribution of goods **or** to promoting technical **or** economic progress. In a number of cases dating before the adoption of Regulation 1/ 2003, the EU Courts recognized the discretion of the Commission in taking into account public interest objectives when implementing Article 101(3).¹¹⁷ On the basis of this case law, the Commission has taken into account public interest considerations when implementing Article 101(3) TFEU. In some other documents the Commission conceptualizes the 'positive economic effects' of the agreement as 'efficiency gains', thus adopting a narrow perspective of the type of benefits included in the assessment.¹¹⁸ These should be objective, in the sense that they do not depend on the subjective opinions of the parties involved, and rely on verifiable data.¹¹⁹

65. Sustainability agreements may well fall within this specific condition of Article 101(3) TFEU. The Commission has already taken into account environmental concerns in the interpretation and enforcement of Article 101(3) TFEU.¹²⁰

¹¹⁷Case C- 26/ 76, *Metro v Commission* [1977] ECR 1875, para 21; Joined Cases T- 538, 542, 543 & 546/ 93, *Métropole Télévision v Commission* [1996] ECR II- 649, para 118: 'in 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)]'.

¹¹⁸European Commission, Communication— Notice — Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/97, paras 33 & 42 (observing that 'Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article [101(3)].').

¹¹⁹Ibid., paras 49 & 56.

¹²⁰ See, *Philips/ Osram*(Case IV/ 34.252) Commission Decision 94/ 986/ EC [1994] OJ L 378/ 37, para 27: '[t] he use of cleaner facilities will result in less air pollution, and consequently in direct

66. In particular, in *CECED*, the Commission has exceptionally taken into account as efficiency gains benefits that were not generated on the specific relevant market, where the anti- competitive effects were felt, but also ‘collective environmental benefits’ that were not necessarily limited to the relevant market in question.¹²¹The OECD has also recognised ‘cost savings, innovation, improved quality and efficiency’ as ‘direct economic benefits’ which are ‘typically recognised in competition law analysis as efficiency gains¹²². Many, or even most, sustainability benefits are likely to fall under one or more of the above headings.¹²³

67. According to a well-established principle in the jurisprudence of the CJEU, ‘[t]he question whether there is an improvement in the production or distribution of the goods in question, which is required for the grant of exemption, is to be answered in accordance with the spirit of Article [101 TFEU]’.¹²⁴The balancing function of efficiency gains also makes the Commission conclude that ‘it is necessary to verify what is the *link* between the agreement and the claimed efficiencies’ (the requirement of a *causal link*, although the Commission will not exclude from consideration wider efficiency enhancing effects’).¹²⁵In this sense it is factually wrong to classify sustainability or any other benefits as ‘indirect economic benefits’ or ‘non – competition’ concerns. One should look at the specific benefits and apply the law accordingly. In this context, the totality of benefits of an agreement to all users should be taken into account¹²⁶. It’s not a question of what types of sustainability benefits and costs should be taken into account, but how it is possible to monetize these with the tools provided by, for instance, environmental and ecological economics as well as the weight we should place on each of these.

64. In this context, the Netherlands ACM’s Draft Guidelines on sustainability provide more insights on arrangements that fall under article 101 (3) and the relevant provision of the Dutch Competition Act, which may provide efficiency gains, including ‘objective sustainability benefits’. Objective sustainability benefits are defined as benefits that are valuable not only to users but also to society (or parts thereof) in general. The parties involved can substantiate the benefits of sustainability initiatives qualitatively or quantitatively, while the

and indirect benefits for consumers from reduced negative externalities’; *CECED* (Case IV.F.1/ 36.718) Commission Decision 2000/ 475/ EC [1999] OJ L 187/ 47, paras 55– 7; *DSD* (Cases COMP/ 34493 etc) Commission Decision 2001/ 837/ EC [2001] L 319/ 1, para 148: ‘consumers will likewise benefit as a result of the improvement in environmental quality sought, essentially the reduction in the volume of packaging.

¹²¹See *CECED* (Case IV.F.1/ 36.718) Commission Decision 2000/ 475/ EC [1999] OJ L 187/ 47, paras 55– 7. See also *P&I Clubs* (Cases IV/ D- 1/ 30.373 and IV/ D- 1/ 37.143) Commission Decision 1999/ 329/ EC [1999] OJ L 125/ 12, noting that the agreements in question relating to the direct marine insurance market will not only benefit ship-owners (the immediate customers of the protection and indemnity (P&I) clubs) and the final customers of ship-owners, be they passengers or goods carriers, who also benefit from the provision of such a level of insurance, but also ‘any other third person that could suffer from extra- contractual damages produced by a ship-owner (such as marine pollution)’.

¹²² See 2010 OECD Report, OFT – OECD, OFT Contribution to the OECD Policy Roundtable on Horizontal Agreements on the Environmental Context 2010 (24 November 2011), p 11.

¹²³ See section 1.2, par. 18-28.

¹²⁴Joined Cases 56 & 58/ 64, *ConstenSarL&GrundigVerkaufs- GmbH v Commission* [1966] ECR 299.

¹²⁵Guidelines on Article 101(3) (formerly 81(3)), para. 50.

¹²⁶See 2010 OECD Report, OFT – OECD, OFT Contribution to the OECD Policy Roundtable on Horizontal Agreements on the Environmental Context 2010 (24 November 2011), p 98.

guidelines encompass also the concepts of ‘true costs’ and ‘true prices’ used in the analyses of the impact of the specific agreement on production.¹²⁷

b) Fair share of the resulting benefits for Consumers.

68. A key obstacle to a broader approach to the application of Article 101(3) is that the agreement should allow ‘users’ a fair share of the resulting benefits, which is often interpreted as the requirement that the a fair share of the specific benefit should accrue to the group of users of the relevant market that were affected by the restriction of competition at the first place. But who are the relevant users for this purpose, and what constitutes a ‘fair’ share of the resulting benefits?

69. A narrow view of the concept of ‘user’ would take into account a representative consumer, final or intermediate, on a specific relevant market. The concept of consumers should not be understood as referring only to current customers of the undertakings in question in the relevant market, but also to ‘subsequent purchasers’, again in the same relevant market. This is, however, inconsistent with the emphasis put on the benefits of sustainability for the economy and the long-term interest of consumers. Such an approach risks undermining vital sustainability agreements, such as the ones to combat climate change.

70. One may claim that the assessment should not be limited to the benefit to actual (or future) consumers of the specific relevant market, but should extend overall in order to assess *all* the benefits of the conduct found restrictive of competition under Article 101(1) TFEU, without only limiting the assessment to those related to the specific relevant market.¹²⁸ Adopting a ‘wide’ definition of benefits accruing to the ‘consumers’, which expands the assessment of Article 101(3) TFEU to other markets than the relevant one, would nevertheless require some limiting principle, even if this assessment concerns only benefits to ‘consumers’ and not benefits to all other actors involved.

71. One could take a more realistic perspective of the interests of the users. Users are simultaneously active in various social spheres, and have wider interests than their narrow financial ones in the specific relevant market. The current approach, which merely assesses the effect of a specific agreement on the prices on a relevant market, does not take into account the complexity of social interactions and the overlapping games to which each of these users participatesto, thus taking a more accurate picture of their overall interests and strategies across various social spheres, as consumers, citizens, workers¹²⁹.

72. However, it must be recognised that there should be some limits to the concept of ‘user’ taken into account the context of competition assessment under Article 101(3) TFEU. The assessment under Article 101 (3) of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market, and the condition that consumers must receive a fair share of

¹²⁷ See chapter 5a of the ACM Draft Sustainability Agreements Guidelines.

¹²⁸ See, for instance, Case T- 86/ 95, *Compagnie Générale Maritime v Commission of the European Communities* [2002] ECR II- 1011; [2002] 4 CMLR 29, para 343. See also Case T- 213/00, *CMA CGM SA v Commission of the European Communities* [2003] ECR II- 913, para 227.

