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SUSTAINABILITY AND COMPETITION LAW AND POLICY: DO WE NEED TO BROADEN THE CONCEPT OF 'CONSUMER WELFARE' IN ORDER TO CONTRIBUTE TO THE REALISATION OF GREEN TRANSITION?

ABSTRACT. *Consumer welfare is a core element of many antitrust regimes. It is not surprising, therefore, that it at-tracts many of the tensions associated with the growing calls for competition policy to extend the scope of interests protected by competition law to non-market values such as environmental protection. This arti-cle analyses the risk that antitrust assessments lose their objectivity and verifiability when they move away from economic-quantitative criteria to rely on more abstract parameters such as the contribution to sus-tainability goals. To this end, the reflection focuses on the discipline of sustainability agreements in the European Commission's 2023 Guidelines on horizontal co-operation and compares this balanced solu-tion with an alternative Dutch proposal, more daring but more risky.*

CONTENT. 1. Consumer welfare and European competition law. – 2. Competition law and sustainability. – 3. Which 'consumer welfare'? – 4. The Guidelines on the application of Article 101 to horizontal co-operation agreements. – 5. Regulation of environmental agreements at national level: the Dutch case. – 6. Conclusions.

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The author would like to thank his colleague Giuseppe Andrea Polizzi for his contribution to the drafting of the present text.

1. Consumer welfare and European competition law

This introduction examines whether, in order for competition law to contribute to the realisation of green transition, it is necessary to extend the concept of 'consumer welfare'.

It is clear from the Council Regulations and the Commission Guidelines that consumer welfare is the fundamental objective of competition law. For instance, according to the Commission Guidelines on the application of Article 81(3) 'The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'.[1]

The case law of the Court of Justice has repeatedly recognised that consumer welfare is the fundamental objective of competition law and that competition law must be interpreted as referring not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition.[2]

Consumer welfare, therefore, is also pursued by keeping a competitive, not artificially maintained, market structure, based on merit.

A significant objective of the introduction of the concept of consumer welfare has always been to try to protect the application of competition law from political influence aimed at other public interest objectives, such as industrial policy, employment protection and other social policies.

The economic nature of this notion, moreover, has been further enhanced by the more economic approach that the Commission has adopted and implemented since the early stages of the modernisation of the competition rules. The renewed focus on economic data has two merits. First, it strengthens the credibility of antitrust intervention which is carefully fine-tuned to defend only a market structure characterised by genuine competitive dynamics. Secondly, it counterbalances the loss in terms of legal certainty in the transition from the form-based to effects-based application of the rules.

In this regard, it is clear how the increased and refined focus on quantitative

[1] Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/08, para 13.

[2] Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527.

data in the application of antitrust law to individual cases has enabled private parties to base any challenges and disputes against decisions of the competition authorities on more robust and clearer grounds. At the same time, the possibility of envisaging and pursuing a coherent reference to a consumer welfare standard with strong economic and quantitative credentials has enabled the antitrust authorities to protect their administrative activities from markedly qualitative influences and pressures of a particular or political nature.

Consumer welfare has always been an integral part of the application of the competition rules. In the European context, it has equalled if not surpassed in substance the original common market imperative as the fundamental rationale of the antitrust regime. Consumer welfare is, however, currently undoubtedly subject to significant debate, aimed at broadening the sphere of interests protected by competition law to non-market values, such as environmental protection.

Such debate is particularly (and perhaps understandably) lively in the United States, where the concept of consumer welfare – in the wake of the suggestions of authors such as Bork – has always been interpreted and applied in a very radical manner, as a lexical cover to an antitrust policy actually aimed at pursuing the total welfare standard. Filtered through an extreme productive efficiency approach, the criterion at issue has resulted in a reorientation of American competition practice and case law since the 1980s, reducing the margins of public intervention to decidedly minimal scrutiny of the practices of undertakings in the light of their reflections on the prices charged to consumers.

