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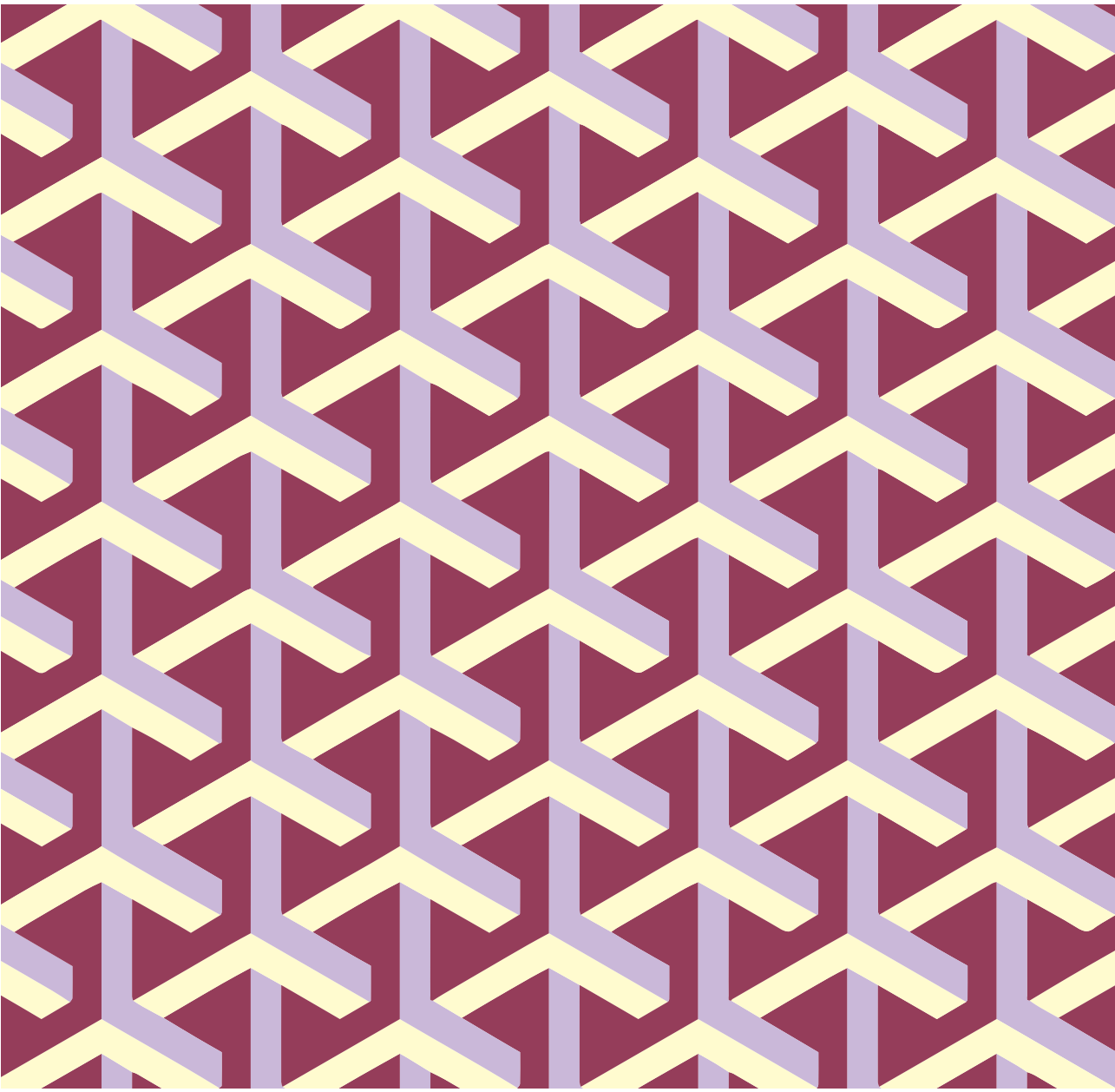

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SUSTAINABILITY AGREEMENTS, GREEN TRANSITION AND ARTICLE 101 TFEU

MEETINGS & READINGS

ROBERTO BARATTA[*]

Preface

Should cartels that have the object or effect of preventing, restricting, or distorting competition be authorized so long as they contribute in the EU to environmental protection and sustainable production? This is the central question discussed at a seminar held at the Department of Law of the University of Roma Tre. Renowned academics and practitioners have generously agreed to offer their illuminating thoughts on a contentious matter.

The question of whether Article 101(3) TFEU would steer production towards greener goods and services should be contextualised. In principle, a systematic interpretation of EU law calls for consistency among EU policies (Article 7 TFEU), whereas environmental protection should be integrated into the Union's policies (Article 11 TFEU), and a high level of environmental protection within the internal market is to be ensured (Article 3(3) TEU). In this context, anti-competitive cartels must be assessed not only in terms of protecting consumer welfare and competitive markets, but also under the prism of environmental objectives. Interestingly, **Sergio Maria Carbone**, Margherita Colangelo and Mario Siragusa focus on the *Guidelines on horizontal cooperation agreements* approved by the Commission on 1 June 2023, which suggests an innovative, albeit cautious, interpretation of Article 101 TFEU. **Margherita Colangelo** thoroughly analyses the Commission's approach to sustainability agreements, including the 'standardisation' one. While focusing inter alia on the Dutch Authority recent practice, **Mario Siragusa** rightly sheds light on the risk of going beyond the traditional objectives of competition law, i.e., in his view, exposing public authorities to lobbying pressure and political interference – ultimately, to legal uncertainty. Quite in the same vein, **Andrea Pezzoli** suggests a cautious approach, while providing a very interesting overview of recent decisions taken by the Italian Antitrust Authority's. Pezzoli's paper is complemented by that of **Beatrice Bichi Ruspoli Forteguerri**, who focuses on the role of national competition authorities (NCAs) in applying Article 101(3) TFEU to anti-

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competitive agreements: she argues that the European Commission could play a key role in guiding NCAs to take account of sustainability considerations. A favorable approach is taken by **Francesco De Leonardis**, who points out that competition law and environmental law are not necessarily two worlds apart. After all, he remarks, the Italian Environmental Code sets out that companies are required to ensure a high level of environmental protection, whereas EU law is moving in a similar direction. In fact, in the EU legal framework, the European Green Deal (EGD) has given greater weight to environmental objectives within the internal market, as **Morgan H. Harris** rightly points out in thoughtful pages. Indeed, EGD and the subsequent *acquis* shift the responsibility for environmental protection from consumers to producers. This might pave the way towards environmental sustainability when evaluating agreements between undertakings that adversely affect competition and consumer welfare. The need for integrating sustainability considerations into competition policy is seemingly also stressed by **Gabriella Muscolo**, who highlights, among other things, the inadequacies of regulatory policy: in her view, the complementary market-based alternatives, namely environmental agreements between companies, are key tools in the green transition.

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.*

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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.

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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.*

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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 overweigh, 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 overweigh 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.

MARGHERITA COLANGELO*

THE EU COMMISSION'S GUIDELINES ON HORIZONTAL COOPERATION AGREEMENTS: SUSTAINABILITY AGREEMENTS AND THE SAFE HARBOUR FOR SUSTAINABILITY STANDARDS

ABSTRACT. *The role that various areas of law may play in addressing sustainability objectives is currently under debate. In competition law, the topic is part of a larger discussion about the use of antitrust law to further non-economic objectives and its alignment with the traditional consumer welfare standard. The process of revising the Horizontal Block Exemption Regulations provided an opportunity for the European Commission to address sustainability agreements. The new Horizontal Guidelines, adopted in June 2023, include a specific chapter dedicated to them. This paper analyses the main features of this chapter, within which a significant part is devoted to sustainability standards. The analysis highlights that the Commission has cautiously confirmed its traditional stance while considering broader forms of benefits in the competitive assessment, providing a soft safe harbour for sustainability standards, and maintaining a certain degree of flexibility.*

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1. Introduction

Sustainability is an open concept rooted in the protection of the environment and combined with social and economic development.[1] The terms 'sustainability' and 'sustainable development' are often used interchangeably and have recently gained much popularity.[2] According to the most commonly agreed definition of sustainable development coming from the Brundtland Report of the World Commission on Environment and Development, it refers to 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[3] Nowadays, climate change and environmental degradation are pressing global challenges, and discussions focus on how sustainability objectives intersect with the potential role that specific areas of law – including competition law – may play in addressing them.

At the international level, a fundamental point of reference is the Resolution 70/1, commonly known as the 2030 Agenda or the UN Sustainable Development Goals (SDGs), adopted in 2015 by the UN General Assembly and defining broader development targets for both developed and developing countries.[4] At the European level, the EU's commitment to the implementation of the 2030 Agenda through its internal and external policies is contained in policy documents and recent legislation.[5] Importantly,

[1] The foundational principles for sustainable development are based on natural science. It presupposes a balancing exercise between three pillars, ie environmental, social, and economic development. See OECD, 'Sustainability and Competition', OECD Competition Committee Discussion Paper (authored by J Nowag), <http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf>, at 13: sustainability is based on the idea that environmental degradation and depletion of natural resources reduce economic growth and development; in turn, sustainable development aims at reviving growth while changing its quality.

[2] For an analysis of the definitions of such concepts, see, eg, HE Daly, 'Sustainable Development - Definitions, Principles, Policies' in M Keiner (ed), *The Future of Sustainability* (Springer 2006) 39; CA Ruggerio, 'Sustainability and sustainable development: A review of principles and definitions' (2021) 786 Science of The Total Environment. See also OECD (n 1) 11.

[3] UN World Commission on Environment and Development, 'Our Common Future' (1987) 43 (also known as the Brundtland Report). See GB Asheim, 'Sustainability: ethical foundations and economic properties', The World Bank (Policy Research Department Public Economics Division) May 1994 (affirming that the Brundtland Report looks at sustainability both as a requirement for intragenerational justice).

[4] General Assembly of UN, 'Transforming Our World: The 2030 Agenda for Sustainable Development', Resolution adopted on 25 September 2015, A/RES/70/1.

[5] European Commission, 'Next steps for a sustainable European future' COM(2016) 739 final; Id, 'The European

some provisions of EU Treaties include reference to sustainable development, which is listed among several other objectives in Article 3 of the Treaty on European Union (TEU).[6] Moreover, Article 11 of the Treaty on the Functioning of the European Union (TFEU) provides specifically for environmental protection requirements to be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.[7] Such provisions should be also read in connection with the general principle of consistency of EU policies and activities and all related goals, which must be ensured according to Articles 7 TFEU and 13(1) TEU.

Regulation is traditionally considered the preferred option to achieve specific public interest objectives such as sustainability. However, it has so far proved to be insufficient and the mobilisation of the private sector is seen as crucial in this context. Thus, the question arises as to what role competition law, which deals with conducts of private firms in the market, should play.

In general, considering the provisions mentioned above, the integration of sustainability objectives in the implementation of European competition policy could be viewed as mandated by the wording of the Treaties.[8] However, the topic is part of a larger discussion about the use of antitrust law to further particular public policies. This debate centers on whether pursuing non-economic objectives is consistent with the orthodox conception of antitrust law based on the traditional consumer welfare standard and on whether such approach should be reconsidered.[9] In particular, competition law

Green Deal', Communication COM/2019/640 final; Id, 'Towards a Sustainable Europe by 2030: Reflection Paper' (2019) <https://data.europa.eu/doi/10.2775/6762511>; Id, 'Delivering on the UN's Sustainable Development Goals – A comprehensive approach' SWD(2020) 400 final. See also: European Consensus on Development 'Our World, Our Dignity, Our Future' [2017] OJ C 210/1; Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2021] OJ L 243/1.

[6] See also recital 9 TEU.

[7] With regard to Article 11, see B Sjåfjell and A Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge, 2015). See also Articles 191 to 193 TFEU.

[8] For an overview of the steps that marked the entry of the sustainable development principle into EU law, see, eg, C Muraca, 'Tutela della concorrenza e sostenibilità ambientale: un dialogo difficile ma necessario' (2021) 1 Rivista della regolazione dei mercati 70, 79-81.