¹²⁹ See I. Lianos, Polycentric Competition Law, (2018) Current Legal Problems 161, 173 (noting that “(i)ndividuals are allocated to distinct structural positions with different strategy sets without necessarily taking into account the broader social context of their position, and their presence and interaction in other spheres of social activity”).

the benefits implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreements within the same relevant market. Negative effects on consumers in one product or geographic market cannot normally be balanced against and compensated by positive effects in another unrelated product or geographic market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account ‘provided that the group of customers affected by the restriction and benefiting from the efficiency gains are substantially the same’.¹³⁰

73. In some cases the Commission has nevertheless taken into account ‘out of market efficiencies’ in view of ‘objective factual elements’ specific to the circumstances at hand.¹³¹ The case law of the EU courts has also adopted a more relaxed approach as to the linkage between the ‘category’ of users affected by the anticompetitive conduct and that of those benefitting from the alleged improvements or economic progress. In *Compagnie Générale Maritime v Commission*, it was 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 [. . .] without requiring a specific link with the relevant market’.¹³²

74. In assessing the effect of anticompetitive agreements in a two-sided markets setting in *Mastercard*, the Court has held that ‘it is necessary to take into account the system of which that measure forms part, including, where appropriate, all the objective advantages flowing from that measure not only on the market in respect of which the restriction has been established, but also on the market which includes the other group of consumers associated with that system, in particular where, as in this instance, it is undisputed that there is interaction between the two sides of the system in question’.¹³³ However, the Court was open to the possibility that each group of consumers (in each relevant market) will not necessarily benefit from the same share of that profit, but merely they should all enjoy appreciable objective advantages, even if these are not ‘to the same extent’.¹³⁴ In view of this broad formulation, it is not clear if this signifies that the case law accepts anymore the requirement that the category of consumers to which flow the benefits of the agreement must be substantially the same as those affected by its restrictive effects.

75. The approach followed is not very different from the consideration of dynamic efficiencies, as a specific innovation may be a source for economic growth in various economic sectors, and consequently relevant markets, in

¹³⁰Ibid., para. 43.

¹³¹*Star Alliance* (Case COMP/ AT.39595) Commission Decision, paras 57– 8 (such as ‘a certain discrepancy between market definition on the demand- side and supply- side, two- way flow of efficiencies and considerable commonality between passenger groups travelling on the route of concern and related behind and beyond routes’).

¹³²Case T- 86/ 95, *Compagnie Générale Maritime v Commission of the European Communities* [2002] ECR II- 1011, para. 343. See also, See also Case T- 213/ 00 CMA CGM SA v Commission of the European Communities [2003] ECR II- 913; [2003] 5 CMLR 4, para 227.

¹³³Case C- 382/ 12 P, *MasterCard Inc and Others v Commission*, ECLI:EU:C:2014:2201, para. 237.

¹³⁴Ibid., para. 248. See also the Opinion of AG Mengozzi, para. 161.

particular if this relates to a General Purpose Technology. In *GlaxoSmithKline*¹³⁵, both the General Court and the CJEU recognised that dynamic efficiencies emerging through innovation initiatives may be considered as relevant benefits, recognising that the benefits of an agreement need not happen in the same market where the harmful effects manifest themselves. It is therefore perfectly plausible to plead that ‘the higher prices faced by consumers today may be traded off with longer-term benefits to society’.¹³⁶

76. As sustainability agreements are often wide in scope, it should not be necessary for the group of customers affected by the restriction and benefiting from the efficiency gains to be substantially the same as long as they at least overlap. The Commission’s 101(3) Guidelines¹³⁷ stipulate ‘*that the net effect of the agreement must be neutral from the point of view of those customers directly or indirectly affected by the arrangement...*’.¹³⁸ This may still work as long as it is carried out looking at the affected users as a whole and not just a subset of those, i.e. directly affected by the restrictions of competition.

77. In any case, it is not required that the same consumers benefit from each and every improvements and economic progress identified under the first condition. It suffices that sufficient benefits are passed on to the broader sociological category of consumers so as to compensate, overall, for the negative effects of the restrictive agreement. In that case, consumers obtain a fair share of the overall benefits.¹³⁹ The Commission explains in its Guidelines that ‘(t)he decisive factor is the overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers’¹⁴⁰. The EU Courts fully acknowledge this¹⁴¹. Hence, it cannot be excluded that some individual consumers may be worse off as a result of an agreement justified by Article 101(3) TFEU. Furthermore, although the Commission accepts that consumer harm assessed under Article 101(1) TFEU might be compensated by some benefits provided by the anti-competitive agreement assessed under Article 101(3) (‘efficiency gains’), they require that these benefits *effectively* (and not only hypothetically) and *fully* compensate the consumer harm in a way or another. The compensation must take a form that is axiomatically valued by the users, such as innovation or higher quality. The type of the compensation and other methodological aspects are not precisely prescribed. This may indeed relate to sustainability concerns as long as there is some evidence that the users value this. As we explained in the previous discussion this evidence may not necessarily relate to willingness to pay assessments but to a broader constitutional context reading of the interests of the users. In any case, the last condition of Article 101(3) preserves a residual users’ choice and enables the

¹³⁵ Case C-501/06 P, *GlaxoSmithKline Services Unlimited v Commission*, EU:C:2009:610; [2010].

¹³⁶ See, G. Monti & J. Mulder, *Escaping the Clutches of EU Competition Law Pathways to Assess Private Sustainability Initiatives*, (2017) 42(5) European Law Review 635.

¹³⁷ Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/97 [hereinafter (2004) Commission 101(3) Guidelines].

¹³⁸Ibid., para. 85.

¹³⁹ I. Lianos, V. Korah with P. Siciliani, *Competition Law: Analysis, Cases and Materials* (OUP, 2019), 106.

¹⁴⁰ (2004) Commission 101(3) Guidelines, para. 87.

¹⁴¹ Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito SL v Asociación de Usuarios de ServiciosBancarios (Ausbanc)* [2006] E.C.R. I-11125, para. 70, “[I]t is the beneficial nature of the effect on *all* consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers’.

consumers to indicate their preferences, as competition should not be substantially eliminated. Hence, it is always possible for consumers to indicate that they value lower prices than higher quality, innovation or broader sustainability-related concerns.

78. Considering the concept of “a fair share” for the users (current, future, direct or indirect users can be taken into account), the Netherlands ACM’s Draft Guidelines on sustainability arrangements, suggest that a fair share of the benefits should be received by direct and indirect consumers, which can be regarded as a full compensation of the loss consumers will incur as a result of the sustainability agreement¹⁴². The Netherlands ACM believes that there is good reason to depart from the principle of full compensation (or at least full compensation) of users in the relevant market if two cumulative conditions are met: (i) the arrangement is intended to prevent or limit obvious environmental damage, and (ii) the arrangement provides an efficient contribution to the compliance with an international or national standard for preventing environmental damage to which the public authority is bound¹⁴³. If the sustainability agreement creates negative external effects a fair share does not necessarily mean full compensation of the loss that is the result of the agreement. Indeed, as the Netherlands ACM Draft Sustainability Guidelines with regard to assessing this condition in the context of environmental damage arrangements, ‘it can be fair that users are not fully compensated for the disadvantages of the arrangement because their demand for the products in question essentially increases the problem for which society has to find solutions’.¹⁴⁴ As long as the benefits of the sustainability agreement for the entire society outweigh the loss for direct and indirect consumers (as can be determined through a social cost-benefit analysis), these consumers can be assumed to receive a fair share of the benefits¹⁴⁵. The Guidelines provide guidance on assessing advantages and disadvantages on environmental-damage arrangements and whether quantification is required or not.

79. The concept of consumers should not also be understood as referring only to the present customers of the undertakings in question in the specific relevant market, but also to ‘subsequent purchasers’¹⁴⁶. The Commission’s 101(3) Guidelines stipulate the method to be used for assessing these benefits for future consumers¹⁴⁷:

‘In making this assessment it must be taken into account that the value of a gain for consumers in the future is not the same as a present gain for consumers. The value of saving 100 euro today is greater than the value of saving the same amount a year later. A gain for consumers in the future therefore does not fully compensate for a present loss to consumers of equal nominal size. In order to allow for an appropriate comparison of a present loss to consumers with a future gain to consumers, the value of future gains must be discounted. The discount rate applied must reflect the

¹⁴² See ACM Sustainability Agreements Guidelines.