In contrast, it is clear that, pursuant to the ordoliberal structuralist approach, consumer welfare in Europe has always been applied in a more balanced manner, translating into the conviction that the best benefit for end consumers is guaranteed by the sole preservation of a genuinely competitive, not artificially maintained, market structure, based on merit.

In addition, the European antitrust regime has demonstrated significant foresight and has for some time distanced itself from the temptations of interpreting consumer welfare in merely retrospective terms, looking only at the past. Far from limiting itself to conducting evaluations based solely on what exists in order to ascertain the effects on consumer welfare, the European competition law administration has been able to increasingly value innovation, which in recent years has been far more important than mere efficiency.

When assessing mergers, for example, considerations are inevitably always

forward-looking, weighing up the impact of the transactions on the developmental trends in the markets concerned. In order to be more effective, such an assessment cannot be limited today to taking into account existing products: in the context of markets increasingly characterised by dynamic economies of scale, the assessment of research projects and new products in the pipeline of the undertakings involved has become an established practice for European antitrust authorities, which are thus able to consider the competitive conditions that may arise when the new products are on the market.

Nevertheless, the debate that has developed in the United States involves, also as a result of the terminological overlap, European consumer welfare and the need to broaden the interests protected by competition law, not only with reference to the abovementioned sustainability context, but also with regard to the challenges of the digital economy.

2. Competition law and sustainability

It is important to consider whether competition law can be an instrument among those available to tackle pollution or climate change or whether regulatory intervention should be preferred.

To the extent that, pursuant to sustainability, the need for a change in consumption and production habits, which directly affect the choices made by consumers and undertakings, is on the agenda, competition law can certainly have a role to play.

The Commission has taken steps in this direction, with numerous interventions by Commissioner Vestager, which have paved the way for a specific link between the so-called European Green Deal and the competition rules, culminating in the 'Competition Policy Contributing to the European Green Deal' conference organised by the Directorate-General for Competition on 4 February 2021. The conclusions of the conference are summarised in the Competition Policy Brief of September 2021, 'Competition Policy in Support of Europe's Green Ambition',[3] which outlines a

[3] DG for Competition (European Commission), 'Competition Policy in Support of Europe's Green Ambition' <https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-

complementary role for competition policy to that of legislative intervention in the joint response to the challenges of the ecological transition.

Moreover, in the Treaties, there is no lack of calls for greater coherence (Article 7 TFEU) of EU policies with respect to the objectives of sustainable growth (Article 3(3) TEU and 191(1) and (2) TFEU). In addition, in 2016 the European Union ratified the Paris Agreement adopted under the United Nations Framework Convention on Climate Change.

3. Which 'consumer welfare'?

As we have seen, the notion of 'consumer welfare' is mainly an economic notion.

Article 101(3) TFEU includes among the necessary conditions for the inapplicability of Article 101(1) TFEU that the agreement allows consumers 'a fair share of the resulting benefit'.

> The concept of 'fair share' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1) […] the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement.[4]

This definition raises a number of issues.

First, whether the concept of 'consumer welfare' should be interpreted, as economists tend to do, as simply 'consumer surplus', namely, the difference between the price the consumer was willing to pay for the product and what the consumer actually paid. That is the interpretation that has certainly prevailed in the United States.

Or, whether the concept should be interpreted more broadly, encompassing not only the price level, but also improvements in product quality, consumer choice and innovation, thus also taking into account dynamic efficiencies. This is instead the prevailing interpretation in Europe.

en/format-PDF> accessed 26 February 2024.

[4] Commission Guidelines on the application of Article 81(3) of the Treaty, para 85.

Furthermore, there is debate as to whether reference should also be made to the concept of 'total surplus', which includes not only the 'consumer surplus' but also the producer's profit.

