

**SERGIO MARIA CARBONE\***

## SUSTAINABILITY AGREEMENTS AND ARTICLE 101 TFEU

*ABSTRACT. The original notion of individual consumer's benefit triggering the derogatory effects under Art. 101.3 TFEU has been superseded and definitively expanded so as to include not only individual consumers' benefits but also all other social value benefits fostering the development of a new social model of market economy superseding the old one embodied in the original Treaty of Rome. On this basis, the paper discusses the recent Communication whereby the EU Commission has provided instructions and guidelines for the proper assessment of the compatibility of horizontal cooperation agreements with the objective set out by Art. 3 TEU of contributing to the shaping of a new European social market economy. This, in particular, implies the extension of the scope of action of all competent public authorities and the evolution of their power of control to such an extent as to include the assessment of the consistency and the actual sustainability of the effects deriving from each specific cooperation agreement for the benefit of the entire community thereby affected.*

**CONTENT.** 1. The originally narrow meaning of 'beneficial effects' under Art. 101.3 TFEU. – 2. Enlarging the notion of 'beneficial effects': the case concerning common-brand agreements. – 3. The case of horizontal cooperation agreements concerning new and more sustainable products. – 4. Extending the derogating effects under Art. 101.3 TFEU to 'collective advantages'. – 5. Assessing the beneficial effects of horizontal cooperation agreements: role and limits of the competent public authorities. – 6. Conclusive remarks.

---

\* Emeritus Professor of European Union Law, Department of Law, University of Genoa.

---

### 1. *The originally narrow meaning of 'beneficial effects' under Art. 101.3 TFEU*

A recent Communication issued by the Commission on the effects and contents of Art. 101 TFEU on various cooperation agreements has stressed the importance of para. 3 of such Article in order to compensate, through possible positive and beneficial effects, any negative, restrictive and adverse consequences on competition and on the interests of consumers which may flow from the contracting parties' reciprocal obligations to undertake possible initiatives in the relevant market affected by such agreements. The above-mentioned Communication therefore constitutes the occasion and offers the proper ground for assessing whether the effects of said agreements are likely to favor a sustainable development of the market and/or of the same community within which they are meant to operate.

In this context, the Commission has codified in an *unicum* communication the results already achieved through the practice developed by the same Commission and various national antitrust authorities and set out new targets to be reached through a progressive expansion of the notion of 'beneficial effects' for consumers which are required to outweigh, under Art. 101.3 TFEU, any possible negative effects that the same consumers have to suffer, even if to different extents, due to the specific constraints deriving from the many types of contractual obligations included in the various cooperation agreements existing in the practice of international trade and commerce.

Such 'beneficial effects' for consumers were evaluated at the very beginning of the application of said Art. 101.3 TFEU on the basis of an extremely narrow meaning, *i.e.* limited to effects directly and immediately beneficial for individual consumers together with those deriving from new products and/or services available in the relevant market in terms of cost-savings for individual consumers. In other words, and according to this meaning, at least to the extent that any direct beneficial effect for individual consumers is proven, the related evidence may also consist of the reduction of the redundant presence of players and offers in the same market. In the same perspective, any possible market evolution due to the effects of a cooperation agreement causing subjective restrictions of the presence of producers may also be considered a direct benefit for individual consumers for the purposes of the derogation under Art. 101.3 TFEU, if it results that at least part of the decrease of the related variable costs of production and commercialization extends to downstream sales through price reduction.

Accordingly, an individual beneficial cost-saving for consumers has been found also in the case where a cooperation agreement enlarged the production or a commercial

---

activity of a company from a specific product sector or geographical market into a new one, adding to the same company's supply chain certain transport or infrastructure services that brought benefits for the individual consumers present in the relevant area.

In sum, at the very beginning of the enforcement of European antitrust law, cooperation agreements and in general horizontal agreements between competitors were deemed capable to rationalize the market and increase its efficiencies for the purposes of the derogatory effects envisaged by Art. 101.3 TFEU only to the extent that they resulted into individual benefits for consumers in terms of prices or at least of quality of goods or services present and available on the market.

