BEATRICE BICHI RUSPOLI FORTEGUERRI*

THE ROLE OF NATIONAL COMPETITION AUTHORITIES IN THE ASSESSMENT OF SUSTAINABILITY AGREEMENTS UNDER ARTICLE 101(3) TFEU

ABSTRACT. *The article wishes to contribute to the broader debate on sustainability agreements in European competition law, specifically focusing on the role of national competition authorities (NCAs) in evaluating these agreements under Article 101(3) TFEU. After exploring the potential inclusion of wider policy considerations in the parameters to exempt anti-competitive agreements under Article 101(3) TFEU, the article delves into the risks commonly associated with allowing NCAs to incorporate these into their assessments. Concrete examples illustrate the Commission's narrow approach and the Dutch NCA's initially broader perspective. The article argues that perceived risks can be mitigated through the harmonizing role of the European Competition Network. In essence, it advocates for a nuanced approach that respects democratic objectives while upholding legal coherence in Union's competition law.*

CONTENT. 1. Introduction. – 2. The parameters to greenlight an agreement under Article 101(3) TFEU. – 3. The role of NCAs in applying Article 101(3) after Reg. (EC) 1/2003. – 4. The Commission's narrow view of its own powers. – 5. An example of a broader approach: the ACM avant-garde. – 6. Conclusive remarks.

* Ph.D. Candidate, Università degli Studi Roma Tre.

1. Introduction

In the 2023 Guidelines on the application of Article 101 TFEU to horizontal cooperation (Horizontal Guidelines), the Commission introduced a chapter on agreements concluded to pursue sustainability objectives (so-called, 'sustainability agreements').[1] The rising prominence of sustainable development on the European Union's political agenda, brought these agreements at the heart of an increasing debate. In the perpetual existential discussion on the objectives of competition law, the current discussion on sustainability agreements regards the conditions and extent of a potential exemption under Article 101(3), TFEU (hereinafter, Article101(3)).[2]

The present contribution does not aspire to a comprehensive examination of these debates, but rather to focus on a specific aspect: the role of national competition authorities (NCAs) in evaluating sustainability agreements under Article 101(3). The discussion begins with a brief examination of the parameters for justifying otherwise prohibited anti-competitive agreements under Article 101(3), particularly exploring the potential inclusion of wider policy considerations (Section 2). Subsequently, the article evaluates the key risks associated in literature with NCAs incorporating wider policy considerations into Article 101(3) assessments (Section 3). Concrete examples from soft-law are then provided, illustrating the Commission's narrow approach (Section 4) and the initially broader perspective proposed by the Dutch NCA (Section 5). Throughout this analysis, the argument is presented that the perceived risks of granting NCAs a broader approach can be effectively mitigated, especially through the harmonizing role of the European Competition Network (Section 6).

[1]Communication from the Commission of 21 July 2023 Guidelines on the applicabilityof Article 101 of the Traty on the Functioning of the European Union to horizontal co-operation agreements [2023] OJ C259/1.

[2] Many scholars advocate for a greener competition law, among which: Simon Holmes, 'Climate Change, Sustainability and Competition Law' [2020], VIII Journal of Antitrust Enforcement, 354; Giorgio Monti, 'Four Options for a Greener Competition Law' [2020], XI Journal of European Competition Law & Practice, 124; Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press 2016). On the other hand, dissenting opinions include: Jean Tirole, 'Socially responsible agencies' [2023], VII Competition Law and Policy Debate, 171; Edith Loozen, 'EU antitrust in support of the Green Deal. Why better is not good enough' (2023) 00, Journal of Antitrust Enforcement, 1; Maarten Pieter Schinkel and Treuren Leonard, 'Green Antitrust: (More) Friendly Fire in the Fight against Climate Change' (2023), SSRN Electronic Journal <https://ssrn.com/abstract=3749147> accessed 25 February 2024. In geneal, proponents of a greener competition law contend that the current approach to mainstream competition must be revised to position competition as a solution to, rather than a contributor to, the problem of climate change. In contrast, critics of green antitrust argue that mainstream competition is already sufficiently environmentally conscious.

2. *The parameters to greenlight an agreement under Article 101(3) TFEU*

This section mentions the debate on the goals of competition law to outline the role of economic principles in antitrust analysis, and the specific challenges posed by Article 101(3) in light of Regulation (EC) 1/2003.[3]

Even today, the objectives of competition law remain a subject of debate,[4] and this diversity of views is reflected in the ongoing discussions surrounding Article 101(3). The arguments opposing the integration of environmental considerations into competition law often draw inspiration from two main perspectives: the Chicago School, which views the primary goal of competition policy as attaining economic efficiencies; and Ordoliberalism, expressing concerns about the instrumentalization of competition law for objectives divergent from safeguarding the competition process.[5] More recently, the Neo-Brandeisian School contends that antitrust should play a pivotal role in advancing broader societal objectives, encompassing economic equity and sustainability.[6] While a comprehensive discussion of this debate is beyond the scope of this article, it is essential to note how the more economic approach is not without its controversy.

In the European Union (EU), the provisions on competition in primary law (*i.e.*, Articles 101 to 109 of the TFEU) have been drafted in broad terms and do not explicitly state what the competition rules are supposed to achieve. As a result, these rules could be interpreted to serve various and sometimes conflicting goals. The more economic approach to EU competition law was introduced through EU secondary legislation and soft-law. This process, referred to as 'modernisation',[7] began in the late 1990s and reached its culmination in Reg. (EC) 1/2003. Competition authorities had a major role in the transition, determining how competition law should be applied in practice, with the courts determining whether the authorities acted lawfully.[8]

[3] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (hereinafter, Reg. (EC) 1/2003).