In this respect, the Guidelines on the application of Article 81(3) indicate that 'The concept of "consumers" encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers'.[5]

Finally, it is important to consider which consumers must be taken into account. In particular whether only those adversely affected by the agreement or a wider audience should be taken into account, including all those who may benefit from the pursuit of a public interest objective, such as the effects on the environment.

According to the Guidelines on the application of Article 81(3), there should be a close relationship between the market in which consumers have been negatively affected and the market in which positive effects are to be ascertained.

> Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same.[6]

[5] *Ibid.* para 84.

[6] *Ibid.* para 43.

4. The Guidelines on the application of Article 101 to horizontal co-operation agreements

The Guidelines on horizontal cooperation agreements approved by the Commission on 1 June 2023 interpret these principles in an innovative way.[7]

With regard to the efficiency gains,[8] the Commission demonstrates that it has broadened the range of appreciable benefits resulting from cooperation between undertakings far beyond the purely economic sphere, without, however, going so far as to confuse or overlap with the extensive 'sustainability goals' mentioned in the introduction to the chapter concerned.[9]

Due to the requirement that efficiency gains should be 'objective, concrete and verifiable', must 'be capable of being substantiated' and not merely assumed, the 2023 Guidelines provide reassuring prospects for certainty and concreteness when it comes, for example, to efficiency gains resulting from the agreement:

> understood in broad terms, encompassing not only reductions in production and distribution costs but also increases in product variety and quality, improvements in production or distribution processes, and increases in innovation. It therefore allows for a broad range of sustainability benefits resulting from the use of particular ingredients, technologies and production processes to be taken into account.[10]

The Guidelines themselves provide some examples of such sustainability benefits, such as:

> the use of less polluting production or distribution technologies, improved conditions of production and distribution, more resilient infrastructure, better

[7] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2023] OJ C259/1.

[8] *Ibid.* paras 557-559.

[9] *Ibid.* para 517: 'The notion of sustainability objectives therefore includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), reducing pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, ensuring animal welfare, etc.'.

[10] *Ibid.* para 557.

> quality products. [R]educe supply chain disruptions, shorten the time it takes to bring sustainable products to the market and enable consumers to make informed purchasing decisions by facilitating the comparison of products.[11]

According to the Commission, this relevant category of consumers encompasses 'all direct or indirect customers of the products covered by the [cooperation] agreement' and 'the sustainability benefits that result from [the] agreement[s] must accrue to the consumers of the products covered by [those] agreements'.[12] The benefits in question are subject to a balancing test such that the second condition of paragraph 3 is fulfilled if 'the benefits resulting from the agreement outweigh the harm caused by the agreement' in terms of increased prices or reduced choice.[13] According to the Guidelines, three types of benefits should be noted.

First, 'individual use value benefits',[14] meaning benefits that derive from the consumption or the use of the products covered by the cooperation agreement (improved product quality or a cheaper price).

Secondly, 'individual non-use value benefits':[15] these are indirect benefits, resulting from the fact that consumers prefer a sustainable product, not necessarily because it is better, but because it has a less negative impact on the environment and others, to the benefit of society and future generations. In order to include this type of benefit in the balancing exercise, the parties to the cooperation agreement must demonstrate the actual preferences of consumers and this assessment must be based on a representative portion of all consumers in the relevant market.

Finally, 'collective benefits',[16] which occur irrespective of the consumers' individual appreciation of the product, because they do not directly concern them, but go beyond them, concerning a wider group. In order to be considered as decisive benefits for the purposes of the balancing exercise, however, according to the Guidelines, there must be substantial overlap between the broader category of collective beneficiaries and the consumers in the relevant market.[17]

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[11] *Ibid.* para 558.

[12] *Ibid.* para 569.

[13] *Ibid.*

[14] *Ibid.* paras 571-574.

[15] *Ibid.* paras 575-581.

[16] *Ibid.* paragraphs 582-589.