¹⁴³ See chapter 5b of the ACM Draft Sustainability Agreements Guidelines.

¹⁴⁴Ibid., para. 41.

¹⁴⁵ See Chapter 5 of the ACM Draft Sustainability Agreements Guidelines.

¹⁴⁶(2004) Commission 101(3) Guideline, para. 81.

¹⁴⁷ On this issue, see C. Townley, Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born, (2011) 11 ECLR 580.

rate of inflation, if any, and lost interest as an indication of the lower value of future gains'.¹⁴⁸

80. This approach discounts future benefits and costs, and may be considered as biasing the analysis in favour of the present versus the next generations¹⁴⁹, unless the entire focus is put on effects on (sustainable-centered) innovation.¹⁵⁰ Notwithstanding this, the 'fair share of the resulting benefit' is a flexible concept capable for taking into account wide sustainability concerns. Nothing here suggests that it is necessary to quantify and reduce these to narrow financial considerations.¹⁵¹

c) An agreement should be no more restrictive than necessary

81. The agreement must not 'impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives'. In paragraph 73 of its 2004 Exemption Guidelines, the Commission suggests that this '*implies a two-fold test. First, the restrictive agreement as such must be reasonably necessary to achieve the efficiencies. Second, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies*'. This likens to a counterfactual test in which the decision-maker explores whether or not the restrictive agreement and individual restrictions make it possible to perform the activity in question more efficiently than would likely have been the case in the absence of the agreement or the restriction concerned. The 'less restrictive to competition alternative test' does not only enable competition authorities to determine if the efficiencies are specific to the agreement in question but also to determine if the individual restrictions of competition resulting from the agreement are indispensable. In any case, 'it is necessary to take due account of the period of time required for the parties to achieve the efficiencies justifying the application of the exception', which, in cases where the benefits cannot be achieved without considerable investment, should include the period of time required to ensure an adequate return on such investment.¹⁵² The indispensability requirement in Article 101(3) TFEU must be distinguished from the 'objective necessity test' employed in the context of ancillary restraints under Article 101(1) TFEU, in that it may accept as compatible to Article 101(3) TFEU even restrictions of competition that would not eliminate, but would only significantly reduce anticompetitive effects, than those required for the application of the 'objective necessity test' under the ancillary restraints doctrine in the context of Article 101(1) TFEU, where the CJEU seems to go as far as to demand that in the absence of the restriction, the efficient main operation or activity 'is likely not to be implemented or not to proceed'.¹⁵³

82. Following this, undertakings need to demonstrate that their proposed sustainability agreement is necessary to achieve the relevant sustainability benefits, that is, they need to show that without the agreement the benefits cannot be attained to the same extent. Any significant contribution to the specific

¹⁴⁸(2004) Commission 101(3) Guideline, para. 88.

¹⁴⁹See S. Holmes, Climate change, sustainability, and competition law, (2020) 8(2) Journal of Antitrust Enforcement 354.

¹⁵⁰I. Lianos, Polycentric Competition Law, (2018) Current Legal Problems 161, 176,

¹⁵¹ See (2004) Commission 101(3) Guidelines, paras 94, 103-104.

¹⁵²Guidelines on Article 101(3) (formerly 81(3)), para. 75.

¹⁵³Case C- 382/ 12 P, *MasterCard Inc and Others v Commission*, ECLI:EU:C:2014:2201, para 93.

SDG claimed could be considered as being reasonably necessary to achieve the sustainability objective that satisfies the condition of ‘technical and economic progress’.

d) No elimination of competition in the relevant market

83. The fourth condition of Article 101 (3) and/or Art. 1(3) Law 3959/2011 is that the agreement must not ‘afford such undertaking the possibility of eliminating competition in respect of a substantial part of the products in question’. This condition ensures that some degree of residual competition will always exist on a specific market, regardless of the extent of efficiency gains or, in our case, sustainability benefits. Preserving some degree of consumer choice is therefore a key concern. Under this reading, this condition could be problematic, in terms of compatibility with Article 101(3) TFEU, if for instance the inter-company agreement implementing SDGs extends to the whole industry and is binding. In this context, it would be important to ensure that the companies participating to the agreement are still able to compete on important parameters of competition for the specific market, and in case this is not possible, envisage the imposition of some state-mandated conduct that would enable the companies to argue state compulsion and therefore not to be found liable under Article 101 TFEU and/or Art. 1 Law 3959/2011.

2.2.2 Broader public policy concerns in the implementation of Article 1(3) of Greek Law 3959/2011

84. Article 10 par. 2 of Law 3959/2011 provides the Hellenic Competition Commission (HCC) the power to issue an exemption decision under article 1 par. 3. Although the HCC has not yet referred to sustainability concerns in granting an exemption, there is some past case law indicating that it may eventually consider public policy concerns. For instance, in decision 457/V/2009 the HCC granted an exemption to the Public Company of Electricity (DEH) for an exclusive supply agreement for 15 years with a lignite mine for the generation of electricity, among others, on the grounds that security of energy supply would benefit direct consumers¹⁵⁴. In Decision 627/V/2016¹⁵⁵ the HCC unanimously cleared with commitments the acquisition of Piraeus Port Authority SA (PPA) by COSCO (HONG KONG) GROUP LIMITED (COSCO), *among others*, on the grounds that the net economic benefit by the above mentioned clearance would benefit the public sector and, subsequently, the ‘users’ of the Greek port, by 368,5 million euro (par. 250 of the decision). On the same grounds, the Foundation of Economic and Industrial Research (FEIR) states, *inter alia*, that the privatization of PPA by COSCO is a part of a wider project which aims to restore the productive activities of Greece¹⁵⁶.

85. However, the HCC has also adopted in the past a more restrictive interpretation of the conditions of application of an exemption, when assessing quality-related efficiency gains. For instance, in Decision 512/VI/2010¹⁵⁷ it rejected the argument put forward by the Technical Chamber of Greece (TEE) that minimum fees, which were set by TEE for specific provision of services by

¹⁵⁴ See, <https://www.epant.gr/apofaseis-gnomodotiseis/item/244-apofasi-457-2009.html>.

¹⁵⁵ See, <https://www.epant.gr/apofaseis-gnomodotiseis/item/70-apofasi-627-2016.html>.

¹⁵⁶ See, <http://www.olp.gr/el/press-releases/item/3165-oikonomikes-epidraseis-apo-tin-idiotikopoiisi-tou-organismou-limenos-peiraios-meleti-iove>.

¹⁵⁷ See, <https://www.epant.gr/apofaseis-gnomodotiseis/item/138-apofasi-512-2010.html>.

engineers, were justified as they aimed to account for the maintenance of quality standards of services provided, given that these are considered as credence goods and there is asymmetric information in the market creating conditions of moral hazard and adverse selection, on the grounds that there were less restrictive alternatives to maintain such quality standards, such as contractual guarantees for performance quality, performance bonds and third-party accreditation – quality rating. In addition, the HCC refused to take into account wider benefits that are manifested in markets where the consumers do not largely coincide with the ones directly affected by the agreement. In light of the previous considerations, the assessment by the HCC needs to evolve so as to take more actively into account sustainability concerns.