[9] For an overview on the debate on consumer welfare standard, see Organisation for Economic Co-operation and Development (OECD), 'The Consumer Welfare Standard – Advantages and Disadvantages Compared to Alternative

regimes holding that competition policy should promote only consumer welfare rather than wider public interest goals are called to deal with the question of whether there is any room in such standard for sustainability benefits. Indeed, it is controversial whether sustainability costs and benefits can be measured and included as efficiencies in consumer welfare as price effects and/or non-price effects (as qualitative efficiencies) or whether these considerations should be handled as public policy issues outside the competition law framework, or if the mainstream standard of consumer welfare should be abandoned.[10]

Most descriptions of competition law enforcement use the sword and shield paradigm. Applying this to sustainability, competition agencies must clarify to businesses that sustainability cannot be a cover for anticompetitive behaviour, while at the same time competition rules could be used to exempt measures that promote sustainability from antitrust prohibitions.[11] This can be seen as a conflict between calls for a stricter enforcement on the one hand, and a laxer enforcement on the other.[12] However, it is important to clarify a fundamental premise, ie that protection of both competition and

Standards' (2023) OECD Competition Policy Roundtable, Background Note, <www.oecd.org/daf/competition/consumer-welfare-standard-advantages-and-disadvantages-to-alternativestandards-2023.pdf>. On the relationship between competition law and public policy objectives, see H Schweitzer, 'Competition Law and Public Policy: Reconsidering an Uneasy Relationship – The Example of Article 81' in J Drexl, L Idot and J Monéger (eds), *Economic Theory and Competition Law* (Cheltenham, Edward Elgar, 2009) ch 9; I Lianos, 'Polycentric Competition Law' (2018) Current Legal Problems 161; A Gerbrandy, 'Rethinking Competition Law within the European Economic Constitution' (2019) 57 Journal of Common Market Studies 127; O Brook, *Non-Competition Interests in EU Antitrust Law An Empirical Study of Article 101 TFEU* (Cambridge University Press, 2022).

[10] On the relationship between competition law and sustainability, see, eg, A Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' (2017) 40 World Competition 539; G Monti and J Mulder, 'Escaping the Clutches of EU Competition Law Pathways to Assess Private Sustainability Initiatives' (2017) 42 EL Rev 635; E Loozen, 'Strict competition enforcement and welfare: A constitutional perspective based on Article 101 TFEU and sustainability' (2019) 56 CML Rev 1265; G Monti, 'Four Options for a Greener Competition Law' (2020) 11 Journal of European Competition Law & Practice 124; G De Stefano, 'EU Competition Law & the Green Deal: The Consistency Road' (2020) 1(2) CPI Antitrust Chronicle 41; CA Volpin, 'Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)' (2020) 1(2) CPI Antitrust Chronicle 9.

[11] See S Holmes, 'Climate Change, Sustainability and Competition Law' (2020) 8 Journal of Antitrust Enforcement 354, 355; OECD (n 1) p 19 et seq. Moreover, see J Nowag and A Teorell, 'Beyond Balancing: Sustainability and Competition Law' (2020) 4 Concurrences 34 (using, with regard to the integration of sustainability in competition law, the distinction of supportive integration – similar to the 'shield' – and preventative one – similar to the 'sword').

[12] See also SM Colino, 'Antitrust's Social "Ripple Effect"' 42(2) Berkeley Journal of International Law (forthcoming 2024).

sustainability may well go hand in hand rather than be in conflict.[13]

The case of agreements between competitors is an illustrative example. Industry sustainability-oriented initiatives – concerning, eg, the abandonment of certain polluting standards – are likely to result in higher prices and restricted choice for consumers. On the one hand, some consider the collaboration between businesses as essential to advancing sustainability[14] and there is a concern among stakeholders that undertakings may be reluctant to collaborate to achieve greater sustainable results due to the fear of being found liable of infringement of competition law.[15] Moreover, coordination may be necessary – at least in an initial phase – for undertakings to avoid free-riding on the investments required to promote a sustainable product and to provide information to consumers ('first mover disadvantage'). On the other hand, some argue that allowing companies to enter into anticompetitive agreements does not provide them with greater incentives to promote sustainability and question the ability of private actors to coordinate in the public interest.[16] However, this strict approach has been criticised for being overly conservative, as it would generally question the potential role of private undertakings in complementing regulatory efforts.[17]

Against this background, the process of revising the Horizontal Block Exemption Regulations (HBERs) provided an opportunity for the European Commission to take action on the issue. The final version of the new Horizontal Guidelines (HGs) was adopted in June 2023, after a two-year review process.[18] The long-awaited intervention

[13] See, eg, A Pezzoli, 'Come era verde il mio cartello' (2022) 1 Analisi giuridica dell'economia 319, 321.

[14] See, eg, R Nidumolu, J Ellison, J Whalen, E Billman, 'The collaboration imperative' (2014) 92(4) Harvard Business Review 76.

[15] See International Chamber of Commerce (ICC), 'Taking the chill out of climate action: A progress report on aligning competition policy with global sustainability goals' (2023) <www.iccwbo.org/news-publications/policies-reports/how-competition-policy-acts-as-a-barrier-toclimate-action>. See also A Miazad, 'Prosocial Antitrust' (2022) 73 Hastings L J 1637, arguing (at 1644) that narrow focus on consumer welfare impedes prosocial collaboration, defined by the Author as collaboration that addresses environmental or social risks.

[16] MP Schinkel and Y Spiegel, 'Can Collusion Promote Sustainable Consumption and Production?' (2017) 53 International Journal of Industrial Organization 371; MP Schinkel and L Treuren, 'Corporate Social Responsibility by Joint Agreement' (2024) 123 Journal of Environmental Economics and Management 102897.

[17] See, eg, Monti (n 10) at 125.

[18] European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements', Communication [2023] OJ C 259/1 (hereinafter, HGs). See also European Commission, 'Competition Policy in Support of Europe's Green Ambition', September 2021

of the Commission has occurred after some remarkable initiatives taken by some competition authorities.[19] The Dutch competition authority (ACM) has been a pioneer in this area, publishing the first draft guidelines on sustainability agreements in 2020 and a second version in 2021[20] and finally replacing them with a Policy Rule in October 2023.[21] Moreover, although now outside the EU, one cannot ignore the activism of the UK Competition and Market Authority (CMA), which published the final version of its Green Agreements Guidance in the same month.[22]

While the first version of the Horizontal Guidelines published by the Commission in 2001 contained a specific chapter on "environmental agreements",[23] there was

<https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF>.

[19] With regard to other initiatives, in 2021 the Hellenic Competition Commission (HCC) published a Staff Discussion Paper on Sustainability Issues and Competition Law (https://www.epant.gr/en/enimerosi/competition-law-sustainability. html) and in 2022 launched a regulatory sandbox for sustainable development in the market (https://www.epant. gr/en/enimerosi/sandbox.html). In September 2022, the Austrian Federal Competition Authority published its Guidelines on sustainability cooperation agreements between companies following the "sustainability exemption" contained in the Competition Law Amendment Act 2021 [see Kartellgesetz 2005 (Austrian Cartel Act), Austrian Federal Law Gazette I 2005/61 as amended by Kartellund Wettbewerbsrechts-Änderungsgesetz 2021 ('KaWeRÄG 2021'), Austrian Federal Law Gazette I 2021/176] <https://www.bwb.gv.at/fileadmin/user_upload/Leitlinien_zur_Anwendung_von____2_Abs_1_KartG_auf_Nachhaltigkeitskooperationen__Nachhaltigkeits-LL__final.pdf>, <https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Cartel_Act_2005_Sep_2021_english.pdf>. See n 50. It is also worth mentioning that in Germany in March 2023, the Federal Ministry for Economic Affairs and Climate Action published a study entitled 'Wettbewerb und Nachhaltigkeit in Deutschland und der EU', conducted by academic experts, aiming at providing general insights and proposals on how antitrust law can be further developed with a view to sustainability goals <https://www.bmwk.de/Redaktion/DE/Publikationen/Studien/studie-wettbewerb-und-nachhaltigkeit.pdf?__blob=publicationFile&v=2>.

[20] Authority for Consumers and Markets (ACM), 1st draft guidelines on sustainability agreements, 9 July 2020, <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>; 2nd draft guidelines on sustainability agreements, 26 January 2021, <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf>.

[21] ACM, Policy rule 'ACM's oversight of sustainability agreements. Competition and sustainability'(4 October 2023) <https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf>.

[22] Competition & Markets Authority (CMA), Guidance on environmental sustainability agreements, 12 October 2023 <https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf>; see also draft guidance, 28 February 2023 <https://assets.publishing.service.gov.uk/media/63fde435e90e0740de2669e7/Draft_Sustainability_Guidance_document__.pdf>(hereinafter, CMA Guidance).

[23] European Commission, 'Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation

no such dedicated part in the 2011 Guidelines and this was in line with the more restrictive approach towards non-economic factors adopted by the Commission after the entry into force of the modernisation regime.[24] Now the new 2023 HGs include a separate chapter devoted to "Sustainability Agreements", ie "agreements between competitors that pursue one or more sustainability objectives".[25] Sustainability is broadly conceived and includes: addressing climate change (eg, by reducing greenhouse gas emissions), reducing pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, promoting resilient infrastructure and innovation, reducing food waste, facilitating a shift towards healthy and nutritious food, ensuring animal welfare, and so on.[26] Importantly, the new HGs state that "cooperation agreements may address residual market failures that are not or not fully addressed by public policies and regulation".[27]

This paper is structured as follows. Firstly, it analyses the main structure of Chapter 9 of the revised HGs on sustainability agreements and the approach adopted by the Commission. Then it examines the part specifically devoted to sustainability standardisation agreements. Finally, it draws some conclusive remarks on the Commission's approach in light of the experience gained so far.

2. The EU Commission's approach to sustainability agreements

In the new HGs the Commission clarifies that sustainability agreements do not constitute a separate category of horizontal cooperation agreements for the purposes of applying Article 101. Therefore, in general, the guidance contained in the chapters devoted to the various types of agreements applies and, in case of conflict, the guidance

agreements', Communication [2001] OJ C 3/02, ch 7.

[24] European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements [2011] OJ C 11/01; see also Id, 'Guidelines on the application of Article 101(3) of the Treaty (formerly Article 81(3) TEC)' [2004] OJ C101/97; Council Regulation (EC) No 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.

[25] HGs, para 515.

[26] HGs, para 517.

[27] HGs, para 520.

most favourable to the parties applies.[28] Sustainability standardisation agreements constitute an exception and should be assessed in accordance with the guidance provided in Chapter 9, whereas Chapter 7 on standardisation agreements only provides further background on the conditions that both chapters have in common.[29]

The Commission also states that "agreements that restrict competition cannot escape the prohibition laid down in Article 101(1) simply by referring to a sustainability objective".[30] Then, where the parties substantiate that the main object of an agreement is the pursuit of a sustainability objective, and where this casts reasonable doubt on whether the agreement reveals by its very nature a sufficient degree of harm to competition to be considered a by object restriction, the agreement's effects on competition will have to be assessed on the basis of the following factors: the market power of the parties participating in the agreement; the degree to which the agreement limits the decision-making independence of the parties in relation to the main parameters of competition; the market coverage of the agreement; the extent to which commercially sensitive information is exchanged in the context of the agreement; and whether the agreement results in an appreciable increase in price or an appreciable reduction in output, variety, quality or innovation.[31]

As for sustainability agreements that do not breach competition law, the Commission essentially considers the following cases: i) sustainability agreements that do not raise competition concerns, ie, that do not affect competition parameters such as price, quantity, quality, choice, or innovation; ii) sustainability agreements that constitute a sustainability standard and fall into the scope of a "soft safe harbour"; iii) sustainability agreements that benefit from individual exemption ex Article 101(3) TFEU.

With regard to i), examples provided by the HGs include: agreements that aim solely to ensure compliance with sufficiently precise requirements or prohibitions in legally binding international treaties, agreements or conventions, whether or not they have been implemented in national law, and which are not fully implemented or enforced by a signatory State; agreements that do not concern the economic activity of undertakings, but their internal corporate conduct; agreements aimed at creating a data-

[28] HGs, para 525.

[29] Ibid.

[30] HGs, para 521.