## ***2. Enlarging the notion of 'beneficial effects': the case concerning common-brand agreements***

In this perspective, a progressive expansion of the said notion of 'beneficial effects' occurred in relation to a case concerning common-brand agreements with price fixing and the institution of a common commercial distribution channel in a specific market. The effects of these agreements were found to be compatible with the antitrust criteria in consideration of the benefits deriving therefrom for individual consumers as evidenced upon specific assessment. Therefore, the restrictive effects produced by the presence of competitors on the market are admitted and considered lawful if and to the extent that proof is given of the proportionate, beneficial effects stemming therefrom for individual consumers. To this end, one has also to take into consideration the beneficial effects obtained through the expansion under a sole and common brand of the presence of certain new goods and services and the related individual consumers' cost-savings in the relevant distribution market.

The same approach has been deployed in other contexts to verify the actual existence of an efficient and beneficial gain in favor of individual consumers deriving from the entrance of new products and services available to each of them into a specific market.

As a matter of fact, also in a different context, such new entrance has been regarded as reliable proof of the beneficial effects for individual consumers to the extent that it is proven that it proportionally overweighs the negative impact in terms of antitrust effects related to the elimination or reduction by concentration of the various players and offers present in the market. The existence of specific incentives to sales

passing on to individual consumers stands as proof of such individual compensatory benefits. In fact, the circumstance that in this case at least part of the decrease of the variable costs of production or distribution therefrom deriving are legitimately found to pass on to individual consumers in a proportionate and adequate manner is deemed sufficient to trigger the application of Art. 101.3 TFEU.

On the contrary, this is not the case if it results that the beneficial effects for consumers are limited to a more rational allocation and distribution of the goods in storages and the goods remain in the separate ownership of the various parties which keep their respective accounting books and different criteria of calculation of the costs or profits without any stimulating innovation induced by their common presence on the market.

However, the solution would be different in case of proof that the sole presence of a unique and common interface permits individual consumers to operate with more rational and efficient criteria capable of better satisfying their allocating storage needs. Within such limits and in this framework, it is confirmed that the proof of the existence of real beneficial effects for individual consumers may be obtained not only as a result of the sole decrease of prices but also in terms of logistic and personal increased efficiencies, if it is proven that their benefits pass directly and immediately on to individual customers.

### ***3. The case of horizontal cooperation agreements concerning new and more sustainable products***

Moreover, a further and different perspective for the evaluation of the expanded use of the notion of beneficial individual effects for consumers has been devised for the purposes of obtaining the effects of derogation under Art. 101.3 TFEU. It is the case of agreements fostering the collaboration or the cooperation for reciprocal industrial and commercial integration among partners and competitors present in the same market aimed at promoting the consumption of a product more sustainable than others. In fact, in presence of the above circumstances such agreements have been considered susceptible to produce 'individual effects' or benefits as far as they actually promote and improve the single consumer's experience in respect of a specific product or service of which they increase, at the same time, the quality and effects. The classic example of this situation of non-direct beneficial use is the case of the horizontal cooperation agree-

ments on quality and efficiencies for the production of certain products through the elimination from the relevant industrial chain of certain specific non-sustainable materials, notwithstanding that such qualitative improvement of the product is obtained with the increase, at the same time, of the related price. In fact, in this case, to the extent that such positive individual externalities are considered proportionate to outweigh the negative effects on the level of the prices to consumers, they are to be considered relevant for the purposes of benefiting from the derogation under Art. 101.3 TFEU.

Another benefit for non-use consumers, to be considered a direct relevant advantage and assimilated to individual benefits for the purposes of Art. 101.3 TFEU, may result from a higher appreciation of the consumption of new and more sustainable products by reason of their having a less negative impact than the others. In this sense, the importance and the relevance of a new washing machine not because it cleans better, but because it contaminates less the water, thus causing an important ‘individual’ safe. And in the same vein, the notion of direct and individual benefit has been further expanded to legitimate under Art. 101.3 TFEU the effects of agreements among producers for the use of a higher quality fuel for cars. Such effects must be assessed not only in terms of speed or resilience of the vehicles that make use of the fuel, but also because of the lower level of pollution they give rise to for the benefit of the future generations’ society.