3 Sustainable development considerations under Article 102 TFEU and/or Article 2 Law 3959/2011

86. Sustainability considerations may also arise under the examination of an abuse of a dominant position under article 102 TFEU and/or Art. 2 Law 3959/2011. Article 102 TFEU has long been interpreted as including the possibility for the dominant undertaking to justify its conduct and thus avoid the finding of an abuse. The concept of 'objective economic justification' has been used by the Court in the past to indicate the existence of specific defences that can be argued by a dominant undertaking. Some argue that objective justifications should not be considered as a 'defence', as what they simply do is to prevent the finding of an infringement under Article 102 TFEU.¹⁵⁸

87. The European Commission's Guidance of 2009 on its enforcement priorities in applying Article 102 recognises efficiencies as a possible defence, stating that "*the Commission considers that a dominant undertaking may also justify conduct leading to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise.*" Similarly to the requirements of Article 101(3) TFEU, an efficiency defence in dominance cases is admissible when the following conditions are cumulatively satisfied:

- Efficiencies have been, or are likely to be, realised as a result of the conduct
- The allegedly abusive conduct is indispensable to the realisation of those efficiencies, i.e. there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies
- The likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets; and,
- The conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.¹⁵⁹

88. By demonstrating that its conduct produces substantial efficiencies so that the positive effects outweigh the negative effects, a company may avoid an

¹⁵⁸ R. O'Donoghue and J Padilla, *The Law and Economics of Article 102 TFEU* (Hart, 2nd ed, 2013), 283.

¹⁵⁹ Communication— Guidance on the Commission's enforcement priorities in applying [Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/ 7, para. 30.

Article 102 TFEU and/or Art. 2 Law 3959/2011 infringement.¹⁶⁰ If sustainability benefits are analysed, from an economic perspective¹⁶¹, as efficiency gains, these could potentially trade off the social cost of anticompetitive effects.

89. An undertaking may also show that its conduct is objectively justified on the basis of a proportionality test¹⁶². Consumer safety and health can be legitimate interests that may operate as an objective justification for not finding an abuse.¹⁶³ However, as the Commission's Priority Guidance on exclusionary abuses observes, 'proof of whether conduct of this kind is objectively necessary must take into account that it is normally the task of public authorities to set and enforce public health and safety standards. It is not the task of a dominant undertaking to take steps on its own initiative to exclude products which it regards, rightly or wrongly, as dangerous or inferior to its own product'.¹⁶⁴ Hence, public interest considerations may in theory be assessed as offering an objective justification to alleged anticompetitive conduct, in particular if there is a consistent body of state measures and guidance promoting such objectives and, if not mandating it, explicitly delegates to undertakings the task to take them into account in their commercial strategies. Hence, it may be argued in this case that the undertaking did not take steps 'on its own initiative' but implemented broadly deliberated public interest objectives. The fact that there is continuous involvement by the State, for instance through some form of sunshine regulation, in supervising how undertakings implement these objectives, may satisfy the condition that the dominant undertaking did not act on its own initiative. Under this reading of the conditions for 'objective justification', there could be some limited possibilities for a dominant undertaking to argue sustainability concerns by, for instance, refuse to supply undertakings that do not comply with SDGs. However, as for Article 101(3) TFEU, '(i)t is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified. It then falls to the Commission, NCAs and courts to make the ultimate assessment of whether the conduct concerned is not objectively necessary and, based on a weighing-up of any apparent anti-competitive effects against any advanced and substantiated efficiencies, is likely to result in consumer harm'.¹⁶⁵

90. In cases where a dominant undertaking engages in behaviour that may significantly contribute to address sustainability concerns and there are no other less restrictive to competition alternatives to achieve its objectives, it could be argued that a *prima facie* restriction of competition may be justified. Such assessment should take into account the horizontal integration clauses, and in particular Article 11 TFEU, according to which environmental protection

¹⁶⁰ Case C- 95/ 04 P, *British Airways plc v Commission* [2007] ECR I- 2331, para 69.

¹⁶¹ See, for instance, regarding environmental sustainability, N. Stern, *The Economics of Climate Change* (CUP, 2014), also known as the Stern Review (2006).

¹⁶² Case C- 209/ 10, *Post Danmark A/ S v Konkurrenserådet (Post Danmark I)*, ECLI:EU:C:2012:172, para. 41; Case C- 52/ 09, *Konkurrenverket v TeliaSonera SverigeAB* [2009] ECR I- 527, para. 76.

¹⁶³ Case T- 30/ 89, *Hilti AG v Commission* [1990] ECR II- 163; Case C- 53/ 92 P, *Hilti AG v Commission* [1994] ECR I- 667.; Case T- 83/ 91, *Tetra Pak International SA v Commission* [1994] ECR II- 755; Case C- 333/ 94 P, *Tetra Pak International SA v Commission* [1996] ECR I- 5951.

¹⁶⁴ Communication— Guidance on the Commission's enforcement priorities in applying [Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/ 7, para. 29.

¹⁶⁵Ibid., para. 30.

objectives “must be integrated” into all EU policies and activities. Examples of such behaviour by a dominant undertaking that may be justified include, among others, the setting of a higher price in order to cover environmental and broader sustainability costs or in order to reinvest in environmental protection and attainment of sustainability aims without this being found excessive, charging different customers different prices for products based on the impact on sustainability objectives, bundle environmentally-friendlier product options, refuse to provide inputs to an undertaking that does not satisfy certain sustainability standards.¹⁶⁶ Although such issues could have raised concerns on excessive pricing, discriminatory pricing, tying requirements and refusal to supply grounds, if exercised by a dominant firm, under the condition that the prerequisites of an objective justification are met and thus there are no less restrictive alternatives to achieve the objective, after examination of the specific circumstances of the case, they could be considered as part of a broader sustainability efficiencies defence.

91. In addition to the possibility to argue objective justifications, the current law offers some flexibility in integrating sustainability concerns in the way the various criteria of application of Article 102 TFEU to different categories of practices may be interpreted and evaluated. For instance, under Article 102(a)TFEU, an abuse by an undertaking with a dominant position consists in imposing ‘unfair purchase or selling prices or other unfair trading conditions’. A broader approach on the definition of unfair prices or unfair trading conditions may lead to consider economic, social, environmental or moral aspects in this assessment analysis. Under Article 102(a) competition law may also be used to address non-sustainable practices such as excessively low prices paid by retailers or other intermediaries to farmers for their production, putting in jeopardy the strategy of sustainability from farm to fork. A sustainability approach would argue that low prices, in particular in the presence of evidence that these are not significantly passed on to final consumers, may encourage an excessive use of scarce resources and low prices (such as for coffee, cocoa and bananas) may discourage sustainable land use practices¹⁶⁷. Such analysis however raises difficulties with regard to the definition of what could be considered as ‘fair’ prices by the competition authorities and courts as well as determining the ‘true costs’ of production, taking into account externalities¹⁶⁸ in the cost analysis of a product.

92. In this context, concerns have been expressed by the European Parliament’s Economic and Monetary Affairs Committee regarding unfair and unsustainable low prices. More specifically the Committee: *“Stresses that the concept of a ‘fair price’ should not be regarded as the lowest price possible for the consumer, but instead must be reasonable and allow for the fair remuneration of all parties along the food supply chain; stresses that consumers have interests other than low prices alone, including animal welfare, environmental sustainability, rural development and initiatives to reduce antibiotic use and stave off antimicrobial resistance, etc.”*

¹⁶⁶See S. Holmes, Climate change, sustainability, and competition law, (2020) 8(2) Journal of Antitrust Enforcement 354.

¹⁶⁷Ibid.