[4] For a study on the goals of EU competition law see Okeoghene Odudu, *The boundaries of EC competition law: The scope of Article 81* (Oxford University Press 2006), and Giuliano Amato, *Il potere e l'antitrust: il dilemma della democrazia liberale nella storia del mercato*, (Il Mulino 1998), for a parallel between the EU and the United States.

[5] Nowag (n 2) 34.

[6] Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021).

[7] Commission's White Paper of 28 April 1999 Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty [1999] OJ C132/1.

[8] Whish and Bailey (n 6) 17 ff.

The controversy on the goals of competition law becomes particularly pertinent when examining Article 101(3), offering a 'legal exception' to the prohibition of agreement which restrict competition set out under Article 101(1). To qualify for this exception, an agreement must meet four cumulative conditions related to efficiency gains, indispensability, pass on a fair share of benefits to consumers, and the preservation of competition. This places competition authorities in a delicate position, balancing pro-competitive and anti-competitive effects. The Commission played a fundamental role in advancing the 'economic approach' to these requirements.

Before Reg. (EC) 1/2003, the Commission adopted decisions under Article 101(3) TFEU considering several other policies, including those related to the environment.[9] Post-modernization, the 2004 Guidelines on Article 101(3) (Exemption Guidelines) emphasized the aim of EU competition rules to 'protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'.[10] Nevertheless, consumer welfare remains undefined within EU legislation.[11] In practice, this concept is used to allude to neo-classical economic theory, wherein consumer welfare constitutes one facet of total welfare alongside producer welfare.[12] Coherently with this resrictive view, according to the Exemption Guidelines: 'Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions'.

While an in-depth discussion on the four requirements for an exemption under Article 101(3) goes beyond the scope of this article, it is important to focus on two key

[9] Most notably in CECED (Case IV.F.1/36.718) Commission Decision 2000/475/EC [1999] of 24 January 1999 OJ L187/47. Remarkably, in this case the Commission deemed Article 81(1) (now 101(1) TFEU) inapplicable by virtue of Article 81(3) (now 101(3) TFEU) to an agreement among primary producers and importers of washing machines. The agreement aimed, among other things, to prohibit the production and import of the least energy-efficient washing machines. Despite restricting consumer choices, it was considered to promote economic and technical progress. In this instance, the Commission acknowledged that the affected group could extend beyond the consumers of the product. In paragraphs 55-57, it recognized collective non-economic environmental benefits resulting from reduced energy consumption and broader general advantages. Scholars have argued that this decision, the first in which the Commission quantified environmental benefits economically, expanded the scope of Article 101(3) from a pure consumer welfare to an all-encompassing consumer approach (Nowag (n 2), 230).

[10] Communication from the Commission of 27 April 2004 Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97.

[11] Holmes (n 2) 362 notes how the term 'consumer welfare' does not explicitly appear in either the provisions on competition law in the Treaties or any othr EU law. He advocates for a reconsideration of its legal significance, suggesting that even if it is considered the correct legal standard, its interpretation should be modernized and not intended in the narrow sense of 'consumer surplus'.

[12] Whish and Bailey (n 6) 6ff.

aspects: the nature of the benefits (i.e., efficiency gains), and the relevant beneficiaries (i.e., fair share for consumers). To streamline the analysis, it is useful to distinguish between: (i) a narrow view, permitting only agreements that would bring about improvements in economic efficiency to consumers of the product in the market affected by the agreement; (ii) a broader view, which would allow the consideration of less quantifiable benefits, such as other public policies (e.g., fight against climate change), and of indirect benefits to consumers in other markets or to society as a whole.[13] Less quantifiable benefits are often referred to as 'non-economic' or 'non-competition' interests, even though a broader welfarist calculus could encompass many of them.[14] Indirect benefits are known as 'out-of-market efficiencies', arising when sustainability beneficiaries do not align with the consumers impacted by the competition restriction.[15]

While it is not the core topic of this article, it is worth mentioning that, even adopting a narrow view on Article 101(3), policy considerations could still play an important role in priority setting.[16] This power has been reinforced by the recent Directive (EU) 1/2019 (the ECN+ Directive).[17] In practice, through prioritization, competition authorities could choose not to initiate a case against an anticompetitive agreement that produces specific public policy benefits, rather than navigating an intricate balancing test under Article 101(3). The modernization of competition law has simply moved the consideration of public policy from the substantive analysis under Article 101(3), to procedural priority-setting.[18] The opportunity of such shift is subject of debate, and

[13] The debate on green antitrust often revolves around whether to adopt a narrow or broad perspective on competition law, e.g. Whish and Bailey (n 6) 160ff; Or Brook, 'Struggling with Article 101(3), TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities' (2019) 56 Common Market Law Review 121.

[14] Anna Gerbrandy e Jan Polanski, 'Addressing the Legitimacy-Problem of Competition Authorities Taking into Account Non-Competition Values' [2013] SSRN Electronic Journal <http://dx.doi.org/10.2139/ ssrn.2398956> accessed 25 February 2024. Numerous articles and books delve into the scope of Article 101 TFEU, addressing the extent to which non-economic factors can be considered: apart from the already mentioned Nowag, (n 2), and Brook, (n 13), see also Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2011).