For 'individual non-use value benefits', the link to the consumers of the products covered by the individual sustainability agreement is still clear and strict. This type of benefit essentially corresponds to a kind of consumption choice of an altruistic nature, since it concerns:

> indirect benefits resulting from consumers' appreciation of the impact of their sustainable consumption on others. In particular, some consumers may value their consumption of a sustainable product more highly than the consumption of a non-sustainable product because the sustainable product has less negative impact on others.[18]

Regarding 'collective benefits', in contrast, the scope of the definition could certainly have been a very slippery slope for the Commission, with the risk of losing all contact with those who suffer harm resulting from the agreement between undertakings and consequently undermining the foundations of an economic assessment and balancing exercise. Aware that 'not all negative externalities can be cured through voluntary, individual consumer actions' (the assessment of which falls under the category of 'individual non-use value benefits') the Commission defines 'collective benefits' as:

> benefits [which] occur irrespective of the consumers' individual appreciation of the product and accrue to a wider section of society than just consumers in the relevant market.[19]

However, remaining in line with its own practice and case law, it limits the relevance of collective benefits for the purposes of Article 101(3) TFEU assessments:

> For collective benefits to be taken into account, the parties to the agreement must be able to:

[17] Drawing on one of the examples in the 2023 Guidelines (para 585), it can probably be ruled out that there is substantial overlap between consumers of clothing and beneficiaries of the environmental benefits of an agreement to use sustainable cotton that reduces the consumption of chemicals and water in the land where it is grown. The environmental benefits that would also result from the agreement are likely to occur only in the area where the cotton is grown.

[18] *Ibid.*para 575.

[19] *Ibid.* para 582.

(a) describe clearly the claimed benefits and provide evidence that they have already occurred or are likely to occur;
(b) define clearly the beneficiaries;
(c) demonstrate that the consumers in the relevant market substantially overlap with the beneficiaries or form part of them; and
(d) demonstrate that the share of the collective benefits that accrues to the consumers in the relevant market, possibly together with individual use and non-use value benefits accruing to those consumers, outweighs the harm suffered by those consumers as a result of the restriction.[20]

In both cases, the Commission's decision to both carefully circumscribe the relevant elements in terms of benefits and the relevant beneficiary-consumer-market relationship, and outline the method to measure how far such benefits are actually reflected in consumers' willingness to pay – a delicate area which will be examined further – is particularly welcome.

5. Regulation of environmental agreements at national level: the Dutch case

Various national competition authorities have taken action in the area of environmental agreements, including initiatives in Greece[21] and Germany,[22] a recent legislative change in Austria[23] and, even more recently, guidance in the UK.[24]

[20] *Ibid.* paragraph 587.

[21] On 22 June 2022, the Hellenic Competition Commission announced the adoption of a Sandbox for sustainable development and competition. Press release <https://www.epant.gr/en/enimerosi/press-releases/item/2226-press-release-creation-of-the-sandbox-for-sustainable-development-and-competition.html> accessed 26 February 2024.

[22] At the conclusion of the examination of two cases of cooperation between undertakings with sustainability implications, Andreas Mundt, President of the Federal Cartel Office, stated that: 'Competition law does not stand in the way of cooperations for achieving sustainability objectives – on the contrary. Effective competition is part of the solution since sustainability requires innovation, which in turn only emerges in a competitive environment'. Press release <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html> accessed 26 February 2024.

[23] On 8 July 2021, in connection with the transposition of Directive (EU) 2019/1, the *Nationalrat* (National Council, Austria) passed a bill to amend the *Kartellgesetz* (Cartel Act, Austria) by introducing in its para 2.1 an exemption (similar to Article 101(3) TFEU) according to which 'Consumers shall also be deemed to enjoy a fair share of the benefits which result from improvements to the production or distribution of goods or the promotion of technical or economic progress if those benefits contribute substantially to an ecologically sustainable or climate-neutral econ-

The Dutch case is very interesting because of the in-depth legal analysis and the activism of the competition authority.