[31] HGs, paras 534-535.

base containing information about suppliers or distributors and the sustainable features of their activities without requiring the parties to necessarily purchase from, or sell to them; agreements relating to the organisation of industry-wide awareness campaigns or campaigns raising customers' awareness.[32]

With regard to iii), the part devoted to Article 101(3) TFEU is a complex and detailed section on the four cumulative conditions required for an individual exemption (efficiency gains, indispensability, pass-on to consumers, no elimination of competition), the analysis of which is outside the scope of this paper.[33] However, some observations may be made here. Relevant questions inevitably concern the quantification of the benefits of sustainability agreements, the balancing of benefits and costs and the conditions for assessing the necessary requirements for an exemption under Article 101(3) TFEU,[34] in particular that of the 'fair share' to be passed on to consumers.[35] As a matter of fact, controversy arises as to whether the benefits deriving from the agreement must apply equally to the same consumers in the same markets as those suffering anticompetitive

[32] HGs, paras 527-531.

[33] HGs, paras 556 et seq. With regard to the difficulties in applying the traditional competitive assessment to environmental considerations, see OECD, 'Environmental Considerations in Competition Enforcement', Background Paper, 1 December 2021, DAF/COMP(2021)4, at 15, summarising such challenges as follows**:** i) determining the extent to which environmental effects may be taken into account, for example, when they are not directly affecting competition between market players, or they are of non-immediate economic nature; ii) deciding whether it is possible to take into account environmental efficiencies that benefit consumers other than those affected by the anticompetitive restriction (including future consumers); iii) knowing which timeframe to adopt for the consideration of environmental effects or efficiencies; and iv) assessing how to balance these environmental effects with other types of effects or efficiencies, when present.

[34] On the possible inclusion of non-economic objectives in the assessment under Article 101(3) TFEU, see C Townley, *Article 81 and EC Public Policy* (Hart Publishing, 2009); O Brook, 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities' (2019) 56 CML Rev; Id, 'Block Exemption Regulations and Public Policy: In the Defence of BERS' (2022) Cambridge Yearbook of European Legal Studies 1.

[35] According to a strict interpretation of the consumer welfare standard, any consideration of environmental or sustainability-related effects whose impact is of non-immediate economic nature, is 'unquantifiable' in economic terms, or does not produce an impact on the 'relevant consumers' (intended as the category of consumers in the relevant geographic and product market affected by the conduct), would not be included. An often-quoted example of an interpretation of Article 101(3) TFEU allowing for broader considerations to be taken into account is the Commission's decision in *CECED* (Commission Decision of 24 January 1999 in Case IV.F.1/36.718). The Conseil Européen de la Construction d'Appareils Domestiques (CECED) is an association comprising manufacturers of domestic appliances and national trade associations. In this case, an agreement between 90% of its members not to produce or import certain energy-categories of washing machines was exempted under Article 101(3) TFEU.

effects, and whether (and if yes, to what extent) it is possible to take into account the fact that future consumers will benefit despite current consumers will be hurt by the agreement. In the HGs the Commission reaffirms the general principle according to which consumers receive a fair share when the benefits deriving from the agreement outweigh the harm caused by it, so that the overall effect on consumers (as a whole) in the relevant market is at least neutral.[36] Therefore, the sustainability benefits that result from an agreement must accrue to the consumers of the products covered by that agreement. However, the Commission acknowledges that sustainability benefits are often manifested in the form of broad qualitative or cost efficiencies and identifies three types of benefits for consumers, ie: i) individual use benefits; ii) individual non-use value benefits; iii) collective benefits.

The first type refers to benefits resulting from the use of the product and directly improving the consumer's experience (eg, taking the form of improved product quality or product variety resulting from qualitative efficiencies, or of a price decrease as a result of cost efficiencies, or from the consumption of a sustainable product in the same way as results from the consumption of any other product). Individual non-use value benefits relate to voluntary (altruistic) choices by individual consumers. They are defined as those resulting from consumers' appreciation of the impact of their sustainable consumption on others: eg, consumers may decide to purchase a particular washing liquid not because it cleans better but because it contaminates the water less.[37] The Commission relies on a willingness-to-pay approach, considering that "consumers may be willing to pay a higher price for a sustainable product or to limit their choice of products (by not buying non-sustainable variants) in order to benefit society or future generations".[38] The third category of collective benefits is the most peculiar one and refers to those benefits that "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".[39] For example, consumers may be unwilling to pay a higher price for a product produced with a green but costly technology: in such case, in order to ensure that the benefits de-

[36] HGs, para 569. See also Guidelines on the application of Article 101(3) TFEU, paras 43, 85 *et seq.*

[37] HGs, para 576.

[38] HGs, para 577. On the use of willingness-to-pay approach, see R Inderst and S Thomas, 'Prospective Welfare Analysis – Extending Willingness to Pay to Embrace Sustainability' (2022) 18 Journal of Competition Law & Economics 551.

[39] HGs, para 582.

rived from the use of that green technology materialise, an agreement to phase out the polluting one may be necessary. The Commission clarifies that for collective benefits to be taken into account, the parties to the agreement are required to: (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.[40]

Therefore, the Commission continues to adhere to the established approach in line with the consumer welfare standard while recognising the significance of broader benefits.[41] A critical issue is how to quantify and measure these benefits, which will require greater clarity. This is explicitly acknowledged by the Commission, which notes that, particularly with regard to collective benefits, there is currently little experience and anticipates that it will provide further guidance once it has gained sufficient experience handling real cases.[42]

Certainly, the approach adopted by the Commission is more conservative than the initiatives previously taken by the British and Dutch authorities.[43] With regard to the CMA, firstly it is worth clarifying that its Guidance focuses exclusively on environmental sustainability. It distinguishes between: i) 'environmental sustainability agreements', ie agreements between competitors which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on the environment or assist with the transition towards environmental sustainability; ii) 'climate change agreements', ie a sub-set of environmental sustainability agreements, which contribute to combating climate change (typically reducing the negative externalities arising from greenhouse gases, emitted from the production, distribution or consumption of goods and services); and iii) 'mixed agreements', where environmental issues are closely interlinked -eg, climate change and biodiversity, so that businesses' environmental sustainability agree-

[40] HGs, para 587.

[41] See Colino (n 12) 20.

[42] HGs, para 589.

[43] Holmes (n 11).

ments may generate both climate change benefits and other environmental benefits. With regard to the fair share, the CMA considers that benefits can include future as well as current benefits,[44] and acknowledges that the 'fair share to consumers' condition generally requires an assessment of whether the harm to consumers of the agreement's products is offset by benefits to substantially the same set of consumers and that, with limited exceptions, benefits to consumers in other markets are not included in this assessment.[45] However, a permissive approach is applied to climate change agreements, as the CMA considers it appropriate to exempt them if the 'fair share to consumers' condition can be satisfied taking into account the totality of the climate change benefits to all UK consumers arising from the agreement.[46]

With regard to the Dutch competition authority, the ACM, which adopts a definition of sustainability as broad as that of the Commission, identifies the category of 'environmental-damage agreements', defined as agreements that contribute efficiently to compliance with an international or national standard or to the achievement of a specific policy objective to prevent environmental damage. With regard to the latter, the ACM declares that it will not continue investigating an environmental-damage agreement if the initial investigation shows that i) it is plausible that the agreement is necessary for achieving the environmental benefits, and ii) that such benefits sufficiently outweigh the potential competitive disadvantages. In such respect, it is worth mentioning that in the draft Guidelines the ACM stated that, with regard to environmental-damage agreements, it should be possible to take into account benefits for others rather than merely those of the users.[47] However, in the Policy Rule, adopted after the publication of HGs, the ACM clarifies that it is important that consumers in the relevant market receive an appreciable and objective part of the advantages and that there should remain a degree of residual competition.[48] Thus, the final stance taken by the ACM is

[44] For the quantification of such benefits, see CMA Guidance, paras 5.25-5.28. See also para 5.7.

[45] See CMA Guidance, paras 5.20-5.21.

[46] CMA Guidance, para 6.4.

[47] ACM, 2nd draft Guidelines, para 48: "it can be fair not to compensate users fully for the harm that the agreement causes because their demand for the products in question essentially creates the problem for which society needs to find solutions. Moreover, they enjoy the same benefits as the rest of society. In that context, the agreement must contribute (efficiently) to the compliance with an international or national standard (to which undertakings are not bound) or to a concrete policy objective. One example of a concrete policy objective is the government's policy aimed at reducing CO2 emissions on Dutch soil by year X by Y%."

[48] See ACM, Policy Rule, para 23, adding that: "[i]n the foregoing, the 'polluter pays' principle and the principle of

closer to the Commission's approach.

It is worth mentioning that, up to now, a unique legislative intervention has been adopted in Austria. With the implementation of the ECN+ Directive,[49] in 2021 the Austrian legislator took the opportunity to *inter alia* introduce an explicit sustainability exemption from the general scope of the prohibition on cartels, providing in § 2(1) Austrian Cartel Act (the national corresponding rule to Article 101(3) TFEU) that "[c]onsumers 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 economy." [50]

3. Sustainability standardisation agreements

A substantial part of Chapter 9 of the HGs is dedicated to sustainability standardisation agreements (or sustainability standards), which are likely to be a common type of sustainability agreements and for which the Commission lays down specific provisions, as previously mentioned.[51] Sustainability standardisation agreements have sim-

an effective enforcement of Article 101 TFEU by ACM and other members of the European Competition Network (ECN) is taken into account".

[49] Directive (EU) 2019/1 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 (ECN+ Directive).

[50] See n 19. For comments, see V Robertson, 'Sustainability: A World-First Green Exemption in Austrian Competition Law' (2022) JECLAP; B Zelger, 'The new sustainability exemption according to § 2(1) Austrian Cartel Act and its relationship with Article 101 TFEU – European spearhead or born to fail?' (2022) 18(3) European Competition Journal 514.

[51] HGs paras 537-555. In general, standardisation can take place in various ways, ranging from the adoption of consensus-based standards by recognised international, European or national standards bodies, through consensus-based technical specifications developed by consortia and fora, to agreements between independent undertakings. As clarified by para 437, the HGs do not cover the preparation and production of technical standards as part of the exercise of public powers and the European standardisation organisations recognised under Regulation (EU) No 1025/2012 are subject to competition law to the extent that they can be considered to be an undertaking or an association of undertakings within the meaning of Articles 101 and 102. See Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the

ilarities with the traditional standardisation agreements addressed in Chapter 7 of HGs, but also have specific features indeed: first, the adoption of a sustainability standard may lead to the creation of a label, logo or brand name for products that meet certain minimum requirements and that can be used as long as the adopters comply with those requirements; second, adhering to and complying with a sustainability standard can be expensive, especially if it calls for altering current manufacturing or distribution procedures; third, unlike technical standards, questions of interoperability and compatibility between technologies are generally less relevant for sustainability standards; fourth, many sustainability standards are process-, management- or performance-based, thus, unlike many technical standards, sustainability standards often simply specify a goal to be met, without imposing a specific technology or production method to achieve that goal.[52]

This sub-category of sustainability agreements refers to those situations where competitors agree to adopt and comply with certain standards, eg, when competitors agree to phase out, withdraw, or replace non-sustainable products and processes with sustainable ones, or to harmonise packaging materials in order to facilitate recycling or harmonise packaging sizes to reduce waste, or to purchase only production inputs that have been manufactured in a sustainable manner. These agreements are used to specify requirements that undertakings in a supply chain have to meet in relation to a wide range of sustainability metrics and usually provide rules, guidelines or characteristics for products and processes in such regard. The HGs clarify that agreements between competitors that limit the participating undertakings' output of the products concerned by the agreement do not belong to such category.[53]

Some examples of standard-setting agreements related to sustainability issues can be found in the recent existing practice before the adoption of the new Guidelines. An often-cited example is the Dutch case *Chicken of Tomorrow* (2014).[54] At that time,

Council [2012] OJ L 316/12.

[52] HGs, paras 540-544.

[53] HGs, para 538.