#### ***4. Extending the derogating effects under Art. 101.3 TFEU to ‘collective advantages’***

It is therefore confirmed that the notion of individual consumer benefit as per Art. 101.3 TFEU has been progressively enlarged and expanded in order to include also the positive effects to individual consumers of future generations that are produced by the presence of an added value component capable of avoiding the consumption of polluting or non-sustainable products, notwithstanding the loss of the illusory benefit of an immediate and temporary decrease of the price, which would eventually come with detrimental effects to the individual work of future generations of consumers.

The progressive extension of the notion of benefits in such a manner as to take advantage also on non-use consumers tends to foster the inclusion of the voluntary effects through the positive externalities of certain cooperation agreements which likewise extend the derogation foreseen by Art. 101.3 TFEU, notwithstanding the presence of some anticompetitive effects. As a matter of fact, such positive outcome has to be con-

sidered in light of the fact that the anticompetitive effects are internalized and neutralized through the innovation of a common and sustainable joint product or technology resulting from an industrial development carried out on the basis of a common undertaking under horizontal cooperation agreements.

This further larger extension of the positive effects to non-use consumers benefits obtained by a great variety of cooperation agreements existing in the commercial practice has included also those produced to the benefit of a larger group of interested beneficiaries ('collective benefits') in order to compensate the possible negative antitrust effects deriving therefrom through the innovation of important and sustainable advantages for a wider section of the society rather than, and not limited to, the sole individual consumers of a specific market.

Such effects are in particular relevant when it comes to cooperation agreements aimed at obtaining a sustainable economic development of an entire community or of a particular group of consumers. These effects are not only those directly produced by the opening of new markets or the introduction of less expensive or better products or services, but also those consisting in new employment opportunities deriving from better criteria for the distribution of the available resources in the market, obtained through the execution of specific development programs or projects, despite the fact that this reduces the presence of competitors in the market. In fact, in this case the derogating effects under Art. 101.3 TFEU are extended to include also the benefits deriving from the collective advantages for an entire community that stand out as measures countervailing the possible negative antitrust effects consisting in the reduction of competitors in a specific market.

##### ***5. Assessing the beneficial effects of horizontal cooperation agreements: role and limits of the competent public authorities***

Therefore, also the presence of such collective benefits may be considered sufficient enough to justify the legitimacy of a cooperation project between competitors because of the beneficial results for the entire community in which it produces its effects. Of no relevance to the contrary are any possible antitrust effects deriving from the reciprocal obligations undertaken by the parties to restrict or eliminate their competition in the specific market where the common sustainable program of cooperation has to be developed. Of course, a complete and exclusive assessment of such collective beneficial

effects is required as to the terms in which they may actually have a positive impact on the public policy, welfare and security of the local community in which the common project between competitors has to be implemented and evaluated.

This kind of assessment, therefore, unavoidably implies the exercise of a discretionary power subject to the ordinary rules on transparency and accountability, with a view to avoiding or at least mitigating the risk of misuse by the competent authorities of such power, whose aim is to reconcile and control the economic rationale of the parties' common project with the public beneficial concerns of the community in which the project itself is designed to produce effects. In this way and within such a procedure, the private rules originating from the intention of the parties to a cooperation agreement may be integrated, shaped and developed in such a way as to become consistent (even if originally they are not) with the public welfare and capable of obtaining a sustainable development of the community in which the common project is executed.