The sensitivity of Dutch institutions to sustainability issues and the prominent role of international law in the Dutch legal system is worth pointing out. Indeed, the Supreme Court upheld the decision of the Court of Appeal in the Hague in the case of *Urgenda Foundation v State of the Netherlands*, which had found that the Dutch Government had breached its duty of care under Articles 2 and 8 of the European Convention on Human Rights for failing to reduce greenhouse gas emissions by 25% by the end of 2020.[25]

At first, the Dutch competition authority applied the concept of 'consumer welfare' in a traditional way, considering that agreements aimed at improving the welfare of farmed chickens (*Chickens of Tomorrow* case of 2015)[26] and those aimed at ensuring better working conditions for South African miners (*Blood-Coals* case of 2013)[27] were restrictive of competition and the benefits generated by these agreements did not compensate consumers harmed by the restrictions of competition.

Then, the Authority developed a model that not only incorporates the Commission's approach in the 2023 Guidelines, but goes even further. In particular, in the two 'Draft guidelines on sustainability agreements', published in 2020 and 2021,[28]

omy'. Official translation <https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Cartel_Act_2005_Sep_2021_english.pdf> accessed 26 February 2024.

[24] On 12 October 2023, the Competition and Markets Authority published a 'Guidance on the application of the Chapter I provision of the Competition Act 1998 to environmental sustainability agreements between businesses operating at the same level of the supply chain'<https://www.gov.uk/government/publications/guidance-on-environmental-sustainability-agreements> accessed 26 February 2024.

[25] *Urgenda Foundation v State of the Netherlands* [2019] Supreme Court of the Netherlands, <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf> accessed 26 February 2024.

[26] Netherlands Authority for Consumers and Markets, case n. 13.0195.66. The official summary of the Authority's reasoning may be found at <https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow> accessed 26 February 2024.

[27] Netherlands Authority for Consumers and Markets, case n. 14.0791.01. The official summary of the Authority's reasoning may be found at <https://www.acm.nl/nl/publicaties/publicatie/13544/Advies-ACM-over-herkomst-transparantie-in-de-steenkolenketen> accessed 26 February 2024.

[28] Netherlands Authority for Consumers and Markets, 'Draft guidelines "Sustainability Agreements"' available at <https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements> and 'Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law' <https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law> accessed 26 Febru-

and then in the 'Policy rule – ACM's oversight on sustainability agreements', published on 4 October 2023.[29]

In the Dutch model, in contrast to the Commission's model (according to which sustainability agreements fall within the traditional categories of horizontal agreements, such as cooperation, research and development and others), a particular category of agreements is identified: the 'Environmental-damage agreements', namely, are agreements that in the production or use of products or services result in damage to the environment, such as atmospheric warming, reduction of bio-diversity or damage to health.[30] The 2023 Dutch document is not fully aligned with the 2021 draft; it is nevertheless useful to refer to what the Dutch Authority then envisaged, as it represents an alternative and more advanced paradigm compared with the one subsequently suggested by the Commission.

In fact, with the 2021 draft the Dutch authority made clear that if these so-called *Damage Agreements* (a) meet international or national standards, which are not compulsory for undertakings (thus voluntary), or (b) tend to pursue a concrete objective of preventing environmental damage, then in considering the benefit to consumers, within the meaning of the application of the Article 101(3) TFEU equivalent rule, benefits other than those enjoyed by users could have been considered: user could therefore not necessarily be fully compensated.[31]

For all other sustainability agreements, which are not *Damage Agreements*, users should have been fully compensated.[32] In other words, they must attribute sufficient value to the improvements brought about by the agreements to offset the price increases (in terms therefore similar to those used by the Commission in defining 'individual non-use value benefits').

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[29] Netherlands Authority for Consumers and Markets, 'Policy rule – ACM's oversight on sustainability agreements' <https://www.acm.nl/en/publications/policy-rule-acms-oversight-sustainability-agreements> accessed 26 February 2024.