[15] Julian Nowag, 'Sustainability and Competition Law: An International Report' in Pranvera Këllezi, Pierre Kobel e Bruce Kilpatrick (eds), *Sustainability Objectives in Competition and Intellectual Property Law* (Springer Nature Switzerland 2024).

[16] Or Brook, 'Priority Setting as A Double-Edged Sword: How Modernization Strengthened the Role of Public Policy' (2020) 16(4) Journal of Competition Law & Economics 435.

[17] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3, art 4, par 5.

[18] Brook (n 16) 437-438.

some literature advocates, at the very least, for more transparency in the criteria applied in priority setting.[19]

Understanding the parameters to greenlight an agreement under 101(3) gained particular importance after Reg. (EC) 1/2003, as decisions will be made not only by the Commission but also by NCAs and national courts.

3. The role of NCAs in applying Article 101(3) after Reg. (EC) 1/2003

This section delves into the main challenges generally associated with granting NCAs a broader view in the application of Article 101(3) within the decentralized enforcement system established by Reg. (EC) 1/2003.[20] The analysis focuses on two key concerns: the risk of divergent approaches among NCAs (commonly referred to as the risk of fragmentation)[21] and the perceived lack of democratic legitimacy for NCAs in balancing different policies.[22]

3.1. The fragmentation risk

The modernisation of EU competition law brought a major change in the architecture of EU competition law. Firstly, it abolished the Commission's monopoly over decision-making under Article 101(3) TFEU, empowering NCAs with the authority to enforce Articles 101 and 102 when agreements or conducts affect trade between Member States.[23] The preventive notification and authorisation system was also abol-

[19] Whish and Bailey (n 6) 175; Giorgio Monti, 'The proposed Directive to empower national competition authorities: too little, too much, or just right?' (2017) 3(3) Competition Law & Policy Debate 40, advocates for circumventing NCAs' discretion to prioritise cases which are expected to yield more benefits to EU as a whole.

[20] Nowag, *Environmental Integration in Competition and Free-Movement Laws* (n 2) 33 notes that debates in literature have revolved around the legality of decentralization. Scholars who previously contested decentralization based on the wording or perceived lack of justiciability of Article 101(3) now advocate for a restrictive application of the article within a decentralized system.

[21] Brook (n. 13) 'Struggling with Article 101(3), TFEU', maintains that not all NCAs have adhered to the Commission's narrow approach, hindering the 'effective, uniform and certain enforcement' of EU competition law. However, Holmes (n 2) 360, observes how there is a risk of inconsistent outcomes also adopting a narrow price centric approach. This position is echoed by Nowag (n 2), 45, noting that competition analysis takes place in a complex legal and economic context, often entailing socio-economic policy decision.

[22] Other more general arguments against the integration of environmental considerations into competition analysis encompass concerns related to the wording of Article 101(3), legal certainty, and justiciability (Nowag (n 2) 34).

[23] Reg. (EC) 1/2003 art 5.

ished, requiring firms to make their own assessment of the compatibility of their conduct with competition law.[24]

The need for a precise understanding of the intended objectives of Article 101(3) has become of paramount importance after Reg. (EC) 1/2003. Indeed, in a decentralised system decisions will be made not only by the Commission but also by NCAs and national courts.[25] Exactly for this reason, some scholars have raised doubts about the appropriateness of vesting NCAs and national courts with the responsibility to balance restrictions on competition under Article 101(1) against a broad spectrum of EU policies under 101(3).[26] Indeed, proponents of a narrow approach contend that focusing exclusively on economic efficiencies would establish a clear and uniform legal standard across the EU, thereby circumventing the risk of a fragmented application of competition law.[27]

The core objective of the modernization package was to steer substantive competition analysis, ensuring uniformity and legal certainty in enforcement.[28] In the Commission's own words, the purpose of Article 101(3) is 'to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations'.[29] This safeguard prevents NCAs from favouring national undertakings to the detriment of their EU competitors.

Nevertheless, the risks of divergence in the substantive interpretation of Article 101 TFEU can be mitigated by several factors, including voluntary and mandatory convergence of EU and national legislation and strict cooperation between competition authorities.[30] Indeed, not only do all Member States of the EU possess competition law systems largely modelled upon Articles 101 and 102, but several Member States also

---

[24] Reg. (EC) 1/2003 art 1.

[25] Nowag, *Environmental Integration in Competition and Free-Movement Laws* (n 2) 37, emphasizes that the analysis of Article 101(3) TFEU must remain consistent, whether the provision is applied at the national level or by the Commission, to ensure legal certainty.

[26] Whish and Bailey (n 6) 165; Brook, 'Struggling with Article 101(3), TFEU' (n 13).

[27] Whish and Bailey (n 6) 165; Brook, 'Struggling with Article 101(3), TFEU' (n 13).

[28] Brook, 'Struggling with Article 101(3), TFEU' (n 13).

[29] White Paper (n 7).