[54] ACM, Case number 13.0195.66, 26.1.2015 <www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition>. See Id, 'Analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow', ACM/DM/2014/206028 <www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf>. The economic assessment of the ACM is accessible in Dutch: M Mulder et al, 'Economische Effecten van 'Kip van Morgen', ACM Economics Bureau', 2014 <https://www.acm.nl/sites/default/files/old_publication/publicaties/13759_onderzoek-acmnaar-de-economische-effecten-van-de-kip-van-morgen.pdf>.

the ACM decided that an agreement between Dutch retailers to only produce and sell chicken raised according to higher animal welfare and sustainability standards did not qualify for the exemption from the cartel prohibition. This decision attracted heavy criticism and critical comments from some scholars, sector organisations, and policymakers.[55] Adopting a traditional willingness-to-pay approach, the ACM found that the initiative qualified as a restriction of choice for consumers. In particular, the ACM ran a survey and found that consumers valued animal welfare and sustainability criteria as well as public health in their purchasing decisions, but not enough to justify the price increase expected from the agreement.

Moreover, competition issues in standard-setting cooperation have been raised in the agri-food sector.[56] It is worth mentioning that since 7 December 2021 the legal

[55] For a critical comment, see Monti and Mulder (n 10) at 639 et seq. However, it is worth adding that in 2020 the ACM published the study 'Welfare of today's chicken and that of the 'Chicken of Tomorrow' <https://www.acm.nl/en/publications/welfare-todays-chicken-and-chicken-tomorrow> concluding that the welfare conditions in that year of the selection of chicken meat sold in Dutch supermarkets resulted to more than exceeding the minimum requirements of the Chicken of Tomorrow. Therefore, it argued that it seemed highly likely that an anticompetitive agreement was not necessary, as, apparently, supermarkets were already stimulated enough individually to improve chicken welfare.

[56] Eg, in Germany some investigations conducted by the Bundeskartellamt have led to mixed results. The Bundeskartellamt had no competition concerns regarding the sustainability initiative about living wages in the banana sector, which was qualified as a qualitative production standard established on a voluntary basis in order to ensure that the production of bananas in Ecuador complies with the relevant legal provisions in this country (statutory minimum wages) or that, in general, living wages are paid (Case summary 'German Retailers Working Group – Sustainability initiative to promote living wages in the banana sector', B2-90/21, 8.3.2022 <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2022/B2-90-21.pdf?__blob=publicationFile&v=2>. Such agreement did not involve exchange of information on purchasing prices, other costs, production volumes or margins and binding minimum prices or surcharges were not introduced at any point of the supply chain. Similar initiatives can be found elsewhere, such as in Belgium. See <https://www.belgiancompetition.be/sites/default/files/content/download/files/20230330_Press_release_11_BCA.pdf>. By contrast, the Bundeskartellamt found that the financing concept for the distribution of risks and burdens associated with agricultural transformation processes for milk producers presented by the agricultural policy project "Agrardialog Milch" (based on a jointly agreed mandatory and index-based price surcharge or price stabilisation mechanism), constituted sector-wide price fixing violating Section 1 of the German Competition Act (GWB) and Article 101 TFEU. The Bunderskartellamt also found that the exemption provided by Article 210a CMO Regulation did not apply. See Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, [2013] OJ L 347/671(as amended). See Bundeskartellamt Case summary 'Financing concept for a market-compliant and fair distribution of risks and burdens associated with agricultural transformation processes for milk producers', 8 March 2022, <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2022/B2-87-21.pdf?__blob=publication

framework for assessing initiatives to implement sustainability standards in this sector has changed with the entry into force of Article 210a of the CMO Regulation, which excludes certain restrictive (both horizontal and vertical) agreements from Article 101 TFEU prohibition, when those agreements are indispensable to achieve sustainability standards going beyond the mandatory EU or national rules.[57] On 7 December 2023 the Commission also adopted Guidelines on how to design sustainability agreements with the aim of clarifying how operators can start joint sustainability initiatives in line with Article 210a.[58]

At EU level, a debated case concerned the Commission's decision finding that Daimler, BMW and Volkswagen group breached EU antitrust rules by colluding on technical development in the area of nitrogen oxide cleaning.[59] The car manufacturers held regular technical meetings to discuss the development of the selective catalytic reduction (SCR)-technology which eliminates harmful nitrogen oxide (NOx)-emissions from diesel passenger cars through the injection of urea (also called "AdBlue") into the

File&v=2>. Moreover, the Bundeskartellamt did not oppose an initiative related to animal welfare, "Initiative Tierwohl", a project based on an agreement between the agricultural, meat production and food retail sectors, providing for the payment to livestock owners of a standard premium as a reward for improving the conditions in which animals are kept. See Bundeskartellamt, Press release 'Achieving sustainability in a competitive environment – Bundeskartellamt concludes examination of sector initiatives', 18.1.2022 <https://www.bundeskartellamt.de/SharedDocs/ Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html>. In such case,the Bundeskartellamt provided guidance to the initiative and called for the inclusion of more competition elements in the structure of the financing model. In addition, the Bundeskartellamt declared that it had no serious competition law concerns against the "industry agreement milk", a voluntary programme aimed at improving animal welfare in milk production. See Bundeskartellamt, Press release 'Increasing animal welfare in milk production – Bundeskartellamt tolerates the introduction of the QM+ programme', 29.3.2022 <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/ 2022/29_03_2022_Milch_Nachhaltigkeit.html> (according to which the Bundeskartellamt used its discretion not to oppose the agreement but also made its decision in light of the CMO Regulation).

[57] Regulation (EU) No 1308/2013 (see n 56). Article 210a was introduced as part of the 2021 reform of the Union's Common Agricultural Policy (CAP).

[58] European Commission, 'Guidelines on the exclusion from Article 101 of the Treaty on the Functioning of the European Union for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation (EU) No 1308/2013', Communication [2023] OJ C, C/2023/1446. Here, "the term 'sustainability agreement' refers to any type of agreement, decision or concerted practice involving producers, both horizontally and vertically, that relates to the production of or trade in agricultural products and that aims to apply a higher sustainability standard than mandated by Union or national law, irrespective of the form of cooperation" (see Recital 10). See also HGs, para 47.

[59] Commission decision of 8 July 2021, *Car Emissions*, Case AT.40178, para 139.

exhaust gas stream. During these meetings, and for over five years, the car manufacturers colluded to avoid competition on cleaning better than what was required by law, despite the relevant technology being available. The Commission found that such conduct constituted an infringement by object in the form of a limitation of technical development.[60] This is the first decision in which the Commission has concluded that collusion on technical development amounts to a cartel. Given this novelty, the Commission advised the parties on aspects of their cooperation on SCR systems that did not raise competition concerns, such as the standardisation of the AdBlue filler neck, the discussion on AdBlue quality standards or the joint development of a software platform for AdBlue dosing.[61]

Moreover, outside the EU, another often-cited case is that occurred in the US in 2019, concerning the State of California and four automakers which entered into a California Air Resources Board framework agreement on fuel efficiency standards. The agreement called for lowering average fuel consumption by 2026 and reducing average emissions below the national standard. The DoJ opened an investigation into the agreement for a possible cartel violation in September 2019, due to concerns that it could

[60] See Article 101(1)(b) TFEU.

[61] With regard to this case, the Executive Vice-President of the Commission Margrethe Vestager, confirming that competition law enforcement and sustainability objectives may go in the same direction, said: "So today's decision is about how legitimate technical cooperation went wrong. And we do not tolerate it when companies collude. It is illegal under EU antitrust rules. Competition and innovation on managing car pollution are essential for Europe to meet our ambitious Green Deal objectives. And this decision shows that we will not hesitate to take action against all forms of cartel conduct putting in jeopardy this goal." See Commission, Press release 'Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars', 8 July 2021 <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581>. For a comment on the case, see J Tirole, 'Socially responsible agencies' (2023) 7(4) Competition Law & Policy Debate 171, 174, arguing that this case "illustrates the authorities' dilemma between mission and societal concerns" and that "the EU environmental standards should have been enforced politically by ministries in charge of the environment, not by an agency in charge of protecting consumers who benefited from the cartelization. In this second-best situation, the competition authority substituted itself for failing environmental regulation". See also Holmes (n 11), at 6: "The fact that this case concerned sustainability, and something very important in the context of the fight against climate change (Nox emissions), was not formally an aggravating factor in the decision to impose significant fines. That said, when assessing the 'gravity' of the infringement, the Commission expressly noted that the parties' behaviour was 'by its very nature, capable of hindering competition in relation to cleaning better than required by the applicable EU emission standards and thus limiting technological development a type of conduct that is explicitly prohibited by Article 101(1)(b) of the Treaty. Technical development and innovation in the field of car emission cleaning technology is of public interest'." Other cases in recent years of 'cartel' behaviour where sustainability was a parameter of competition include the *Trucks* decision of the Commission of July 2016, fining five major truck producers for (*inter alia*) colluding on the timing of the introduction of new emission technologies to meet environmental standards and on passing on the costs of emission technologies for trucks compliant with newly introduced emissions standards (Case AT.39824, 19.07.2016).

raise prices by limiting the range of cars that could be driven in California. However, in February 2020, the DoJ closed the investigation without bringing charges against the car manufacturers.[62]

In general, as is the case with other standardisation agreements, sustainability standards may have both procompetitive and anticompetitive effects. Of course, they may help to overcome a first-mover disadvantage, because without the agreement, market participants would likely not shift their production, distribution and marketing activities towards higher environmental standards. However, these agreements may lead to an increase in production or distribution costs and consequently to increased prices, prevent effective access to the standard and may be problematic when they correspond to fixing the level of quality of innovation brought to the market by competitors in a specific industry.[63]

In the revised HGs, on the one hand, in addition to the positive outcomes of such agreements that may derive from enabling the development of new products or markets, increasing product quality or improving conditions of supply or distribution, the Commission considers the provision of information about sustainability matters, since sustainability standards may "empower consumers to make informed purchase decisions and therefore play a role in the development of markets for sustainable products"; lastly, sustainability standards can also level the playing field between producers that are subject to different regulatory requirements.[64] On the other hand, it is made clear that sustainability standards may restrict competition in three ways, ie: through price coordination, foreclosure of alternative standards, and the exclusion of, or discrimination against certain competitors.[65] Accordingly, an agreement between competitors on how to pass on to customers increased costs resulting from the adoption of a

[62] For a comment, see HJ Hovenkamp, 'Are Regulatory Agreements to Address Climate Change Anticompetitive?' (2019) The Regulatory Review – Opinion 506, <https://scholarship.law.upenn.edu/regreview-opinion/506>; J Nowag and A Teorell, 'The Antitrust Car Emissions Investigation in the U.S. – Some Thoughts From the Other Side of the Pond' 1(2) CPI Antitrust Chronicle, July 2020, 55. It is worth mentioning that in the US sustainability initiatives do not benefit from any special treatment or exemptions. In general on horizontal agreements, see United States Department of Justice and Federal Trade Commission, Antitrust Guidelines For Collaborations Among Competitors, April 2020 <https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf>.

[63] See OECD (n 33) at 25.

[64] HGs, para 545.

[65] HGs, para 546.

sustainability standard in the form of increased sale prices, or to fix the prices of products incorporating the standard, constitutes a restriction of competition by object. The same occurs in the case of an agreement between the parties to a sustainability standard to put pressure directly on competing third parties to refrain from marketing products that do not comply with the standard, or in the case of agreements aimed at limiting technological development to the minimum sustainability standards required by law, instead of cooperating to achieve more ambitious environmental goals.[66]

The peculiar treatment for sustainability standardisation agreements provided by the new HGs includes a list of six criteria, which, if met, allow parties to benefit from a "soft safe harbour".[67] According to the HGs, if all six conditions are met, the agreement is deemed unlikely to have an appreciable negative impact on competition; however, if the conditions are not fulfilled, there is no automatic presumption that such agreement restricts competition and it may still benefit from an individual exemption under Article 101(3).

The six cumulative conditions that must be met in order to benefit from the soft safe harbour may be summarised as follows: i) the procedure for developing the sustainability standard must be transparent, and all interested competitors must be able to participate in the process leading to the selection of the standard; ii) the sustainability standard must not impose on undertakings that do not wish to participate in the standard any direct or indirect obligation to comply with it; iii) to ensure compliance with the standard, binding requirements may be imposed on participating undertakings, but the undertakings must remain free to apply higher sustainability standards;[68] iv) the

[66] HGs, para 548.