[30] *Ibid.* para 22.

[31] Netherlands Authority for Consumers and Markets, 'Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law', cit., para 45.

[32] *Ibid.* para 49.

6. Conclusions

First of all, in my view, the traditional concept of 'consumer welfare' does not appear to be distorted by the approach adopted in the new 2023 Guidelines. In fact, 'consumer welfare' remains a mainly economic notion, which entails that users must be compensated for the negative effects caused to them by the restriction of competition.

At the same time, the 2023 Guidelines are certainly innovative: first, they expand the notion of sustainability objectives, in line with the 2030 Agenda for Sustainable Development adopted by all UN Member States in 2015,[33] which encompasses activities that support economic, environmental and social (including labour and human rights) development. Second, they incorporate within the notion of 'consumer welfare', collective benefits, but only to the extent that the broader beneficiary community includes consumers in the relevant market and that the share of the collective benefits that accrues to the consumers in the relevant market (possibly together with individual use and non-use value benefits) outweighs the harm suffered by those consumers as a result of the restriction of competition.

The position of the 2021 draft of the Dutch competition authority shows, in contrast, that a far more radical alternative was at least conceivable. At least in the case of agreements in the category of *Damage Agreements*, it is prepared to accept that users of the goods or services covered by these agreements do not necessarily have to be compensated in full.

In any event, in my view, all these solutions appear to preserve the economic character of the assessment to be carried out, and avoid getting involved in political assessments. Getting involved in political assessments would expose the Commission and the national competition authorities to pressure from lobbies and political interference. It would also make the role of national courts, which would have to carry out assessments of a political, thus discretionary and indefinable, nature, extremely difficult, compromising both judicial review of the decisions of the competition authorities and the direct application of the competition rules.

In the new Guidelines, the Commission seems to maintain a well-balanced approach in reassuring continuity with the *more economic approach* of the past, thus

[33] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, cit., para 516.

ensuring that national authorities and courts do not have excessively wide margins of discretion.

In the light of the framework described above, therefore, the structure and methodology of concrete consumer surveys to quantify consumers' willingness to pay should be considered as a priority.

Such an exercise is considered indispensable by the Commission itself, which acknowledges that it still needs to:

> gain[…] sufficient experience of dealing with concrete cases [with regard to] measuring and quantifying collective benefits [to verify] a clearly identifiable […] impact on consumers in the relevant market.[34]

A correct assessment of consumers' willingness to pay is also crucial in order to carefully prevent the risk of so-called *greenwashing*, which has been warned about and recently pointed out, for example, even by Olivier Guersent (the Director-General of DG COMP).[35]

> On this issue, the detailed 'Technical Report on Sustainability and Competition' commissioned by the Dutch and Greek national authorities and published in 2021 to accompany the second draft of the Dutch Guidelines is of assistance, even if only to understand the complexity and delicate nature of the investigation and quantification of use and non-use-related benefits.[36]

[34] *Ibid.* paragraph 589.

[35] Olivier Guersent, 'Competition Policy, maintaining consistency in a changing world' (*27th International Conference of the IBA Florence*, 15 September 2023) <https://competition-policy.ec.europa.eu/about/news/competition-policy-maintaining-consistency-changing-world-2023-09-15_en> accessed 26 February 2024: '[a]t the same time, we are especially sensitive to the risks of greenwashing. If companies think they can use a green label as a cover for anticompetitive behaviour that is neither necessary to achieve green efficiencies, nor proportionate, they are very much mistaken'.

[36] Roman Inderst, Eftichios Sartzetakis and Anastasios Xepapadeas, 'Technical Report on Sustainability and Competition' (*jointly commissioned by the Netherlands Authority for Consumers and Markets and the Hellenic Competition Commission*, January 2021) <https://www.acm.nl/en/publications/technical-report-sustainability-and-competition>.