[30] Giorgio Monti, 'Independence, Interdependence, and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network', in Dominique Ritleng (ed), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press 2016).

mandate that domestic law should be interpreted consistently with the EU rules.[31]

Furthermore, Reg. (EC) 1/2003 establishes effective cooperation mechanisms, demonstrated through both bottom-up and top-down integration.[32] Collegial and circular control among NCAs is ensured by the Advisory Committee, where experts from various NCAs convene to discuss individual cases and general issues of EU antitrust law. This committee serves as a crucial forum for collaboration and dialogue.[33]

Several specific provisions within this Regulation serve as factors mitigating the fragmentation risk: (i) Article 3 introduces the 'convergence rule', stipulating that if an agreement is not prohibited under EU competition law, a NCA or national court should not apply stricter national law to it; (ii) Articles 5 and 10 ensure that only the Commission can take a binding decision declaring an agreement compatible with Article 101, while NCAs can only find that there are 'no grounds for action' on their part;[34] (iii) Article 11 ensures close cooperation between the Commission and national competition authorities in the European Competition Network (hereinafter, the ECN). This provision requires NCAs to consult with the Commission before making a decision, and it empowers the Commission to assume control of a case after consultations with the respective NCA. Coherence can also be achieved in national courts, where appeals against NCAs' decisions may be brought. Indeed, national courts have the authority to: (i) consult the Commission;[35] (ii) request a preliminary ruling from the Court of Justice to ensure a consistent application of EU law.[36]

The Commission's condition of *primus inter pares* in the ECN is essential to ensure the unity of competition policy and its alignment with the decisions of the 'Euro-

[31] Whish and Bailey (n 6) 77-78 and 304; also, Monti, 'The proposed Directive to empower national competition authorities' (n 19), 45, observes that even before Reg. (EC) 1/2003 nearly all national competition laws were mostly already aligned with EU standards.

[32] Angela Maria Romito, *Ruolo e Funzioni dell'European Competition Network: Dal Regolamento (CE) n. 1/2003 alla Direttiva ECN+* (Cacucci Editore, 2020) 27ff. For instance, it mandates the notification of the opening of investigations to the Commission before or immediately after initiating the first formal investigative measure, known as 'early information' (art 11(3), Reg. (EC) 1/2003). Additionally, the regulation requires the Commission to provide all NCAs with copies of the main documents collected for the purpose of making a decision (art 11(2), Reg. (EC) 1/2003).

[33] The Commission is obligated to consult with the Advisory Committee prior to adopting individual decisions concluding investigative proceedings (art 14(1) Reg. (EC) 1/2003).

[34] This provision is critiqued by Monti, 'The proposed Directive to empower national competition authorities' (n 19), 46, who argues that it betrays a lack of trust in NCAs.

[35] Under art 15 of Reg. (EC) 1/2003.

[36] Arts 267 TFEU and 19 TEU.

pean executive' responsible for it.[37] It is beyond the scope of this contribution to investigate in depth the delicate balance between the need to ensure unity in antitrust enforcement and guarantee the independence of NCAs,[38] but I will take the view that the role of the Commission in the ECN is beneficial to a broader approach to sustainability agreements.

The Commission acknowledged the success of Reg. (EC) 1/2003 in meeting the challenge of enhancing the enforcement of competition rules while ensuring their consistent and coherent application.[39] The ECN has proven to be an effective forum for discussing general policy issues, evolving into an effective policy network.[40] With the modernization, the role of the Commission shifted from providing comfort to individual agreements to offering general guidance to undertakings and other enforcers.

The positive application of Article 101(3) by the Commission has been rare since the adoption of Reg. (EC) 1/2003, and no decision has been issued under Article 10 of this Regulation. Nevertheless, undertakings and other enforcers can gain insights into the Commission's approach trough soft-law, Article 9 commitments, individual informal guidance when there is uncertainty because of novel or unresolved questions of competition law[41] and non-prosecution of beneficial agreements through priorities setting.[42]

3.2. The lack of legitimacy

Another argument posed by scholars against assigning NCAs the role of balancing other policies in an Article 101(3) assessment is associated with concerns about democratic legitimacy.[43] The contention is that national competition authorities are

[37] Romito (n 32) 55.

[38] Monti, 'Independence, Interdependence, and Legitimacy' (n 30) 200ff; Stephen Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?' (2005) 18(3) Governance 431.

[39] Communication from the Commission to the European Parliament and the Council COM(2009) 206 final of 29 April 2009 Report on the functioning of Regulation 1/2003 [2009].

[40] Monti, 'Independence, Interdependence, and Legitimacy' (n 30); Monti, 'The proposed Directive to empower national competition authorities' (n 19) 40, advocates for more transparency on the discussions that take place within it to identify best practices.

[41] Commission Notice C/2022/6925 of 4 October 2022 on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters), OJ C381/9.

[42] Whish and Bailey (n 6) 174-175.

[43] Loozen (n 2) 5ff raises concerns about the potential 'politicization' of competition law through the adoption of a

typically mandated solely with conducting a competition law assessment, and it is deemed inappropriate for a competition authority, which lacks democratic election, to weigh competition values against other societal values.[44]

Numerous suggestions have been put forth to alleviate this concern, including: (i) incorporating a non-binding opinion from the competent Ministry (e.g., the Ministry for Environment);[45] (ii) consulting with Consumers' Associations or even groups of citizens;[46] or (iii) conferring political legitimacy by amending the legal mandate of NCAs to explicitly encompass non-competition objectives.[47]

All these proposals may carry the risk of undermining the independence of NCAs[48] and raise questions about their role within the national constitutional framework. Many NCAs were born in the wake of the processes of privatisation and liberalisation of the markets. As State-owned and private companies are treated the same under EU law (Articles 106 and 345 TFEU), the authority that supervises the market should be independent of the government to avoid conflicts of interest.[49] Some have argued that there is an inevitable tension between independence and accountability, which is one of the key aspects of legitimacy.[50] In the past, this debate invested even the Commission, but the modernization of competition law reduced the pressures for an independent European Cartel Office.[51] Indeed, DG Competition already exercises some

broader concept of the consumer welfare standard, such as citizen welfare. According to Loozen, the consumer benefit condition is specifically directed at consumers in the relevant market, recognizing them as sovereigns in that specific marketplace. She argues that private collective action should only be authorized by the legislator, who is accountable for any associated anticompetitive effects. In a market democracy, Loozen contends that only the legislator is democratically legitimized to define and redefine the scope for voluntary exchange.