[67] During consultations some stakeholders complained about ambiguity in the meaning of some requirements and requested attention on mandatory standards. See eg International Chamber of Commerce (ICC), 'ICC comments on the revised Research and Development Block Exemption Regulation and the revised Specialisation Block Exemption Regulation and Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements', 26 April 2022, 28-29 <https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en>.

[68] A criticism of this requirement was raised by MP Schinkel, 'Response to the public consultation of the "draft revised Horizontal Guidelines" of 1 March 2022, in particular to Chapter 9 Sustainability Agreements' (https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en). The Author argues that: "the core problem with sustainability agreements amongst competitors is that they eliminate sustainability as a dimension of competition. Where firms in competition strive to offer a more sustainable product than their rivals, in collaboration they'd have an incentive to jointly agree to all keep to a lower sustainability standard – and so save the cost of living up to a higher one. Now, the mere freedom to adopt a higher standard (…) is therefore not enough to rest assured that not less is done, because the firms involved all want to keep to the agreed lower standard. In essence, unilaterally

parties to the sustainability standard must not exchange commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption or modification of the standard; v) effective and non-discriminatory access to the outcome of the standard-setting process must be ensured.[69] Finally, the sustainability standard must meet at least one of the following two conditions: i) the standard must not result in a significant increase in the price or a significant reduction in the quality of the products concerned; ii) the combined market share of the participating undertakings must not exceed 20% in any relevant market affected by the standard – such condition was not included in the draft version, which provided a seventh condition concerning the establishment of a monitoring system to ensure undertakings' compliance with the requirement of the standard (now removed and replaced in a separate paragraph).[70] However, the Commission does not give a clear guidance on how to assess the significance of the price increase resulting from the standard, merely stating in a footnote that it will depend on the characteristics of the product and of the relevant market.[71]

adopting a higher sustainability standard – i.e. taking more sustainability effort – than was collectively agreed would be a form of "sustainability cartel defection". Just like for classic cartels it does not require a legally binding agreement (which is not available, after all) to all adhere to the higher cartel prices – that is, for the cartel to be stable – here the 'legal' freedom to offer a more sustainable product than was agreed does not assure that firms will indeed do this. In fact, if the firms involved would offer a more sustainable product than collectively agreed, no sustainability agreement would form – or, for that matter, have been needed to promote sustainability – in the first place. When one does form, the members of a sustainability agreement therefore will assure stability against any one of them 'cheating' by offering a greener product than agreed on."

[69] This includes providing effective and non-discriminatory access to the requirements and conditions for the use of the agreed label, logo or brand name, and allowing undertakings that did not participate in the development of the standard to adopt the standard at a later stage.

[70] HGs, para 553. The HGs provide two examples of sustainability standardisation agreements benefiting from the soft safe harbour. The first example involves breakfast cereal manufacturers organising to limit excess packaging size, resulting in decreased packaging costs and consequently a small reduction in wholesale and retail prices. The second example concerns a label for fair-traded tropical fruits set up by a non-governmental organisation together with a number of fruit traders. To use the label, firms must guarantee that the fruits come from producers that ensure fair living wages for their workers and that do not make use of child labour (while remaining free to also trade fruits under other labels or without labels).

[71] See HGs, fn 382. It is worth noting that in CMA's Guidance similar requirements are provided for collaborations between competitors aimed at developing environmental sustainability standards (paras 3.14-3.15). Those agreements are deemed unlikely to have an appreciable negative effect on competition, provided that: i) the process for developing the standard is transparent and it is possible for any business in markets affected by the standard to participate; ii) no business is obliged to implement the standard if it does not wish to do so (albeit the standard may require

4. Concluding remarks

The Commission's intervention in the area of sustainability agreements provides a framework for businesses to cooperate on sustainability goals. It also highlights the EU's focus on sustainability issues in the international landscape, where a unanimous approach to these agreements is currently lacking.[72] It remains to be seen how the new HGs on sustainability agreements will be implemented, whether collaborations among competitors will be widespread and significantly promote sustainability goals, and how

businesses that have committed to implement the standard to comply with the requirements of the standard, and may provide for a mechanism to monitor such compliance); iii) any business can implement the standard on reasonable and nondiscriminatory terms; iv) businesses implementing the standard are free to go beyond the minimum environmental sustainability requirements set by the standard, or to develop or implement additional higher standards (or, if applicable, to develop alternative standards for any competing products they sell outside of the standard); and v) the standard is unlikely to result in an appreciable reduction in the availability of suitable products for consumers to purchase. The Guidance does not refer to increase in prices and clarifies that a standard is unlikely to result in an appreciable reduction in product choice if at least one of the following conditions applies: (i) the participating businesses are free to sell alternative competing products outside of the standard on the relevant market(s) affected by the standard, and remain free to independently determine which of their products the standard will apply to; or (ii) the combined market share of the participating businesses is sufficiently small (for example, below 20% on any relevant market affected by the standard) to allow sufficient alternative choice for consumers.

[72] Eg, in January 2023, the Japan Fair Trade Commission released its draft ('Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society under the Antimonopoly Act', <https://www.jftc.go.jp/en/pressreleases/yearly-2023/January/230118.html>). In July 2023, Singapore's Competition Consumer Commission (CCCS) announced a public consultation to seek feedback on its draft 'Guidance Note on Business Collaborations Pursuing Environmental Sustainability Objectives' <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/sustainability-guidance-note-for-business-collaboration-public-consult-20-july-23>. In the US agencies largely remain silent on sustainability issues and do not support any favourable treatment. See L Kahn, Opinion, 'ESG Won't Stop the FTC' Wall Street Journal (21.12.2022), <https://www.wsj.com/article s/esg-wont-stop-the-ftc-competition-merger-lina-khansocial-economic-promises-court-11671637135>. For an overview on US debate, see D Hearn, C Hanawalt, and L Sachs, 'Antitrust and Sustainability: A Landscape Analysis', Columbia Center on Sustainable Investment and Sabin Center for Climate Change Law (July 2023), at 33 et seq. In the US political debate, there is controversy with regard to net zero alliances (whereby companies pledge to limit fossil fuel production and reduce greenhouse gas emissions), which are under attack from some members of Congress and State Attorneys General, labelling them as collective boycotts [see, eg, Attorneys General of various US States, *Letter to NZIA* (15 May 2023) 1 <https://attorneygeneral.utah.gov/wp-content/uploads/2023/05/2023-05-15-NZIA-Letter.pdf>; Hearing of the US Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights on 'Oversight of Federal Enforcement of the Antitrust Laws' (20 September 2022), <https://www.judiciary.senate.gov/meetings/oversight-of-federal-enforcement-of-the-antitrust-laws>. For an overview at global level, see ICC (2023), 'Taking the chill out of climate action: A progress report on aligning competition policy with global sustainability goals' <www.iccwbo.org/news-publications/policies-reports/how-competition-policy-acts-as-a-barrier-to-climate-action> (in particular, at 15-16 on US and China).

the role of competition agencies in this area will develop.

While failing to meet the expectations of those who supported a more progressive approach, similar to those adopted by some competition authorities at national level, the Commission has taken its first steps with caution. It has confirmed its traditional stance while considering wider forms of benefits to be included in the competitive assessment, providing a soft safe harbour for sustainability standards, and maintaining a certain degree of flexibility. This approach seems to be consistent with the Commission's declared aim to show that competition policy does not stand in the way of horizontal cooperation agreements that pursue genuine sustainability objectives.[73] The presence of controversial aspects in the HGs that require further clarification must also be understood in light of the current lack of substantial practical experience.[74]

[73] See European Commission, 'Explanatory note on the main changes proposed for the Horizontal Block Exemption Regulations and Horizontal Guidelines' <https://competition-policy.ec.europa.eu/document/download/1010b1fc-03be-453a-b482-9a81d5a4e808_en?filename=2023_HBERs_explanatory_note_en.pdf>.

[74] See Holmes (n 11) affirming, at 8, that "these guidelines do not (and could not) provide the answers to all the questions that businesses and others will have on what they can, and cannot, do in this area." However, undertakings may request the Commission to provide informal guidance regarding novel or unresolved questions on individual sustainability agreements. See HGs, para 515; Commission Notice 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) [2022] OJ C 381/9.

FRANCESCO DE LEONARDIS*

COMPETITION AND ENVIRONMENT: CONFLICT OR CONFLUENCE? SOME REFLECTIONS ON SUSTAINABILITY AGREEMENTS UNDER ARTICLE 101(3) OF THE TFEU

ABSTRACT. *The article is based on an analysis of Article 101 of the Treaty on the Functioning of the European Union (TFEU). This provision sets out the general rule of the prohibition of agreements between companies that may distort competition, with an exception for agreements that contribute to improving the production of products. The author, based on international and European provisions, proposes an interpretation of 'production improvement' also in an environmental sense. This interpretation could justify agreements between companies that, while contrary to the application of competition principles, move towards sustainable production (so-called sustainability agreements), even if they do not reflect the application of the competition principle. The competition principle emerges clearly in the Italian Environmental Code and is applied in waste regulation and Extended Producer Responsibility (EPR) systems. The author believes that this principle, on the one hand, is crucial to encourage sustainable production and economic efficiency but, on the other hand, should not be considered an absolute principle. Indeed, sustainable production requires exceptions to the principle itself, but only to the strict extent necessary.*

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1. The intersections between competition law and environmental law

Apparently, competition protection (aimed at ensuring the proper functioning of the EU internal market by promoting the competition between undertakings and preventing and deleting restrictions and distortions, such as abuse of a dominant position, anti-competitive agreements, as well as mergers and acquisitions – hereafter 'competition principle')[1] and environmental protection (aimed at keeping the planet within the planetary boundaries, ensuring conditions for the survival of various species, and primarily the human species)[2] are separated worlds.

In recent years several intersections between them seem to exist not only in positive law but also in the activities of administrations and tribunals at various levels of legal systems.

On the one hand, competition law and environmental law could be complementary. For instance, in the Italian legal system the competition principle has been explicitly included in the Environmental Code (Legislative Decree No. 152/2006, hereinafter 'TUA') which is the main source of national environmental law.[3] Article 178, the opening provision of the Fourth Part of the Code, concerning waste, states that waste management (from the collection to the final treatment) must be oriented to the competition principle. It implies that companies – and EPR schemes, as explained below – are free to compete in offering the best options to manage the end-of-life of products. As a consequence, producers and administrations can fulfil their management duties by picking the most suitable solutions from the market up. In other words, competition is a driver for enhancing environmental protection.

[1] On competition law, see among others: Giuliano Lemme (ed), *Diritto ed economia del mercato* (Cedam 2014); Mario Libertini, *Diritto della concorrenza dell'Unione europea* (Giuffrè 2014); Enzo Cardi, *Mercati e istituzioni in Italia. Diritto pubblico dell'economia* (5th edn, Giappichelli 2022); Sabino Cassese (ed), *La nuova Costituzione economica* (Laterza 2021); Marco D'Alberti, 'Concorrenza' in Sabino Cassese (ed), *Dizionario di Diritto Pubblico* (2nd edn, Giuffrè 2006) 1140; Angelo Lalli, 'Concorrenza. Disciplina pubblicistica' (2015) <https://www.treccani.it/enciclopedia/concorrenza-disciplina-pubblicistica_(Diritto-on-line)/> accessed 29 June 2024; Mario Libertini, 'Concorrenza', *Enciclopedia del diritto – Annali III* (Giuffrè 2010) 191.

[2] Francesco de Leonardis, *Lo Stato ecologico* (Giappichelli 2023) 1-50.

[3] On the legal nature of this decree, see: Alfonso Celotto, 'Il codice che non c'è: il diritto ambientale tra codificazione e semplificazione' (2009) Giustizia amministrativa 485; Pasquale Cerbo, 'I "nuovi" principi del codice dell'ambiente' (2008) Urbanistica e appalti 533; Francesco Fonderico, 'La "codificazione" del diritto dell'ambiente in Italia, modelli e questioni' (2006) Rivista Trimestrale di diritto pubblico 613.

On the other hand, competition rules could represent an obstacle for the implementation of environmental protection, especially when the latter requires massive projects that the market cannot implement alone.

Therefore, there are some exemptions that are reshaping competition law in order to enhance environmental protection.