¹⁶⁸ External costs refer to uncompensated social or environmental effects (e.g. the cost of disposing of the product at the end of its useful life, the environmental degradation caused by the emissions, pollutants and wastes from production, the cost of health problems caused by harmful materials and ingredients).

encourages Member States' competition authorities to take account of consumer demand for sustainable food production, which requires that greater account be taken of the value of 'public goods' in food pricing; requests, in this regard, that EU competition policy look beyond the lowest common denominator of 'cheap food'; considers that the costs of production must be taken fully into account when agreeing prices in contracts between retailers/processors and producers with the intention of ensuring prices that at least cover costs".¹⁶⁹

93. According to a now well established case law of the EU courts, an undertaking which holds a dominant position cannot use 'regulatory procedures' in such a way as to prevent or make more difficult the entry of competitors on the market, in the absence of grounds relating to the defence of the legitimate interests of an undertaking engaged in competition on the merits or in the absence of objective justification.¹⁷⁰ This case law may be also linked with some recent case law which includes among the category of restrictions of competition by object under Article 101 TFEU the arrangements put in place by two competitors infringing EU rules giving rise to penalties, if this leads to the reduction of the competitive pressure on a relevant market.¹⁷¹ This case law seems to be conceptually close to some legal precedents regarding the application of Articles 101 and 102 TFEU to conduct that restricts competition while also frustrating the objectives of other (regulatory) rules.¹⁷² Some authors have relied on this case law to argue that conduct 'causing environmental degradation and, as a result, social injustice should be seen as an "independent abuse" when practiced by undertakings in a dominant position on a relevant market'.¹⁷³ The formulation of such a theory of harm and abuse seems quite broad, but it may be reasonably argued that if, because of the dominant position it benefits from, an undertaking is able to frustrate directly the sustainability aims pursued by regulation and also satisfies the conditions for the finding of an infringement, under the specific regulatory regime, then its conduct may also be sanctioned as an abuse under Article 102 TFEU and/or Art. 2 Law 3959/2011.

Sustainability and Article 106 TFEU

94. Article 106(1) prohibits State measures that provide undertakings which are public or to which Member States grant special or exclusive rights that are contrary to the EU Treaties and could contravene not just the competition rules (Articles 101, 102 TFEU), or Article 28 (non-discrimination), which are explicitly

¹⁶⁹Committee on Economic and Monetary Affairs of the European Parliament, Annual Report on Competition Policy 2018 (31 January 2018), para 78.

¹⁷⁰Case T- 321/ 05, *Astra Zeneca v Commission* [2010] ECR II- 2805, paras 672 & 817; Case C- 457/ 10P *Astra Zeneca v Commission* [2012] ECLI:EU:C:2012:770, para. 134.

¹⁷¹Case C- 179/ 16, *F Hoffmann- La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato*, ECLI:EU:C:2018:25.

¹⁷²Case C- 32/ 11, *Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal*, ECLI:EU:C:2013:160, paras 46- 7; Case C- 457/ 10, *AstraZeneca v Comission*, ECLI:EU:C:2012:770, paras 105- 12. See also, among NCAs, decision 17-D-20 of the French Competition Authority *regarding practices implemented in the hardwearing floor coverings sector*, October 2017), available at <https://www.autoritedelaconcurrente.fr/en/communiques-de-presse/19-october-2017-cartel-floor-coverings-sector> (sanctioning cartel behaviour whereby cartel members deliberately refrained from promoting environmental performance that went beyond a certain industry 'average standard', thus harming consumers that were increasingly attentive to the environmental performance of products).

¹⁷³ M.C. Iacovides & C. Vrettos, Falling through the cracks no more? Environmental degradation and social injustice as abuses of dominance under Article 102 TFEU, available at https://law.haifa.ac.il/images/ASCOLA/Iacovides_Vrettos.pdf.

mentioned, but also other provisions of the EU Internal Market (including free movement of goods, free movement of workers, freedom of establishment, free movement of services, free movement of capital). A Member State may opt to grant special rights to an undertaking for sustainability-related reasons. These rights must fulfil four essential conditions for the specific situation to fall under the scope of the prohibition of Article 106(1) TFEU: (i) they must be granted by Member States; (ii) they must be granted to one undertaking or to limited number of undertakings; (iii) they must affect the ability of other undertakings to compete; and (iv) they must be granted otherwise than according to objective, proportional and non-discriminatory criteria.

95. These restrictions may be justified under Article 106(2) TFEU ‘in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them’ and does not affect inter-State EU trade ‘to an extent that is contrary to the interests of the [EU]’. The specific measures should make it possible for the undertakings in question to perform the tasks entrusted to them under economically acceptable conditions. For instance, Article 106(2) TFEU may justify the grant of an exclusive right to an undertaking, if this is limited in time during the period over which the investments could foreseeably be written off, for environmental reasons as it may be impossible for an undertaking without exclusive rights to make the necessary investments.¹⁷⁴

96. Article 106(1) TFEU tends to be applied simultaneously with 102 TFEU. In *Dusseldorf*¹⁷⁵ and in *Sydhavnens*¹⁷⁶, national authorities had considered that granting an exclusive right to treat a certain type of waste would be the only way to guarantee a sufficient inflow of waste into an installation so as to ensure its profitability. In *Dusseldorf*, the installation operated by the undertaking with the exclusive right, featured a high tech rotary furnace that required a specific mixture of different types of waste to operate optimally. To ensure that this inflow would be sufficient, the Dutch authorities granted AVR the exclusive right to treat certain categories of dangerous waste. This exclusive right was complemented by a prohibition to export those wastes without a permit granted by the Minister for the Environment. Such permit would only be granted if there was insufficient capacity in the Netherlands and where the treatment abroad would be at least at an equally high standard as that offered by the undertaking with exclusive rights in the Netherlands. When the Dutch company Dusseldorp attempted to export waste oil filters for treatment to the German company Factron, the permit was refused because there was no shortage of capacity with the undertaking benefitting exclusive rights. Dusseldorp appealed against this refusal to grant it a permit and pleaded that, *inter alia*, it was contrary to Article 86 in connection with Article 82 EC [now Articles 106 and 102 TFEU].

4 Sustainability and Merger Control

97. Through Merger and Acquisitions (M&A) processes firms are able to expand their product portfolios, enter new markets, increase managerial power and

¹⁷⁴Case C- 209/ 98, *EntreprenørforeningensAffalds/ Miljøsektion (FFAD) v KøbenhavnsKommune*, ECLI:EU:C:2000:279.

¹⁷⁵C- 203/ 96, *ChemischeAfvalstoffenDusseldorf BV and Others v Minister* [1998] ECR I- 4075.

¹⁷⁶Case C- 209/ 98, *EntreprenørforeningensAffalds/ Miljøsektion (FFAD) v KøbenhavnsKommune*, ECLI:EU:C:2000:279.

specialization, be involved in cross-selling, expand their geographical distribution, foster the transfer of valuable intangible assets between targets and acquirers, such as know-how, pursue efficiency in terms of costs (achievement of economies of scope and scale) as well generating new revenues. Consequently, M&A processes have important effects on competitive advantage and firms' performance, and sustainability is increasingly considered as an important competitive advantage.¹⁷⁷

98. Distinct patterns may arise from the interactions among scale-dependent environmental and resource regimes and their implications regarding sustainability.¹⁷⁸ Vertical integration may help firms to internalize problems of cross-level conflict but unfortunately this is not always beneficial from the sustainability point of view since it can easily become an excuse to impose some questionable, from a sustainability perspective, preferences of dominant firms on other industry players. Mergers tend to concentrate power in particular undertakings within an economic sector, which may lead to difficulties in yielding outcomes that comply with the social dimensions of sustainability, in particular fairness.

99. Under the current EU merger control regime, there are various options to address wider in scope sustainability issues: a) to delve into the substantive assessment of mergers under Article 2 of the EU Merger Regulation ('EUMR')¹⁷⁹ in particular by considering sustainability concerns in defining relevant markets¹⁸⁰ or, b) by integrating these concerns in the 'efficiencies' examined under the EUMR; (c) consider such factors in the provision of relevant 'remedies'; (d) to make use of Article 21(4) of the EUMR; and (e) to allow for the evaluation of local issues through the review of mergers under national competition law.¹⁸¹

100. Under Article 2(1)(b) of the EUMR, the development of technical and economic progress is taken into account, provided that it is to the consumers' advantage and does not form an obstacle to competition. Under the broad umbrella of 'economic progress', environmental and sustainability issues may be taken into account (where appropriate) when evaluating a merger. Such issues may however be examined from a positive or a negative point of view. Positive

¹⁷⁷See, Deloitte, How Green is the Deal? The Growing Role of Sustainability in M&A (2008), available at https://www2.deloitte.com/content/dam/Deloitte/il/Documents/risk/CCG/other_comittees/how_green_is_the_deal_deloitte_102408.pdf; T. Gonzalez-Torres, J.-L. Rodriguez-Sanchez, E. Pelechano-Barahona & F. E. Garcia – Muina, "A Systematic Review of Research on Sustainability in Mergers and Acquisitions", (2020) 12 Sustainability 513;

¹⁷⁸T. Gonzalez-Torres, J.-L. Rodriguez-Sanchez, E. Pelechano-Barahona & F. E. Garcia – Muina, 'A Systematic Review of Research on Sustainability in Mergers and Acquisitions', (2020) 12 Sustainability 513; O. Young, Vertical interplay among scale-dependent environmental and resource regimes.(2006) 11 Ecol. Soc. 27.