[44] Gerbrandy and Polanski (n 14).

[45] Alfredo Moliterni, 'Transizione ecologica, ordine economico e sistema amministrativo' (2022), II Rivista di diritti comparati 395.

[46] Holmes (n 2) 400; Monti, 'Four Options for a Greener Competition Law' (n 2) 130.

[47] Gerbrandy and Polanski (n 14). It could be argued that NCAs are already mandated to integrate environmental concerns in antitrust analysis by the Union legislator in Article 11 TFEU, setting out the principle of integration (Nowag, *Environmental Integration in Competition and Free-Movement Laws* (n 2) 41).

[48] Tirole (n 2); Monti, 'Independence, Interdependence, and Legitimacy' (n 30) 184ff, identifies the factors that permit to ascertain the degree of independence that an agency enjoys, related to the procedure to elect the members of the board, budget, and relationship with the State (i.e., if the State can review the decision ex ante or ex post).

[49] Luisa Torchia, 'La regolazione dei mercati di settore fra autorità indipendenti nazionali e organismi europei' (Conference, Milan, October 2011) <www.irpa.eu/pubblicazione/gli-scritti-di-luisa-torchia/> accessed 25 February 2024.

[50] Monti, 'The proposed Directive to empower national competition authorities' (n. 19) 187, referring to William Evan Kovacic, 'Competition Agencies, Independence, and the Political Process', in Josef Drexl, Wolfgang Kerber e Rupprecht Podszun, *Competition Policy and the Economic Approach* (Edward Elgar Publishing 2011).

powers independently, and the Commission exercises more discretion only in difficult cases (i.e., when the issue at stake is of political or economic importance).[52]

The main characteristics of independent administrative authorities have been related to their technical nature and independence from both private parties and political powers.[53] The creation of an independent authority promotes legal certainty, hence boosting investment, because the State makes a credible commitment to a particular economic order.[54] The role of NCAs in applying Article 101(3) TFEU to sustainability agreements is thus intertwined with the broader discourse on the type of discretion exercised by NCAs and their place in the constitutional framework, which in Italy for example is still extremely relevant.[55] This article does not delve into this constitutional debate, but it is essential to make a few observations.

The matter of legitimacy could potentially be alleviated by considering the Commission's role as *primus inter pares* within the ECN.[56] As discussed, the Commission plays a crucial role in maintaining the coherence of antitrust policy within the ECN, a forum for discussions on politically sensitive cases. While the ECN lacks legal personality, as a policy-making governance network it strengthens the legitimacy of NCAs,[57] also in balancing different policies in an Article 101(3) assessment.

Ultimately, the Commission holds a fundamental role in ensuring coherence of

[51] Monti, 'Independence, Interdependence, and Legitimacy' (n. 30) 190-192, observes how calls for an European independent agency have subsided because the Commission already acts as an independent agency; Monti, *The proposed Directive to empower national competition authorities* (n. 19) 43.

[52] Monti, 'Independence, Interdependence, and Legitimacy' (n 30) 193; Monti, 'The proposed Directive to empower national competition authorities' (n 19) 44.

[53] Giuliano Amato, 'Autorità semi-indipendenti e autorità di garanzia' (1997), III Rivista trimestrale di diritto pubblico, 645.

[54] Monti, 'Independence, Interdependence, and Legitimacy' (n 30), 184.

[55] The issue was recently brought before the Italian Constitutional Court, and in judgment 13/2019 of 5 December 2018, certain clarifications were provided regarding the position of the Italian NCA in the constitutional framework. The Court clarified that the Italian NCA does not hold a function akin to that of a 'judge', as it is a party in the judicial proceedings that may follow the potential legal challenge to its decisions. According to the judges, the Italian NCA exercises a discretionary administrative function, wherein the evaluation involves balancing the primary interest against other public and private interests at stake. The judges underscored the significant para-regulatory and advisory powers vested in the Italian NCA and emphasized the broad margin of administrative discretion inherent in practices like granting exemptions for restrictive agreements prohibited under national competition law.

[56] Monti, 'Independence, Interdependence, and Legitimacy' (n 30), 188-190, also referring to Neill Nugent, *The European Commission (European Union)* (Palgrave Macmillan 2001), 326, describes the Commission as an 'administrative and political hybrid', whose legitimacy as competition authority remains relatively high. Also, Amato, *Il potere e l'antitrust* (n 4) 114 defined the Commission's power as a politic-administrative hybrid.

[57] Monti, 'Independence, Interdependence, and Legitimacy' (n 30), 205.

national approaches, and that NCAs activities reflect the political priorities of the EU.

4. The Commission's narrow view of its own powers

Building on the decentralization challenges previously explored, this section focuses on the important role still played by the Commission after Reg. (EC) 1/2003 in ensuring consistent application of EU competition rules. Its narrow view on the enforcement of Article 101(3), TFEU, expressed through soft-law, will influence the approach from NCAs, even when applying national competition rules.

The modernization of competition law has brought about substantive reforms to the objectives and standards leading enforcement.[58] In the 2004 Exemption Guidelines the Commission took a clear step towards a narrow view of Article 101(3) TFEU.