Article 101(1) TFEU prohibits agreements between undertakings that could cause restriction or distortion of competition within the internal market. However, its paragraph 3 lists a number of circumstances under which such 'horizontal agreements' shall be lawful. These circumstances go under the general clause of 'fair share':[4] the cost of the competition distortion must be inferior to the benefits generated by the agreement. In other words, a horizontal agreement is lawful if it 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit'.

What does 'improving the production' mean? The environment and its protection seem not to be included among the exceptions of Article 101(3) TFEU. However, However, both in international and EU law a 'push' towards sustainable production is currently taking place. Does it mean that undertakings can make horizontal agreements (also) to reach environmental goals? If so, do they comply with the above mentioned 'fair share' clause?

It is no coincidence that the European Commission in its latest 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' includes among lawful horizontal agreements those pursuing one or more sustainability objectives, under certain conditions.[5] There-

[4] According to Article 101(3) TFEU, an horizontal agreement could be justified if: 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'.

[5] See Communication from the Commission, 'Approval of the content of a draft for a 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', published on the Official Journal of the European Union, 19 April 2022, C 164/01. On this topic, see: Alfredo Moliterni, 'Antitrust e ambiente ai tempi del Green Deal: il caso dei "sustainability agreements"' (2021) Giornale di diritto amministrativo 354; Roberto Baratta, 'Aiuti di Stato e fragilità ambientali: i nuovi orientamenti della Commissione' (2022) Diritto e società 517; Mario Libertini, 'Gestione "sostenibile" delle imprese e limiti alla discrezionalità imprenditoriale' (2023) Contratto e impresa 54; Andrea Pezzoli,

fore, the inclusion of so-called 'sustainability agreements' may be the occasion to interpret the clause of 'improving the production' as a 'green exemption' that looks towards 'sustainable production' (i.e. the redesign of the trajectory of the economy within the limits of the planet, the sustainable configuration of business activities or, in short, the ecological transition).

The considerations that follow aim to highlight the connection between competition law and environmental law. As happened in the Italian environmental code, the competition principle could strengthen the level of environmental protection and its flexibility can allow to include 'green exemptions' within its field of application. Thus, this contribution will analyse the influence of the competition principle on environmental law, against the background offered by the Italian environmental code, provisions concerning exclusive rights for municipal waste collection, and Extended Producer Responsibility (EPR) systems. Subsequently, the contribution will focus on 'sustainability agreements': notably, on whether international and European law require the enhancement of production processes through environmental lenses in order to legitimize above described horizontal agreements.

2. The competition principle in the Italian Environmental Code

Regarding environmental law principles at the European level,[6] three fundamental provisions are commonly cited: Article 191, Article 11 of the Treaty on the Functioning of the European Union (TFEU), and Article 3 of the Treaty on European Union (TEU).[7]

'Come era verde il mio cartello' (2022) Analisi Giuridica dell'Economia 327. On the relation between State aid and environmental protection, see also: Ornella Porchia, 'Aiuti di stato in materia ambientale e competenze regionali' (2009) Il diritto dell'Unione europea 865; Silvia Marino, 'La tutela ambientale nella politica dell'Unione europea in materia di aiuti di Stato' (2021) Il diritto dell'Unione europea 43.

[6] As known, environmental law principles have been affirmed in the international law declarations and agreements (see in particular principles 3, 4, 6, 10, 14, 15 and 16 of the Rio Declaration).

[7] See among numerous contributions of the Italian doctrine: Maurizio Cafagno, *Principi e strumenti di tutela dell'ambiente. Come sistema complesso, adattivo, comune* (Giappichelli 2007); Paolo Dell'Anno and Eugenio Picozza (eds), *Trattato di diritto dell'ambiente,* I, Padova, 2012; Rosario Ferrara and Maria Alessandra Sandulli (eds), *Trattato di diritto dell'ambiente,* vol 1 (Cedam 2014); Giampaolo Rossi (ed), *Diritto dell'ambiente* (5th edn, Giappichelli

In national law, there are four fundamental provisions on environmental law principles: Articles 3-ter, 3-quater, 3-quinquies, and 3-sexies of the Environmental Code (TUA).

Nevertheless, this collection of rules does not represent a comprehensive list of environmental law principles. Although they mention the four general principles of precaution, prevention, rectification of damage at source, and the polluter-pays principle (Article 191 TFEU and Article 3-ter TUA), there are additional sectorial principles, equally important, that can be inferred from the legislation.

Among these, the competition principle deserves to be mentioned. It was first included in the Italian Code following the reform carried out by Legislative Decree No. 116/2020, which transposed the first of the 'Circular economy package' directives, specifically Directive 851/2018 on waste.[8]

Thus, the competition principle – explicitly referred to in two recitals of said directive[9] – is incorporated into the Fourth Part of the Code concerning waste management and it is not enshrined in a single norm but rather in a plurality of norms.

The first provision embracing this principle is Article 178 TUA, which lists the principles of waste management. Given its placement at the beginning of the Fourth Part of the Code, it could be interpreted as evidence of the full integration of competition protection into the Code and national environmental legislation.

Furthermore, as explained below, the competition principle is closely linked to the extended producer responsibility principle, established by Articles 178-bis and 178-ter TUA. The competition principle is also relevant with respect to the governance of consortia, which generally represent the legal form of Extended Producer Responsibility

2021).

[8] Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste. This Directive constitute, together with Directives (EU) 2018/849 about end-of-life vehicles, batteries and accumulators and waste batteries and accumulators, (EU) 2018/850 about the landfill of waste and (EU) 2018/852 about packaging and packaging waste, the so-called 'Second Circular Economy Package'. About the Package, see Francesco De Leonardis, 'Economia circolare: saggio sui suoi tre diversi aspetti giuridici. Verso uno Stato circolare?' (2017) Diritto amministrativo 163; Francesco De Leonardis, 'Il diritto dell'economia circolare e l'art. 41 Cost.' (2020) Rivista Quadrimestrale di diritto ambientale 50.

[9] See recital 17, which underlines the importance 'to promote a level playing field' in markets for secondary raw materials, and recital 22, which states that '[t]he general minimum requirements [of the extended producer responsibility] should reduce costs and boost performance, as well as ensure a level playing field, including for small and medium-sized enterprises and e-commerce enterprises […]'.

(EPR) systems, such as Conai (for packaging) and other ones concerning vegetable oils, polyethylene goods, mineral oils, and exhausted batteries.[10]

It is also invoked within the regulation of a specific type of waste, packaging waste, which represents about two-thirds of all urban waste.[11] Article 217(1) TUA states that in managing such waste it is necessary to 'ensure a high level of environmental protection' while also 'guaranteeing the functioning of the market' by preventing obstacles to trade and distortions of competition'.

Then, we face provisions that do not explicitly mention the competition principle but are directly connected to it.[12]

2.1. The competition principle ends the municipal monopoly in waste collection

The competition principle entered the Environmental Code progressively, substantially reforming waste management activities.

To begin with, it must be recalled that urban waste, the remnants of consumption, can be divided into two main categories: separately collected waste and mixed waste. Separately collected waste are further categorized by material type and should be processed into second-generation raw materials or compost via recycling, thereby minimizing landfill disposal. Mixed waste should be used, after a mechanical biological treatment, for energy recovery or disposed of.

One of the main issues concerning waste regulation was the existence of a municipal monopoly on waste collection, whether it applied to both categories of municipal waste, or only to one of them, or whether it did not apply at all.

The Italian transposition of the first waste Directive[13] was ambiguous on this aspect. Article 21(1) of Legislative Decree No. 22/1997 established the principle that solely urban and assimilated waste meant for disposal should fall under the municipal

[10] See respectively: Article 224 TUA, Article 233 TUA, Article 237 TUA, Article 236 TUA and Legislative Decree No. 188/2008.

[11] Roberto Leonardi, 'La natura giuridica dell'imballaggio terziario rotto: rifiuto o sottoprodotto?' (2016) Nuove Autonomie 419. See also ISPRA, 'Rapporto rifiuti urbani' (2023).

[12] Article 183(1), letter b-ter, No. 2, TUA and Article 198(2bis) TUA, both introduced by Legislative Decree No. 116/2020.

[13] Council Directive of 15 July 1975 on waste (75/442/EEC).

monopoly. Concurrently, paragraph 7 of the same article stated that this monopoly would not apply for waste meant for recovery if it was the subject of a specific programme agreement.[14]

Thus, the regulation seemed to provide for a sort of a 'dual regime' rule: municipal monopoly for the collection of urban mixed waste (the law reserved to municipalities 'the management of urban waste and assimilated waste destined for disposal under the monopoly forms provided for by Law No. 142 of June 8, 1990, and Article 23') and competition for the collection of waste meant for recovery, provided they were subject to a program agreement. Hence, the monopoly did not apply for separately collected waste: anyone but municipalities can obtain the necessary authorizations to engage in such activities.

The so-called 'dual regime' was further clarified in 2002: Article 23(1) of Law No. 179 of 31 July 2002, amended Article 21(7) of Legislative Decree No. 22/97 to state that 'the monopoly referred to in paragraph 1 does not apply to waste recovery activities for urban and assimilated waste starting from 1 January 2003'. Consequently, the condition of a program agreement was no longer necessary. In subsequent years, Italian administrative tribunals addressed the existence of this dual regime.[15]

However, a few years later, in 2010, the legislator re-handled this issue, stating that 'the organization and management of services related to the collection, disposal, and recovery of urban waste, as well as the collection of related taxes'[16] constitute fundamental functions of municipalities. Thus, this provision seemed to end the dual regime era, extending municipal monopoly to separately collected waste.

Nowadays, administrative tribunals have definitively settled the matter, affirming the existence of the dual regime in accordance with the competition principle.[17]

[14] 'The exclusive right of waste collection does not apply to waste recovery activities covered by the programme agreement referred to in Article 22(11) and to assimilated waste recovery activities' (Article 21(7), Legislative Decree No. 22/97).

[15] See Consiglio di Stato, 5th Section, 16 March 2005, No. 174, according to which it is not applicable to the service of collection and transport of urban waste since 'the privative right referred to in paragraph 1 does not apply to the recovery of urban and assimilated waste, as from 1 January 1 2003'.

[16] Article 14(27), Decree of 31 May 2010, No. 78.

[17] See Consiglio di Giustizia Amministrativa per la Regione Siciliana ('CGA'), 30 March 2022, No. 410 and Consiglio di Stato, 4th Section, 29 May 2023, No. 5257. On the ascending conforming force of the competition principle, see also Consiglio di Stato, 6th Section, 15 December 2022, No. 10993.

The end of the municipal monopoly is also confirmed by a recent reform of the national environmental code. In 2020, the legislator amended the definition of urban waste to include the so-called 'similar waste' or 'assimilated waste'.[18] To this end, the freedom of economic operators to entrust the collection of such type of waste to either the public system or a private one was for the first time recognised, in alignment with the competition principle.[19]

Despite the openness to the application of competition rules, prior to this amendment producers of assimilated waste had to make this choice through a five-year agreement, raising concerns about its compatibility with the competition principle.[20] Furthermore, those producers who had opted for the private system could switch to the public system at any time, even before the expiry of the five-year period, whereas the opposite was not permitted. Thus, producers who had opted for the public system remained bound for five years.

This led to an amendment of the provision in 2022,[21] following a recommendation from the Italian Competition and Market Authority. The duration of the obligation has been shortened to the more reasonable period of two years and producers were guaranteed equal conditions in the case of a reconsideration of the waste management options.

These examples – together with the inclusion of the competition principle among the general principles of the Fourth Part of the Code (see section 1) – show how competition law has become fundamental in environmental legislation. The crucial point is that competition should no longer be seen as an obstacle to environmental pro-

[18] They are 'mixed waste and separately collected waste that come from other sources similar in nature and composition to the household waste listed in Annex L-quater produced and generated by activities listed in Annex L-quinquies' to the Fourth Part of the Code.

[19] 'In order to deliver their municipal waste outside the public service non-households users have to prove that they have sent it for recovery by means of a certificate issued by the entity carrying out the waste recovery activity. This waste counts towards the recycling targets for municipal waste' (Article 198(2bis) TUA, as amended by Legislative Decree No. 116/2020).

[20] Non-household users producing assimilated municipal waste 'who deliver it outside the public service and prove that they have sent it for recovery […] are excluded from the payment of the tariff component related to the quantity of waste delivered' and 'make the choice to use the public service provider or the market for a period of not less than two years' (Article 238(10) TUA, as amended by Legislative Decree No. 116/2020).