In this sense, the involvement of the public Authorities shall induce the parties to improve the contents of their contractual project of cooperation in a direction more oriented towards the common benefit of the affected communities rather than the individual or consumer's benefit. In particular, it is important to understand the broader meaning assigned to such relevant benefits as not limited only to the individual effects on consumers for the purposes of countervailing any possible detrimental antitrust effects in the market. In this perspective, commercial cooperation agreements may be considered suitable for a sustainable development of the society without disregarding the original intent of the parties whose effects, at the same time, are consolidated and strengthened as a result of their being approved by the competent public authorities on the ground of the benefits brought to the entire community. In fact, the consolidated legitimacy obtained through such public control and approval of the agreements' contents eliminates any risk about the capacity of their beneficial effects to compensate any negative consequences such as restrictions imposed on the players present in the market or the elimination in such market of certain goods or services. In other words, the presence of a specific consent and approval by a public Authority or other competent public entity as to the normative and novative effects of a specific agreement utilized by competitors in the commercial practice excludes that the parties bear any possible liability in this respect.

## 6. *Conclusive remarks*

In this evolutionary scenario the notion of ‘beneficiaries’ under Art. 101.3 TFEU may be further expanded irrespective of the fact that such beneficiaries are consumers and subject only to the condition that they form part of the community benefiting from the positive social effects of the measures adopted or in any case introduced in a program under the cooperation agreement to be qualified as sustainable.

In this context and perspective, it shall also be possible to expand the role and competence entrusted with the public antitrust authorities with a view to rendering effective the innovations introduced by the Lisbon Treaty, and in particular those enlarging the intervention of such authorities in order to qualify the market as characterized not only as an economy founded on the competition, but also in a way consistent with the satisfaction of the social needs of the relevant community and therefore contributing to the shaping of a new European social market economy. A system, in other words, where not only competition, but in particular also employment, environmental safeguards and any other common social benefits are necessary components of a sustainable development of the society based on a social market economy and, therefore, grounded on the three pillars represented by efficient economic performance and, at the same time, social welfare and protection of the environment.

As a matter of fact, this end and in particular the need to render compatible the actual enforcement of said principles have been evidenced in the current practice. On the one hand, to this purpose any and all types of social benefits for the consumers or for a local community may justify and override, on a case-by-case basis, possible illegitimate competitive restrictions deriving from the excessive exploitation of the market freedom and of the parties’ autonomy within the international or in a specific market. On the other hand, the same practice has elaborated various new instruments and institutions to foster the possible means to render compatible the enforcement of all the above principles. Among them, the instruments of the ‘social dialogue’ and the ‘corporate social responsibility’ which, even if affected by the social and economic globalization, still remains useful means to reach a fair balance between the flexibility required by the maximum expansion of the market economy and a fair social and environmental protection. Therefore, the use of these instruments and techniques within the procedures aimed to certify the consistency of the effects of a cooperation project with the public benefit as opposed to any possible negative effects has to be fostered before the relevant national regulators. Among them in particular on occasion of the procedures before the



Antitrust Authorities in the framework of the assessment of the capacity of the specific measures to be introduced to provide the individual consumers or the social or environment with such beneficial effects as to ground their evaluation as legitimate notwithstanding the negative antitrust effects produced by some restrictive competitive measures adopted in cooperation agreements.

In this perspective, it is confirmed that the original notion of individual consumers' benefit triggering the derogatory effects under Art. 101.3 TFEU has been superseded and definitively expanded so as to include not only individual consumers' benefits but also all other social value benefits fostering the development of a new social model of market economy superseding the old one embodied in the original Treaty of Rome. This, in particular, implies the extension of the scope of action of all public authorities and the evolution of their power of control to such an extent as to include the assessment of the consistency and the actual sustainability of the effects deriving from each specific cooperation agreement for the benefit of the entire community thereby affected. Of course, the common framework of such control shall be inclusive of all the related beneficial and negative effects. In such a context, specific techniques resulting from the social dialogue and the implementation of the rules on social corporate responsibility may be used as constructive tools and important points of reference capable of guaranteeing a fair comprehensive balance between flexibility and efficiencies of the market within an encouraged sustainable social and environmental-friendly development of the economies of the interested local communities.