As for the nature of benefits, it considers only 'objective economic efficiencies', which must be substantiated, verifiable and have a direct causal link to the agreement.[59] Even in case of 'non-cost based efficiencies' the undertakings must explain in detail what is the nature of the efficiencies and how and why they constitute an 'objective economic benefit'.[60] Relevant beneficiaries encompass all direct or indirect users of the products covered by the agreement.[61] The agreement must at least be 'neutral' for consumers directly or likely affected, who must be fully compensated.[62] Moreover, the longer it takes for the pass-on to occur, the more significant the efficiencies must be to offset it.[63]

Although the Exemption Guidelines are not legally authoritative, NCAs and national courts are expected to take due account of them in accordance with their duty of sincere cooperation.[64] Indeed, the Guidelines display the Commission's perspective on the substantive assessment criteria of the provision, intending to guide the applica-

[58] Brook, 'Priority Setting as A Double-Edged Sword' (n. 16), 436.

[59] Exemption Guidelines (n 10) paras 48-72.

[60] Exemption Guidelines (n 10) para 57.

[61] Exemption Guidelines (n 10) para 84.

[62] Exemption Guidelines (n 10) para 85.

[63] Exemption Guidelines (n 10) para 87.

[64] Whish and Bailey (n 6) 166; see Brook, 'Struggling with Article 101(3), TFEU' (n 13) for a different opinion. The duty of sincere cooperation is enshrined in Article 4(3) TEU.

tion by NCAs.

In the recently updated Horizontal Guidelines, the Commission provides its view with specific respect to sustainability agreements, where 'sustainability' is identified in very broad and indefinite terms.[65] It is beyond the scope of this article to discuss the Horizontal Guidelines in detail. Nevertheless, an outline can serve to demonstrate how the Commission's approach is not very innovative compared to the Exemption Guidelines.

The Commission recognizes that cooperation agreements may address residual market failures, particularly related to negative externalities, that are not fully addressed by public policy and regulation.[66] However, sustainability agreements are not a distinct category of horizontal agreements and, to be exempted, must still comply with all the requirements set out in Article 101(3), as interpreted by the relevant Exemption Guidelines.[67]

As for the nature of benefits, according to the Horizontal Guidelines efficiency gains must be concrete and verifiable and can encompass reductions in the costs of production and distribution, increases in product variety and quality, improvements in production or distribution processes, and increases in innovation.[68]

The pass-on to consumer must always accrue to all direct and indirect consumers of the products covered by that agreement.[69] Hence, benefits for future generations are considered if consumers of the products covered by agreement perceive it as a quality increase and are willing to pay a higher price (willingness-to-pay can be ascertained through surveys).[70] Also, collective benefits, which are referred to a wider section of society, are only considered if the group affected by the restriction is substantially the same of that benefitting from the agreement.[71]

The Commission does not provide guidance on how to measure efficiencies in sustainability agreements. It particularly acknowledges that there is currently little experience with measuring and quantifying collective benefits and aims to provide more guidance on this issue when it has gained sufficient experience.[72]

[65] Horizontal Guidelines (n 1) paras 516ff.

[66] Horizontal Guidelines (n 1) para 520.

[67] Horizontal Guidelines (n 1) paras 522-523.

[68] Horizontal Guidelines (n 1) para 559.

[69] Horizontal Guidelines (n 1) para 569.

[70] Horizontal Guidelines (n 1) paras 577ff.

[71] Horizontal Guidelines (n 1) para 582ff.

[72] Horizontal Guidelines (n 1) para 589.

In conclusion, despite the introduction of the new Horizontal Guidelines that explicitly address sustainability agreements, companies face a challenging path under an Article 101 scrutiny. Success relies on their ability to demonstrate that environmental improvements result in tangible qualitative and cost efficiencies for consumers of the products, with clear monetary value.

The impact of the recently updated Horizontal Guidelines on NCAs is discernible in the trajectory of the Netherlands Authority for Consumers and Markets (hereinafter, ACM), a key player in the realm of sustainability agreements. Notably, the ACM initially advocated for a broader interpretation of Article 101(3), only to moderate this position after the adoption of the Horizontal Guidelines in 2023.

5. An example of a broader approach: the ACM avant-garde

This section delves into the approach to Article 101(3) outlined in the guidelines issued by the ACM, one of the NCAs that has been most focused on matters of sustainability and competition. The Netherlands' authority addressed various cases concerning environmental agreements[73] and developed several policy documents.

In 2021 the ACM expressed its view on sustainability agreements in draft guidelines (Draft Guidelines),[74] recently replaced by a policy rule (Policy Rule).[75] In the latter, the ACM adopts a narrower approach on sustainability agreements compared to the previous Draft Guidelines, in line with the Commission's position expressed in the meanwhile through the mentioned Horizontal Guidelines.

The ACM relies on a degree of discretion as an independent supervisor when evaluating agreements under Article 101(3).[76] But, in doing so, it follows the European

[73] Most remarkably, *Chicken of Tomorrow* (13.0195.66) ACM's analysis of 16 January 2015 <www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow> accessed 25 February 2024. The case centred on agreements among supermarkets, poultry farmers, and broiler meat processors to sell chicken meat cultivated under improved animal welfare conditions. ACM investigated the consumer perception of these measures and concluded that consumers were not willing to pay a premium for improvements in animal welfare and environmental practices high as the specific measures related to the Chicken of Tomorrow requested. As a result, the agreement was deemed to impose restrictions on competition.