[21] Article 14(1), Law of 5 August 2022, No. 118 (Annual Competition Law), which provides for a two-year permanence.

tection, on the contrary as a tool to strengthen it. Indeed, the choice to open up waste management to competition looks at the increase of the efficiency of the service in line with circular economy targets.

2.2. Competition principle and EPR schemes

Another example of existing possibilities to strengthen environmental protection through the implementation of competition leverage in the waste management is represented by so-called extended producer responsibility (EPR) schemes.

The EPR principle, as a reflection of the 'polluter-pays' principle, forces the producer to financially sustain the disposal cost of its products and contributes to steer production toward sustainable products. This principle is based on competition because 'green' producers would pay less than their 'brown' competitors so their 'green' products would cost less than 'brown' ones.

In fact, environmental costs associated with managing end-of-life products are borne by producers, who internalize these costs into the selling price of the goods. Consequently, producers get an 'incentive' to adopt solutions that reduce waste production, create durable and repairable products, and utilize easily recyclable materials. This approach allows them to incur in lower post-consumer management costs and apply competitive product prices, lower than those of competitors facing higher end-of-life costs.[22] In concrete terms, the greater the chance of a product having a second life – i.e. reusability, recyclability – the lower the cost of its end-of-life management.

[22] The earliest elaborations of the concept of extended producer responsibility date back to studies in the 1990s, in which the thesis of industry responsibility for managing the entire product life cycle was first argued: Thomas Lindhqvist, *Extended Producer Responsibility in Cleaner Production: Policy Principle to Promote Environmental Improvement of Product System* (Doctoral Thesis, The International Institute for Industrial Environmental Economics (IIIEE), Lund University 2000). For an essential legal framework, see: Paolo Dell'Anno, 'Disciplina della gestione dei rifiuti' in Eugenio Picozza and Paolo Dell'Anno (n 7); Sara Benvenuti, 'Raccolta, Gestione e Smaltimento dei rifiuti in Italia. La complessità del quadro normativo e del riparto delle competenze' in Ginevra Cerrina Ferroni (ed), *Produzione, Gestione, Smaltimento dei rifiuti in Italia, Francia e Germania tra Diritto, Tecnologia, Politica* (Giappichelli 2014) 47; Giuseppe Garzia, 'La responsabilità e i costi della gestione dei rifiuti. La responsabilità estesa del produttore', in Franco Giampietro (ed), *La nuova disciplina dei rifiuti* (IPSOA 2011); Maria Chilosi, 'Quali profili di responsabilità per il produttore del bene lungo la filiera di gestione?', *Ambiente&Sicurezza* (Rome, 8 February 2011); Fondazione per lo sviluppo sostenibile – FISE UNIRE, 'L'Italia del Riciclo' (2015) ch 2; Danila Iacovelli, *Rifiuti e mercato nell'economia circolare* (Giappichelli 2021) 93; Nicola Lucifero, 'Economia circolare e prodotti alimentari: l'etichettatura ambientale nel sistema delle fonti del diritto europeo e interno' in Silia Gardini (ed) *Percorsi di circolarità, tra diritto ed economia* (April 2023) Il diritto dell'economia 91.

As highlighted by the Italian antitrust authority (AGCM), 'competition plays a crucial role in the waste sector by ensuring adequate market outlets for production inputs. These inputs, realized through recycling activities, can replace virgin raw materials, resulting in a clear commercial and competitive advantage. On average, the European manufacturing sector allocates about 40% of its expenditure to purchasing production inputs'.[23]

Competition plays a key role also in the functioning of the EPR schemes. An EPR scheme is 'a set of measures taken by Member States to ensure that producers of products bear financial responsibility or financial and organisational responsibility for the management of the waste stage of a product's life cycle'.[24]

Producers can fulfil their obligations by setting up an organization that pays for the collection, transport and recycling of the products once they have become waste. As known, the EPR principle is based on steering production toward sustainable products, so competitive dynamics are helpful because they allow producers to organise or participate in different EPR schemes, selecting those that are the most effective.

In fact, the legal framework of EPR schemes outlined by the European legislator moves towards this direction: it stimulates competition by opening the market up to new operators, internalizing environmental costs into product prices, encouraging producers to design eco-friendly products, enhancing both industrial competitiveness and environmental protection, and facilitating the shift towards a circular economy.[25]

Within this framework, among a range of other instruments, Extended Producer Responsibility (EPR) systems emerge as one of the effective tools to activate the competitive leverage. These systems foster a cycle where the environmental impact of production processes is minimized (by using fewer natural resources) and efficient post-consumer resource management aims to recover as many resources as possible.

Competition rules 'open' the market to new operators who must compete with

[23] AGCM, 'Segnalazione ai sensi degli artt. 21 e 22 della legge 10 ottobre 1990, n. 287 in merito a proposte di riforma concorrenziale ai fini della Legge annuale per il mercato e la concorrenza' (2021) para 5(B).

[24] Article 3(1), No. 21, Directive 2008/98/EC.

[25] 'The general minimum requirements should reduce costs and boost performance, as well as ensure a level playing field, including for small and medium-sized enterprises and e-commerce enterprises, and avoid obstacles to the smooth functioning of the internal market. They should also contribute to the incorporation of end-of-life costs into product prices and provide incentives for producers, when designing their products, to take better into account recyclability, reusability, reparability and the presence of hazardous substances' (recital 22, Directive EU 2018/851).

existing players. Consequently, they strive to maintain increasingly higher efficiency standards, both economically and environmentally.

EPR systems effectively implement the aforementioned principles by internalizing environmental costs and overseeing post-consumer management. However, since they operate within a competitive market, they must offer competitive conditions, resulting in improved efficiency standards, including environmental efficiency.

3. 'Improving the production': the environmental way

As above mentioned, according to Article 101(3) TFEU – and the Guidelines of the European Commission – horizontal agreements between undertakings comply with Article 101(1) in so far as they 'contribute to improving the production or distribution of products'. Furthermore, the European Commission qualifies 'sustainability agreements' as horizontal agreements that may also comply with paragraph 3. To this end, it is essential to understand what international and European law mean when they look at 'sustainable' goals.

The answer seems to lie in the notion of 'sustainable production': improving the production also encompasses the redesign of the economy within the limits of the planet. Several international and European norms emphasize the need for an environmentally conscious production.

3.1. Sustainable production in the international legal framework

As to the international legal framework, Principle 4 of the Stockholm Declaration (1972) asserts that 'the conservation of nature, including wildlife, must be given special consideration in economic development planning'. For the first time, the connection between economic development and natural resource protection was highlighted.[26]

Similarly, Principle 7 of the World Charter for Nature (1982) argues that 'in the planning and implementation of social and economic development activities, due

[26] Vincenzo Starace, 'Recenti sviluppi della cooperazione internazionale in materia di protezione dell'ambiente' (1974) La Comunità Internazionale 50; Laura Pineschi, 'Tutela dell'ambiente e assistenza allo sviluppo: dalla Conferenza di Stoccolma (1972) alla Conferenza di Rio (1992)' (1994) Rivista giuridica dell'ambiente 493.

account shall be taken of the fact that the conservation of nature is an integral part of those activities'. Article 9 envisages that '[t]he allocation of areas of the earth to various uses shall be planned and due account shall be taken of the physical constraints, the biological productivity and diversity and the natural beauty of the areas concerned'.

The concept of 'redesign' of the economy emerges for the first time within the Brundtland Report (1987). In particular, points 52, 54, 57, and 60 were dedicated to energy consumption, agricultural production, legal instruments, and eco-design.

With this report, the fourth 'R' – economic redesign – powerfully entered international environmental law alongside the classic three R's: recycling, reuse, and reduction.

Principles 8 and 16 of the 1992 Rio Declaration are very clear with respect to the notion of so-called sustainable production.[27] Principle 8 states that 'to achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies'. Principle 16 emphasizes that '[n]ational authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment'.

With over 200 references to sustainable production, Agenda 21 (1992) connected to the Rio Declaration, stands out as one of the essential instruments legitimizing the shaping of the economy in a green direction.[28]

Ten years later, paragraph 11 of the Johannesburg Conference (2002) explicitly states that 'changing consumption and production patterns and protecting and managing the natural resource base for economic and social development are overarching objectives of and essential requirements for sustainable development'.

Twenty years after the Rio Declaration, point 220 of the 'Future We Want' declaration during the Rio+20 Conference (2012) explicitly calls for the promotion of sustainable production models. Goal 12 of the United Nations' 2030 Agenda for

[27] Laura Pineschi, 'La Conferenza di Rio de Janeiro su ambiente e sviluppo' (1992) Rivista giuridica dell'ambiente 705; Sergio Marchisio, 'Gli atti di Rio nel diritto internazionale' (1992) Rivista di diritto internazionale 581; Paulo A Lemme Machado, 'Nuove strade dopo Rio e Stoccolma' (2002) Rivista giuridica dell'ambiente 169.

[28] See also the chapter No. 30 dedicated to the enhancement of the industry and the commerce.

Sustainable Development – aptly titled 'Ensure sustainable consumption and production patterns' mentions various tools to achieve sustainable production. These include not only green public procurement but also environmental taxation. This goal further emphasizes the need to rationalize inefficient subsidies for fossil fuels, eliminate market distortions, and progressively phase out harmful existing subsidies.

3.2. Sustainable production in European law

Also European law envisages several legal acts advocating for a shift toward sustainable production.

Briefly, it is possible to systematically categorize them into three main groups: 'soft' European law, such as communications, strategies, and action programs that have been particularly numerous in the last five years; 'hard' European law, in which we could include various directives from the last few years; 'in progress' European law, i.e. a series of legislative acts featuring sustainable production that have recently been approved or are close to adoption.

In the first group, notable examples include: Communication on integrated product policy (2003),[29] Europe 2020 Strategy (2010),[30] Sixth (2002), Seventh (2013), and Eighth Environmental Action Plans (2022),[31] Bioeconomy Strategy (2018),[32] Communication on the Green Deal (2019),[33] Biodiversity Strategy (2020),[34] Circular Econ-

[29] Communication from the Commission to the Council and the European Parliament, 'Integrated Product Policy. Building on Environmental Life-Cycle Thinking', 18 June 2003, COM(2003) 302.

[30] Communication from the Commission, 'Europe 2020: A strategy for smart, sustainable and inclusive growth', 3 March 2010, COM(2020) 2010.

[31] Respectively adopted with Decision No. 1600/2002/CE of the European Parliament and the Council of 22 July 2002, with Decision No. 1386/2013/EU of the European Parliament and the Council of 20 November 2013 and with Decision (EU) 2022/591 of the European Parliament and the Council of 6 April 2022.

[32] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'A sustainable Bioeconomy for Europe: Strengthening the connection between economy, society and the environment', 11 October 2018, COM(2018) 673.

[33] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'The European Green Deal', 11 December 2019, COM(2019) 640.

[34] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'EU Biodiversity Strategy for 2030. Bringing nature back into our lives', 20 May 2020, COM(2020) 380.

omy Action Plan (2020),[35] Critical Raw Materials Action Plan (2020)[36] and European Industrial Strategy (2020).[37]

The second group is composed of: Eco-design Directives (2005 and 2009),[38] Non-Financial Reporting Directive (2014 and 2022),[39] Circular Economy Package (2018),[40] Single-Use Plastics Directive (2019)[41] and Taxonomy Regulation (2020).[42]

The third and last group contains proposals that have recently been approved or close to adoption: Regulation extending eco-design requirements to all products,[43] Packaging Regulation,[44] Due Diligence Directive,[45] Green Claims Directive.[46]

[35] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'A new Circular Economy Action Plan. For a cleaner and more competitive Europe', 11 March 2020, COM(2020) 98.

[36] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability', 3 September 2020, COM(2020) 474.

[37] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'A New Industrial Strategy for Europe', 10 March 2020, COM(2020) 102.

[38] Directive 2005/32/EC of the European Parliament and the Council of 6 July 2005 and Directive 2009/125/EC of the European Parliament and the Council of 21 October 2009.