¹⁷⁹Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24 (EUMR).

¹⁸⁰ See, for instance the approach followed by the European Commission in Case M.7292 - DEMB/ MONDELEZ/ CHARGER OPCO (May 5th, 2015), para. 57 (discussing the definition of a separate relevant market for 'non-conventional coffee' than for 'conventional coffee', taking into account 'the need for an organic product which is perceived as healthier or the need to feel more environmentally sustainable or to contribute to sustainable development') and the Portuguese Competition Authority in Ccent. 45/2017 Aviagen / Hubbard (December 21st, 2017).

¹⁸¹ See, S. Holmes, Climate change, sustainability, and competition law, (2020) 8(2) Journal of Antitrust Enforcement 354.

environmental externalities of a notified merger may easily be encountered when deciding to grant clearance due to present and future (sustainability-related) efficiency gains, whereas negative externalities will seldom lead to a blockage of a merger¹⁸², though they could potentially serve for setting an argument in favour of the provision of remedies.

101. To analyse the positive environmental factors as ‘efficiencies’ that counteract any anti-competitive harmful effects to consumers, the Commission sets out the three cumulative conditions¹⁸³: The first one is that they benefit consumers, the second is that efficiencies must be ‘merger specific’ and the third is that efficiencies must be ‘verifiable’.

102. Many mergers are approved on a conditional basis which means subject to the provision of remedies by the parties¹⁸⁴. Remedies can serve to account for negative environmental externalities identified during the substantive assessment of the merger and the drafting of uniform rules for the correction of such externalities through the design of appropriate remedies could prove helpful. Such an approach would be consistent with ‘balancing’ and the principle of proportionality. To provide such guidelines it would be useful to reach some sort of consensus on how far a competition authority should go. On what grounds can sustainability concerns be embedded in the notion of anti-competitive effects and efficiencies? What would constitute a ‘verifiable’ sustainability-related efficiency?¹⁸⁵ Should a competition authority be confined to accepting just behavioural remedies on sustainability grounds or should it be more proactive and radical in applying structural remedies for general sustainability goals?

103. Public interest considerations do not form part of the substantive test of EU merger control. However, Article 21(4) EUMR includes a legitimate interest clause, which provides that Member States may take appropriate measures to protect three specified legitimate interests: public security, plurality of the media and prudential rules, and other unspecified public interests that are recognized by the Commission after notification by the Member State. There are three ways in which wider sustainability goals may be taken into account under this provision, even though such goals are not explicitly stated:

- i) these may fall under one of the current “legitimate interests”- most likely “public security”;
- ii) a sustainability concern may be “recognized” by the Commission as a legitimate interest after the application of a member state towards the

¹⁸² Recently, the Commission took into account environmental and climate change factors as a basis for challenging the Bayer/Monsanto deal. There was widespread opposition to the *Bayer / Monsanto* deal by environmental NGOs and a wider public on the basis of environmental and climate change concerns. Commissioner Vestager responded that ‘while these concerns are of great importance, they do not form the basis of a merger assessment’, arguing that such concerns ‘are handled by my colleagues and national authorities and are subject to European and national rules to protect food safety, consumers and the environment and climate’, Margrethe Vestager, ‘Commission Letter on Monsanto/Bayer’ (Brussels, 22 August 2017) accessed 18 January 2020.

¹⁸³ See paras 78-88 of the Horizontal Merger Guidelines.

¹⁸⁴ See art 6(2) and art 8(2) of the EUMR.

¹⁸⁵ Note that in Case M.9409 – AURUBIS / METALLO GROUP HOLDING (May 4th, 2020), para. 844 the Commission did not accept some efficiencies brought forward by the parties which related to environmental benefits as it found that these were not verifiable, and were unlikely to arise in a timely fashion.

Commission. Indeed, if a Member State wishes to claim an additional legitimate interest, other than the ones listed above, it shall communicate this to the Commission which must then decide, within twenty-five working days, whether the additional interest is compatible with EU law; and qualifies as an Article 21(4) legitimate interest. It is noted that only eight Commission decisions have allowed a Member State to involve Article 21(4) successfully so far and none since 2007.¹⁸⁶

iii) Article 21 (4) EUMR could be amended to explicitly encompass sustainability goals.

104. Finally, a merger may be reviewed under the national merger control rules of one or more member states where it does not fall within the EUMR and in this case each member-state will be accountable for pursuing to a greater or a lesser extent its own sustainability goals. For instance, merger control in Spain contains express reference to environmental issues.¹⁸⁷ Another example is the decision of the German Economics Ministry in August 2019 to allow the *Miba/Zollern* joint venture that had previously been blocked by the German Federal Cartel Office. The Minister ruled that the positive effects of the deal for the environment and climate protection (such as noise reduction, reduced fuel consumption and, more generally, climate protection and a sustainable environment policy) outweighed the competitive disadvantages of the merger.¹⁸⁸

105. Sustainability concerns may also be indirectly considered when assessing innovation effects.¹⁸⁹ A merger with a smaller potential competitor may restrict innovation, particularly when the smaller player has promising pipeline products, leading to restriction of choice for consumers and inhibiting innovation on behalf of the entity's rivals.¹⁹⁰ Merger control may apply to protect actual and potential competition in technologies that are important for attaining the SDGs. One should also emphasise the role of the diffusion of sustainability-related innovation and the development of new markets for complements that would help innovative undertakings to constitute innovation ecosystems. As it was analysed above, in its recent *Dow/Dupont* merger decision,¹⁹¹ the Commission examined innovation competition both at the level of *innovation spaces* within the crop protection industry and at the *industry level*,¹⁹² elaborating on the merger's alleged harm to innovation and taking into account when assessing the merger of the direction of innovation towards 'public policy concerns' by considering when this is socially valuable.¹⁹³

¹⁸⁶ See, I. Lianos, V. Korah with P. Siciliani, *Competition Law: Analysis, Cases and Materials* (OUP, 2019), 1564.

¹⁸⁷ Law 15/2007 allowing non-competition concerns, including environmental protection to be taken into account in phase II cases in which the Council of Ministers decides to assess the concentration in light of these criteria.

¹⁸⁸ See, https://www.bmwi.de/Redaktion/DE/Downloads/V/verfuegung-verwaltungsverfahren-miba-zollern.pdf?__blob=publicationFile&v=4.

¹⁸⁹EU Horizontal Merger Guidelines [2004] OJ C31/5, para 8 (hereinafter EU HMG), paras 8, 20, 38 & 81.

¹⁹⁰ Case COMP/ M.5984 – *Intel/McAfee*, Commission decision of 26 January 2011; Case COMP/ M.6564 – *ARM/GIESECKE & DEVRIENT/GEMALTO JV*, Commission decision of 6 November 2012; Case No COMP/M.7688 – *Intel/Altera*, Commission decision of 14 October 2015.

¹⁹¹*Dow/Dupont*(Case M.7932) Commission Decision of 27 March 2017.

¹⁹²Ibid., para. 1957.

¹⁹³Ibid, paras 1977, 1979 and 1980. See also, I. Lianos, Polycentric Competition Law, (2018) Current Legal Problems 161, 194.

106. With regard to Greek merger control, the HCC has already engaged with sustainability-related arguments in past merger cases, although in none of these cases sustainability has played an important role in the decision reached.