[74] ACM Guidelines on Sustainability Agreements Opportunities within competition law [26 January 2021], second draft.

[75] Policy Rule on ACM's oversight of sustainability agreements, [4 October 2023] ACM/UIT/596876.

[76] Policy Rule (n 75) para 7.

Commission's guidelines and considers both national and European case law.

In the 2021 Draft Guidelines the ACM proposed a different interpretation for the pass-on to consumers requirement. It started by considering how environmental benefits, by definition, extend to a wider group than just the consumers of the products alone (e.g., CO2 emission reductions).[77] Therefore, the ACM believed to have good reason to 'deviate' from the mainstream interpretation of the pass-on requirement if two criteria were met: the agreement was an environmental-damage agreement, and it helped, in an efficient manner, to comply with an international or national standard, or to realize a concrete policy goal to prevent such damage.[78] Only in such cases, the authority believed 'that users do not need to be compensated in full' and benefits for society can be considered in their entirety.[79] The *ratio* for this special regime was that users' demand for the products in question 'essentially creates the problem for which society needs to find solutions'.[80] Also, users of the products enjoy the same benefits as the rest of society.[81]

Finally, with regard to how it would conduct the balancing activity, the previous Draft Guidelines clarified that a quantitative analysis was not always necessary. In particular, it could be excluded when the undertakings involved had a combined market share lower than 30%, and the harm to competition was clearly minor than the benefits

[77] Draft Guidelines (n 74) para 36. On 27 June 2022 the ACM approved the agreement between Shell and TotalEnergies to collaborate in the storage of CO2 in empty natural-gas fields in the North Sea. This initiative aligned with climate change objectives, aiming to mitigate the release of greenhouse gases into the atmosphere. The ACM concluded that any slight restriction of competition resulting from the agreement was outweighed by the benefits it brings to customers of both companies and to society as a whole. <https://www.acm.nl/en/publications/acm-shell-and-totalenergies-can-collaborate-storage-co2-empty-north-sea-gas-fields> accessed 20 April 2024.

[78] Draft Guidelines (n 74) paras 45ff. The AMC concluded on 23 June 2023 that collective price-fixing agreements among supermarkets regarding disposable plastic packaging were unnecessary. New national regulations prohibit supermarkets from providing disposable cups or food containers for free. The Dutch Food Retail Association proposed a collective fixed surcharge among its members, but the ACM determined that such an agreement did not appear necessary for advancing the sustainability goals of the new regulations. <https://www.acm.nl/en/publications/acm-no-need-collective-price-fixing-agreements-among-supermarkets-about-plastic-packaging> accessed 20 April 2024. Conversely, the ACM reached an opposite conclusion on 2 September 2022, approving the agreement made between hundreds of the members of the trade association of Dutch Garden Retail Sector aimed at curtailing the use of illegal pesticides. The objective of the initiative was to collectively (temporarily) exclude growers of products that use illegal pesticides, promoting compliance with national standards. <https://www.acm.nl/en/publications/letter-response-sustainability-initiative-about-reduction-illegal-pesticides-garden-retail-sector> accessed 20 April 2024.

[79] Draft Guidelines (n 74) para 45.

[80] Draft Guidelines (n 74) para 48.

[81] *Ibid.*

of the agreement.[82] When a quantitative analysis was necessary, the policy explicitly referred to environmental/shadow prices as a criterion to express environmental-damage agreements in monetary terms.[83]

The document just examined was only a draft, because the ACM waited for an official position of the Commission before it committed itself to a more definitive line.[84] With the Policy Rules issued in 2023, the Netherlands' authority sets out how it will investigate potential violations, or what sanctions it will impose, within the boundaries of its discretionary power.

In this new policy document, the ACM chooses in principle not to investigate in two situations: (i) in line with Horizontal Guidelines, when undertakings conclude agreements regarding compliance with a binding international or EU sustainability rule (which may fall, under certain conditions, outside the very scope of the cartel prohibition); (ii) in case of environmental-damage agreements, defined as agreements that 'in an efficient manner, help comply with an international or national standard or concrete policy goal to prevent or reduce such environmental damage', by reducing negative externalities and providing for a more efficient usage of natural resources.[85]

According to the Policy Rules, the ACM will not investigate further environmental-damage agreements if it is 'plausible' that the agreement is necessary to obtain the environmental benefits and those benefits sufficiently outweigh any possible harm to competition.[86] Also, consumers in the relevant market must receive an 'appreciable and objective' part of the advantages.[87] In other words, the consumers should substantially belong to the group that benefits from the agreement.

[82] Draft Guidelines (n 74) paras 54ff.

[83] Draft Guidelines (n 74) para 58.

[84] As noted by Helen Gornall, Agnieszka Bartlomiejczyk and Shubhanyu Singh Aujla, 'Oversight of Sustainability Agreements in the Netherlands: New Policy Rule Issued by the ACM' (2024), volume 15 Journal of European Competition Law & Practice 33-40, the ACM preferred to wait for a harmonised EU competition policy on sustainability agreements.

[85] Policy Rule (n. 75) paras 7-9.

[86] Policy Rule (n. 75) para 23. In its letter of 4 October 2023, the ACM issued an informal assessment, endorsing a sustainability initiative focused on commercial waste recycling. The initiative entails collaboration among various collectors of commercial waste, who agree to provide new corporate clients with contracts for a minimum of two sorted waste streams. Upon evaluation, the ACM found it 'plausible' that the primary objective of the initiative is to ensure compliance with legally mandated waste separation requirements, thus promoting sustainability. Furthermore, waste disposers maintain a level of autonomy in their choices. <https://www.acm.nl/en/publications/letter-response-sustainability-initiative-waste-collectors-stimulating-recycling> accessed 20 April 2024.