107. In Decision 577/VII/2013 the HCC examined the acquisition of joint control over the company "WasteSyclo Waste Management Services SA" by the companies "TERNA Energy AVETE SA." and "PUBLIC POWER CORPORATION SA" ("PPCSA")¹⁹⁴. The merger raised some competition issues in view of the important role of PPC in waste disposal and / or waste sub-product infrastructure, and the capacity of the new entity to use PPC facilities, especially lignite plants, in order to manage waste, including their deposition (or by-products) and their combustion (through which it would be able to produce electricity). With regard to the effects of the merger on the wholesale production and supply of electricity market, the HCC considered that the waste treatment process usually results in various sub-products, the main types of which are energy recovery, material recycling and fertilizer ("compost"). It then engaged with the parties' arguments that the WasteSyclo will produce electricity from the by-products generated through the waste management process, and only in cases where the various waste management methods used allow efficient, economically viable and environmentally acceptable waste energy recovery. The HCC accepted the economies of scale argument put forward by the parties in view of the fact that the activity of generating electricity as part of the waste management process was likely to focus on Athens and Thessaloniki, and in some other major cities in Greece, where the volumes of waste were such that they could justify the significant long-term investment required and that the power generation capacity of a typical waste recycling plant is in the range of 35-50 MW.

108. In some transactions, the notifying parties raised sustainability-related arguments, however these were not examined by the HCC [see boxes 1, 2, 3]

Box 1: Case N. 615/2015 of the HCC¹⁹⁵

The case concerned the establishment of a joint venture under the name "ECORECOVERY Waste Recovery Company" (ECORECOVERY S.A.) by "INTERMPETON BUILDING MATERIALS S.A." and "POLYECO". INTERMPETON S.A. is active in the production and marketing of concrete, aggregates and other building materials, as well as quarrying. POLYECO was the first and only fully licensed and certified vertical waste management and utilization unit in Greece at the time of the notification.

As stated in the parties' notification, the purpose of the parent companies of the joint venture was: *"The combination of organizational and administrative know-how of the TITAN Group and the long experience of the TPP Group (the parent company of POLYECO) in waste management and treatment, for the production in Greece of alternative fuel products that are more widespread in other European countries. As part of the implementation of the relevant European Union Guidelines for more environmentally sound waste management through increased recycling and recovery and reduction of waste leading to landfill, the joint venture aims to provide better quality and / or special specifications for alternative fuels to be able*

¹⁹⁴ PPC is the largest electricity generation and supply company in Greece. PPC (directly or through its subsidiaries) and is active in all stages of the production and distribution chain in the field of electricity (lignite mining, production, transport, distribution and supply of electricity).

¹⁹⁵ See <https://www.epant.gr/apofaseis-gnomodotiseis/item/84-apofasi-615-2015.html>

to meet demand, which is estimated to increase significantly in the coming years due to the high and ever-increasing cost of conventional fuels”[Decision 615/2015 of the HCC, para. 5].

ECORECOVERY would be active in the management and processing of non-hazardous solid waste primarily for the production and marketing of solid alternative (secondary) fuels, such as SRF (Solid Recovered Fuel) or RDF (Refuse Derived Fuel). The notifying parties stated that one of the targets of the joint venture for the future, and depending on the success of its development, was to be involved in the management and processing of special forms of hazardous solid waste, and especially in the production and marketing of alternative fuels from polluted wood (railway faucets and / or telephony), and of solid alternative (secondary) fuels, such as WDF (Wood Derived Fuel)¹⁹⁶.

The HCC took into account the effects of the merger on the ‘waste management system’, defined as “the collection, transport, retrieval and disposal of waste, including the supervision of such operations, as well as the supervision of disposal sites and the actions taken by traders or brokers”¹⁹⁷. Waste was further divided into different categories, depending on the form (gases, solids, liquids), the origin (urban, industrial, etc.) and their hazard (hazardous, non-hazardous).

The notifying parties stated that the joint venture will provide an additional integrated waste management and end-to-end solution for consumers and especially producers and / or waste owners. They also argued that: *“(t)he aim of the joint venture is to provide a complete and technically sound industrial solution for the treatment and disposal of solid non-hazardous waste and their conversion into secondary (alternative) fuels, in order to make it competitive against both landfill solutions and other offered solutions by the market, such as those offered by other domestic existing, or potentially to be established, waste treatment companies that receive waste to produce secondary fuels, as well as corresponding foreign companies that offer imported secondary fuel for energy recovery in suitably licensed units of Greece”*.

Furthermore, the parties stated in their notification that one of the targets of the joint venture was to achieve the goals of the circular economy, according to which efforts were made to make the best use of material resources entering the system, so as to maximize its added value. This would achieve the goal of protecting the natural resources of the ecosystem and the delay of saturation of the landfills, leading to the saving of resources, reducing the costs of using aggregates to cover the landfills, improving the optimal utilization of the human resources of the specific sector, creating know-how and developing the human scientific capital. Finally, the requested rally would contribute to the implementation of the state's environmental policy, on the basis of which "the polluter pays" in proportion to the environmental impact it causes.[Decision 615/2015 of the HCC, para. 174].

The HCC proceeded to a traditional competition analysis of possible foreclosure effects of the envisaged merger, focusing on alternative sources of supply and new entry in the affected markets, and finding that the merger did not raise

¹⁹⁶ WDF (Wood Derived Fuel) is a secondary fuel produced from wood waste, mainly from forests, the wood industry, as well as construction and demolition activities, see case n. 615/2015 of the HCC, footnote 39.

¹⁹⁷Law 4042/2012.

competition concerns, without the need to make any specific mention to the sustainability-related arguments put forward by the parties.

Box 2: Case N. 682/2019 of the HCC

The case concerned the acquisition of a controlling share of ALUMINIUM PROCESSING MINING INDUSTRY EP.AL.ME ("EP.AL.ME") by MYTILINAIOS S.A. - GROUP OF COMPANIES. MYTILINAIOS S.A is a group of companies which is mainly active in the fields of metallurgy, EPC (Engineering - Procurement - Construction), electricity and gas trade, as well as participating in the capital of other companies. EP.AL.ME is mainly active in the industrial production, processing and marketing of metals and especially its aluminium, alloys and its products.

The merger aimed to increase MYTILINAIOS' capacity of total production of aluminium products, resulting in the strengthening of the company's presence in the markets of Greece and abroad, by providing integrated solutions to its customers and the acquisition of know-how in the activity of aluminium recycling (scrap). Furthermore, the notifying party put forward two other strategic objectives:

- the reduction of energy required at all stages of its production process, through the recycling of aluminium products (scrap) by products whose use has been completed,
- the achievement of MYTILINAIOS' long-term planning to gradually become a more "green industry", with a significant reduction in its environmental footprint and a substantial saving of natural resources by maximizing the life of aluminium products by replanting them.

The ability of traders to change suppliers in the recycling service market was in this market very limited (to non-existent), as EPALME was almost the only independent foundry that could recycle the relevant products and finding another foundry abroad would be prohibitive due to the extremely high transport costs and the small amount of scrap produced by each company.

However, MYTILINAIOS argued that the merger would enable it to significantly reduce its environmental footprint and make substantial savings of natural resources. This strategy responded to the steady growth trend of consumer demand for "green" products and raw materials, the production process of which involves recycling as a feature. In assessing the merger, the HCC considered the possible unilateral effects of the merger resulting from possible foreclosure strategies (such as tying) by MYTILINAIOS, and accepted the merger under certain conditions, without examining the sustainability-related arguments put forward by the notifying parties.

Box 3: Case N. 694/2019 of the HCC

The case involved the acquisition of joint control by PPC RENEWABLE S.A. which belongs to the Group "PUBLIC POWER CORPORATION SA" (PPC S.A.) and "VOLTERRA S.A. PRODUCTION AND TRADING COMPANY" (VOLTERRA S.A.) over "VOLTERRA LYKOVOUNI SOLE SHAREHOLDER ANONYME COMPANY OF PRODUCTION AND COMMERCIAL ENERGY" (VOLTERRA LYKOVOUNI S.A.) and

"VOLTERRA K-R MONOPROSOPI ANONYME COMPANY OF PRODUCTION AND COMMERCIAL ENERGY" (VOLTERRA MONOPROSOPI), which were before this transaction under the exclusive control of VOLTERRA.

The PPC RENEWABLE SA was established in 1998 by the PPC Group, a state-owned company producing, transporting and distributing electricity throughout Greece, with activity in several segments of the Renewable Energy Sources (RES) value chain¹⁹⁸. VOLTERRA LYKOVOUNI S.A was also active in the development, financing, construction and operation of specific RES projects and the commercialization of the generated electricity, while VOLTERRA S.A was active in the construction, commissioning, management, supervision, maintenance and operation of Power Generating Units from Renewable Energy Sources.

The notifying parties argued that the strategic and economic reasons that led to the merger were investments in the sector of electricity generation from RES. The main goal of the current national policy, as reflected in the current legislation (especially in Law 4414/2016), was the participation and integration in the electricity market of RES units which are economically efficient and based on market-oriented criteria and thus contributed to the National Energy Plan and the National Policy about Climate. The HCC noted the emphasis put by the Greek legislator on "*the utilization of domestic RES potential..., as it contributes to both the diversification of the national energy mix and the security of energy supply, while at the same time enhancing the development of the national economy*"¹⁹⁹. The merger could have also guaranteed easy financing of the capital expenditures required for the construction of various RES projects, such as wind farms for the production of electricity through wind energy²⁰⁰. However, these factors did not play a direct role in the competition assessment of the merger, as the merger was not found to pose any significant risks to competition.

5 Discussion and Recommendations

109. We face a 'climate emergency' in which business as usual is not an option and in which a transition to sustainable development becomes vital, not only as a matter of sustainability-oriented policies that benefit consumers and citizens but also as a means of acquiring a competitive advantage for undertakings.

110. This transition to a sustainable economy will be successful if it is supported by all public and private actors. The latter require some legal certainty, but also a complex system of nudges and incentives in order to integrate sustainability objectives in their business strategies. Competition authorities should facilitate this transition to a Green economy.

111. First, they should make efforts to enforce competition law in a way that does not only jeopardise private and public sustainability strategies, but may also actively and directly contribute to the attainment of sustainability aims. Second, competition authorities should make the necessary investments in re-defining their role and objective function in a broader context that takes into account various sorts of externalities and their inter-generation effects rather than focusing on the simple price effects of market power. This may also require the reliance on other tools than WTP approaches in understanding consumer

¹⁹⁸ See Case 694/2019, par. 21.

¹⁹⁹ See Case 694/2019, par. 8.

²⁰⁰ Case 694/2019, par. 8.

behaviour. Discounted values of profits throughout time should also be weighted with discounted values of costs for environmental and other sustainability goals. However, discounting should be done with caution: first, even an apparently low discount rate can reduce sustainability benefits to virtually nothing when looking long term (as we do for many sustainability concerns- especially climate change) and second, we still grossly underestimate the future costs of climate change. The assumptions on which theories of harm to competition are based must also encompass some notion of long-term sustainability effects and eventually inter-generational equality. Competition law should break its insularity and in accordance with the principle of consistency and that of policy coherence become more synchronised with the broader constitutional values and programmatic aims regarding sustainability, at the international, EU and national levels. This could take place with the integration of complex adaptive systems thinking in competition law that takes into account the non-linearity of the processes under examination and the interaction of different fields of human (and non-human) activity.²⁰¹This methodological upgrade of competition law may require joint efforts between various like-minded NCAs at the European level so as to experiment with common approaches. However, further efforts should also be made.

112. We suggest that, in view of the legal uncertainty and the recognised need for a rapid transition to the Green economy more efforts should be made in order to provide undertakings with the legal certainty they need in order to make the necessary investments. This also requires more targeted competition law interventions that provide a clear set of rules to follow. Collecting information on the various business strategies and the issues they face in proceeding to this Green economy transition are also crucial so as to adapt competition law enforcement to the specific circumstances that are faced by each national economy in managing this process of major economic change.

113. This may require close collaboration with other regulatory authorities, in particular through discussions in the suggested national regulatory network for competition and regulatory policy, which has been recently suggested to be added to Article 24 Law 3959/2011, in light of the collaboration between the competition authority and sector-specific regulators in other jurisdictions.²⁰² Eventually, a common 'Advice Unit', formed by personnel from a variety of regulatory authorities, may be formed in order to provide informal steers on proposed sustainability-related innovations, across all fields of regulatory activity, to enable more direct communication between firms, the government and other stakeholders. The Unit could also organize a series of themed weeks, designed to stimulate intense engagement with stakeholders interested in a particular area of sustainability innovation. This may help establish, if need be, bespoke regulatory frameworks that would promote investments for Green Growth, following a process of public engagement with all stakeholders, including representative citizens' groups (civil society, NGOs).

²⁰¹See, J. R. Ehrenfeld, *Sustainability by Design* (Yale Univ. press, 2008); W. B. Arthur, *Complexity and the Economy* (OUP, 2015).

²⁰² See, for instance in France, <https://www.autoritedelaconcorrence.fr/en/press-release/independent-public-and-administrative-authorities-develop-their-collaboration>.

114. This process may be facilitated with the development of a competition law sustainability 'sandbox'²⁰³ in order, for the industry to experiment with new business formats that aim to realize more quickly and efficiently sustainability goals, and which involve cooperation between competing undertakings or even more permanent changes in market structure in order to be accomplished.²⁰⁴ This could be done under the condition of some form of time-constrained authorisation, under a periodical targeted supervision of the HCC, after balancing the possible anticompetitive effects with the need to provide incentives for the sustainability investment and following a process of public participation, as is the best practice for environmental infrastructure projects.²⁰⁵ In addition, even if such arrangements produce anticompetitive effects, the HCC will not proceed, if the arrangements form part of the 'sandbox', to impose any fines and sanctions, although it will proceed with other remedies.

115. Systematic post-implementation reviews that would integrate both competition and sustainability assessments of past mergers and/or antitrust infringement cases should also enable competition authorities and policymakers to identify points of friction between sustainability objectives and competition law, and regularly review policies.

116. Another avenue could be for NCAs to issue general guidelines to clarify under which conditions the private sector may take cooperative action to promote the attainment of sustainability objectives and what form of public accountability mechanisms should be put in place, including the enforcement of competition law. As was also done by other NCAs, in particular the insightful draft sustainability guidelines of the Netherlands ACM, the HCC is currently envisaging the adoption of sustainability guidelines, following a process of public consultation with the industry and other stakeholders, and the preparation of concrete proposals as to the design and development of the competition law sustainability sandbox, in view of the envisaged legislative change and the inclusion of a provision in Law 3959/2011 regarding no action letters.

117. These initiatives at the national level may provide interesting spaces of experimentation in EU competition law and policy. To the extent that the case(s) involve(s) an effect on EU trade, ultimately, it/they could be moved up from the national level to the Court of Justice of the EU that may set useful legal precedents for the future that could also influence private enforcement of competition law.

²⁰³ A sandbox is defined as 'a safe space where both regulated and unregulated firms can experiment with innovative products, services, business models and delivery mechanisms without immediately incurring all the normal regulatory consequences of engaging in such activity': Financial Conduct Authority, "Regulatory Sandbox", (2015) Research Paper.

²⁰⁴ There is experience with regulatory sandboxes in the financial industry field, in particular Fintech. See, Industry Sandbox, 'A Blueprint for an Industry-Led Virtual Sandbox for Financial Innovation' (2016) Consultation Guide. The UK Financial Conduct Authority also recommended the establishment, with the support of Project Innovate, of a Fintech industry-led virtual sandbox, which would allow firms to experiment in a virtual environment without entering the real market, using their own or publicly available data and a sandbox umbrella company.

²⁰⁵ M. Lee, C. Armeni, J. de Cendra, S. Chaytor, S. Lock, M. Maslin, C. Redgwell & Y. Rydin, Public Participation and Climate Change Infrastructure, (2013) 25(1) Journal of Environmental Law 33.