[87] *Ibid.*

As noted in literature, the final version of the policy document appears less innovative compared to its predecessor, which applied to environmental-damage agreements a quite different regime.[88] In the Draft Guidelines of 2021, the ACM provided for a more flexible approach to crucial concepts such as 'efficiency gains' and 'consumers', also recognizing the existence of national and international targets that NCAs must promote. In the end, the ACM's stance seems to have aligned more closely with the position expressed by the Commission in the Horizontal Guidelines.[89]

6. Conclusive remarks

The article outlined different possible approaches to the assessment of sustainability agreements under Article 101(3) and explored potential risks in allowing NCAs to take a broader approach. Indeed, the Treaties' wording leaves room for the inclusion of public interest considerations in competition rules, as also proved by initial application of Article 101(3) by the Commission.[90] Also NCAs and the Commission still exercise policy discretion in setting their positive and negative priorities.[91]

Following the modernization process, the Commission adhered to a narrow view of its own powers under Article 101(3), focusing on technical economic assessments. This view was ultimately reiterated in the Commission's Horizontal Guidelines, and it brought the ACM to scale back its initially broader approach.

Scholars' arguments in favour of a narrow interpretation of Article 101(3) explored in the article include the need for legal certainty, as well as concerns about the legitimacy of NCAs making choices deemed too political. Separating policy from technicality in Article 101(3) decisions, especially regarding sustainability, remains challenging. However, even reducing the antitrust analysis to a purely economic and technical exercise could be deemed to reflect a political choice.

The assessment would lean towards policy considerations especially when deal-

[88] Gornall and others (n. 84).

[89] As highlighted by Gornall and others (n. 84) 6, while the ACM does not fully align with the Commission, it does exhibit a tendency to approach the Commission's stance, particularly concerning the requirement for full compensation of consumers of the product and the substantial overlap for benefits occurring outside the market.

[90] Most notably, in CECED (n. 9).

[91] ECN+ Directive, art 4, par 5.

ing with environmental data which cannot easily be translated into quantitative or qualitative efficiencies (for instance, when there is a lack of useful or valid economic models or theories available).[92] There may even be agreements in which it can be considered 'unethical' to make such a calculation (e.g., when human dignity is at stake).[93]

The incorporation of sustainability considerations in such cases continues to be a contentious matter. While these subjects are complex and open to debate, deeply ingrained in the essence of competition law (its objectives and institutional framework), the article aims to express some observations supporting the idea of enabling NCAs to weigh a broader spectrum of policies in an Article 101(3) assessment.

Eventually, arguments for a more restrictive interpretation can be mitigated. The risk of fragmentation, legal certainty and coherence can be addressed through the central role of the ECN, soft-law mechanisms, and interpretations by EU Courts. The Commission could have a leading role, e.g., in determining in a transparent and uniform way which environmental economics methodologies it is willing to include in competition analysis, perhaps in collaboration with environmental agencies. The issue of legitimacy for NCAs is more complex, with scholars proposing solutions to integrate democratic legitimacy without compromising independence. However, it can be noted that, as asserted in literature, no institution is ever truly independent, only variably dependent.[94]

At present, the risk of inconsistency and the lack of legitimacy in the application of Article 101(3) can be mitigated by the centralizing role of the Commission in the ECN and, most importantly, by the fact that the Commission is currently the sole authority empowered to issue a binding exemption decision under said provision. This gap moderates the risk of inconsistent applications or the issue of allowing a balance of different policies by a body independent of politics. However, it also implies severe limitations on NCAs in applying Article 101(3).[95]

A revaluation of the entire system could be necessary, allowing NCAs to balance different EU policies within an assessment under Article 101(3), in consideration of

[92] According to Holmes (n 2) 399, although there is a place for quantitative techniques in assessing sustainability agreements, it is not a prerequisite to use them in all cases. Estimates and/or value judgments are often more helpful in certain situations.

[93] Gerbrandy and Polanski (n 14).

[94] Monti, 'Independence, Interdependence, and Legitimacy' (n 30), 184ff.

[95] As noted by Gornall and others (n 84) 1, an NCA's decision not to pursue a sustainability collaboration fails to offer legal certainty when EU competition law could be applied.

the legitimizing role provided by adherence to the Commission's guidelines and discussions within the ECN. Ultimately, competition is not only an end but can also be seen as a means to pursue other objectives.[96] Once these objectives are set by democratically elected authorities, NCAs should be able to consider them.[97] Naturally, any objective should be strictly linked to EU law, to avoid the fragmentation of competition law in relation to contingent national policy goals.[98]

[96] Holmes (n 2) 402.

[97] This viewpoint is echoed by Nowag, *Environmental Integration in Competition and Free-movement laws* (n 2) 42, asserting that permitting private parties to pursue public policy aims doesn't divest the State of the authority to define them, as long as the State retains the ultimate decision-making authority on what qualifies as a public policy aim.

[98] Nowag, *Environmental Integration in Competition and Free-Movement Laws* (n 2) 26 contends that, according to Article 191 TFEU, the integration obligation stipulated in Article 11 TFEU is relevant to national environmental protection objectives only when they can be grounded in EU law. This limitation is designed to prevent the exploitation of national interests as a means to bypass EU regulations.