[39] Directive 2014/95/EU of the European Parliament and the Council of 22 October 2014 and Directive (EU) 2022/2464 of the European Parliament and the Council of 14 December 2022.

[40] Directives 849, 850, 851 and 852 of 2018 (n 8).

[41] Directive (EU) 2019/904 of the European Parliament and the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment.

[42] Regulation (EU) 2020/852 of the European Parliament and the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088. This regulation has been 'completed' with Commission delegated regulation (EU) 2021/2139 and 2023/2486 which establish technical screening criteria for determining the conditions under which a specific economic activity is qualified as eco-sustainable.

[43] Regulation (EU) 2024/1781 of the European Parliament and the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC.

[44] Proposal for a Regulation of the European Parliament and the Council of 30 November 2022, COM(2022) 677 on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC, approved by the Parliament in April 2024.

[45] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

All these acts reflect a living European law that strongly leans toward shaping production in an ecologically conscious manner. It implies the need to structurally 'green' EU treaties.[47]

4. Conclusions on sustainability agreements

The analysis conducted in the previous section shows that International and European law contain sufficient indications to conclude that 'sustainable production' is a binding and concrete objective of the European legal order. Thus, this target should impact the way of producing and, as a consequence, the principles rulings of competition, in order to move towards a circular economy model.

To this end, the clause of 'improving the production' – Article 101(3) TFEU – could be read systematically and in conjunction with cited provisions and the finalization of horizontal agreements, especially sustainability agreements, should be implemented. In fact, the improvement could be ecological as well as economic and consumerist. Indeed, international and European law seem to be moving in this direction, i.e. that of not considering competition as an immutable and rigid value.

This 'new' interpretation of Article 101 TFEU will depend deeply on the assessment of national antitrust authorities on horizontal agreements pursuing environmental and sustainable objectives. Many of these authorities have in fact already expanded Article 101 by declaring horizontal sustainability agreements to be in conformity with European antitrust law.[48]

However, if we focus on 'sustainability agreements' as regulated by the Commission, several uncertainties remain on this point. For instance, the Commission considers sustainability agreements to be lawful only if they do not sacrifice the 'fair share'

[46] Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information.

[47] Edoardo Chiti, '*In motu*. L'Unione europea e la trasformazione della costruzione giuridica della sostenibilità' in Aidambiente (ed), *La riforma costituzionale in materia di tutela dell'ambiente. Atti del convegno (28 gennaio 2022)* (Editoriale Scientifica 2022) 183; Dario Bevilacqua, *Il Green New Deal* (Giuffrè 2024).

[48] See Dutch Authority for Competition and the Market (ACM), cases *MSC Shrimp Fishery* and *Energy Deal*.

clause referred to in paragraph 1, which, however, still today has an undeniable economic preponderance. In other words, the conditionality mechanism of Article 101(1) TFEU remains preponderant, by privileging 'quantitative' benefits over 'qualitative' ones. To this end, some authors remarked that this new kind of agreements should not fall within the field of application of Article 101 TFEU because they are not based on a 'traditional' restriction of competition. They try, instead, to prevent the market from failing and generating negative externalities.[49]

Consequently, Article 101 should be amended in order to explicitly include sustainable production. In this light, Article 41 of the Italian Constitution provides is a valid example of the conformation of production and economic activities in favour to sustainability and environmental sustainability.

Anyway, it is possible to conclude that competition is not always a prevailing principle, it can be useful to reach environmental targets, and must be balanced with other primary non-economic interests. Thus, Article 101 and its exceptions should be progressively interpreted in light of the needs of sustainable production.

[49] Maurits Dolmans, 'Sustainable Competition Policy' (2020) 5(4) Competition L & Pol'y Debate 4. Julian Nowag and Alexandra Teorell, 'Beyond Balancing: Sustainability and Competition [2020] (4) Concurrencies 34.

MORGAN ELEANOR HARRIS[*]

THE EUROPEAN GREEN DEAL AND THE NEW DEAL

ABSTRACT. *The 2019 European Green Deal and the New Deal share a name: but are there more substantive connections between these two 'deals'? By recalling the significance of the New Deal in the historical context of the United States in the 1930's, this study explores the ways in which both reforms seek to transform the constitutive values of the state and of the marketplace. Both deals also challenge economic orthodoxy and widely-held cultural values that shift blame onto individuals to distract from systemic failures. These parallels – as well as some key differences – can help us to better understand the significance of what Green Deal has, and has not, achieved.*

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1. Introduction

The European Green Deal (EGD) communication,[1] adopted by the newly inaugurated Von der Leyen Commission in autumn 2019, has had a remarkable impact.[2] Four years from its adoption, the numerous legislative reforms, soft law acts, and policy initiatives that have stemmed from it have transformed the Union in very concrete ways,[3] especially the rapid deployment of renewable energy under the 'Fit for 55' initiative.[4] Further transformations adopted under the EGD are set to come into force in the near future, from changes to criminal law, to the reform of wastewater management, to the electrification of transportation. It would be easy to say that this transformation is simply unprecedented. However, this would ignore the fact that there is some precedent, which the Commission deliberately chose to allude to right in the title of the EGD: the New Deal, a program of reforms adopted under US President Franklin Delano Roosevelt in the 1930's. One could say that choice to use the word

[1] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal (2019) COM(2019) 640 final.

[2] Maria Cristina Carta, 'Il Green Deal europeo. Considerazioni critiche sulla tutela dell'ambiente e le iniziative di diritto UE' [2020] Eurojus 54; Alfredo Moliterni, 'Il Green Deal europeo e le sfide per il diritto dell'ambiente' [2021] Rivista quadrimestrale di diritto dell'ambiente 4; Jerzy Jendrośka, Moritz Reese and Lorenzo Squintani, 'Towards a new legal framework for sustainability under the European Green Deal' (2021) 19 Opolskie Studia Administracyjono-Prawne 87; Angela Festa, 'Verso l'obiettivo climatico del 2030: su alcuni sviluppi attuativi del Green Deal europeo attraverso norme vincolanti. Il pacchetto "Fit for 55%"' [2024] Eurojus 117.

[3] Numerous examples can be found, including in the sector of waste: revisions of the Shipments of Waste Regulation 1013/2006 and Ship Recycling Regulation No 1257/2013 have set new limits to limit the possibility to export European waste to facilities where it will be handled in an environmentally damaging manner, while revisions to the Packaging and Packaging Waste Directive 94/62/EC, Radio Equipment Directive 2014/53/EU and Ecodesign Directive (EU) 2018/2002 aim to prevent waste across a broad range of sectors. Other concrete examples of environmental changes brought about by the Green Deal include transversal reforms to chemicals, food packaging, drinking water and pharmaceutical legislation to assess, monitor and prevent exposure to new chemical hazards like pharmaceutical by-products, endocrine disrupters, and microplastics.

[4] By 2022, it was clear that all Member States were on course to meet the 2030 renewable energy target of 32% of power from renewable sources, set out in the 'Fit for 55' communication. See SolarPower Europe, *European Market Outlook for Solar Power 2022-2026* [2022], available at <https://www.solarpowereurope.org/insights/market-outlooks/eu-market-outlook-for-solar-power-2022-2026-2> accessed 22 May 2024. This allowed the Member States to raise their ambition to at least 42.5% energy production from renewable sources by 2030, aiming for 45%, in the revision of the Renewable Energy Directive 2018/2001/EU.

'Deal' was simply copying the Americans, who were using the title 'Green New Deal' for a proposed package of infrastructure investments before the EGD came into being.[5] Yet these Green New Deal proposals have not been successful, while the EGD has. It is argued, indeed, that the EGD actually reflects the spirit and scope of the original New Deal, and that exploring these parallels offers us insight into what the normative values at the core of the EGD actually are and why it has had such a far-reaching impact.

It should be clarified at the outset that the 2019 European Green Deal is a Communication of the Commission: as such, it is non-binding in nature. Nonetheless, it constitutes soft law, which can have important functions in the process of creation and interpretation of secondary law in the Union;[6] some soft law can even have normative functions, albeit in limited circumstances. Nevertheless, the EGD set out a uniquely ambitious agenda for policy and legislative reform, and it has unified these reforms over time. Thus, the EGD can be understood as not just the 2019 communication, but this broader season of reform, unified by the aims that it sets out and the underlying values. The EGD describes these as 'deeply transformative policies' that aim to 'mainstream sustainability in all EU policies'. To achieve its aims, the EGD proposes not only mobilizing public and private finance, research and innovation, but a new legal principle: Do No Significant Harm.[7]

This brief study will aim to explore these historic parallels so as to shed light on

[5] In particular Thomas Friedman, later taken up by congresswoman Alexandra Ocasio-Cortez. The Commission also referenced the New Deal, more directly, in its 2018 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A New Deal for Consumers (COM/2018/0183 final); however, it is argued here that the EGD is a better reflection of the scope and nature of the original New Deal.

[6] On the functions of communications as soft law, Linda Senden, *Soft law in European Community law* (Hart 2004); David M Trubek, Mark Nance and Patrick Cottrell, '"Soft law", "hard law", and EU Integration' in Gráinne De Búrca and Joanne Scott (eds), *Law and new governance in the EU and the US* (Hart 2006) 65; Mariolina Eliantonio and Gaia Lisi, 'EU Environmental Soft Law in the Member States: A Comparative Overview of Finland, France, Germany, Italy, the Netherlands, Slovenia and the UK' [2020] SoLaR Working Papers; Morgan E Harris, 'The evolving functions of the Commission's communications in environmental matters' [2023] Il diritto dell'Unione europea 195.

[7] On Do No Significant Harm (DNSH) and how it has affected the activities of Union institutions, see Manuel Beltrán Miralles and others, 'The implementation of the "Do No Significant Harm" principle in selected EU instruments: A comparative analysis' [2023] Publications Office of the European Union, available at <https://publications.jrc.ec.europa.eu/repository/bitstream/JRC135691/JRC135691_01.pdf> accessed 22 May 2024.

the impact of the European Green Deal. First, the study will offer a brief introduction to what the New Deal was and its context. Second, the parallels between the New Deal and the European Green Deal will be explored. Last, some conclusions will be offered.

2. The New Deal (1933-1937)

Both the origins and the starting point of the Great Depression are hotly debated among historians and economists.[8] Some find the origins of the Great Depression in the punitive regime of war reparations imposed on Germany following its defeat in the First World War, and the monetary impact of the war debt imposed on Germany by the allied parties.[9] But other factors were in play. The market for agricultural products in the United States had been in crisis since the early 1920's, unable to guarantee economic security to farmers, with low prices variously attributed to abusive practices by banks and middlemen. These underlying structural weaknesses were certainly exacerbated by a new financial market targeted at the general public. Brokers and banks promoted investments on margin, poorly understood by a new middle class. The financial and banking sectors also lacked any regulatory guardrails. Compounding this was a protectionist approach to international trade[10] and the extreme vulnerability of the working class to economic disruptions: without any unemployment protections, housing security, health care, or retirement provisions, they were at the whims of the market and its boom-bust cycles.[11] Whatever its causes, historians agree that an uncontrolled stock market was only one factor that led to the Depression, and that the reasons for the depth and length of the suffering that followed can be found outside of Wall Street.

[8] David M Kennedy, *The American people in World War II: freedom from fear* (OUP 1999) 10-42. For a macro-economist's perspective, Barry Eichengreen, 'The Origins and Nature of the Great Slump Revisited' [1992] 45 The Economic History Review 213.

[9] Bernake explores the monetary causes of the depression in Ben Bernake, *Essays on the Great Depression* (Princeton University Press 2000) 5-37.

[10] Exemplified in the Smoot-Hawley Tariff act of 1930, which was widely understood to be counterproductive, given that the United States ran a trade surplus not a deficit and the tariff would cut off producers from foreign markets: Amity Shlaes, *The Forgotten Man: A New History of the Great Depression* (Harper Collins 2007) 95-97.

[11] Kennedy (n 8) 24.

The first responses to the economic crisis following the crash of 1929 failed to recognize the radical transformations that were needed to address all its underlying causes. President Herbet Hoover, elected in 1929, clung to the gold standard and balanced budgets even as the Great Depression deepened and suffering spread, following the economic advice of his Secretary of the Treasury Andrew Mellon and the macroeconomic orthodoxy of his time. In fact, it was commonly held that that economic downturns were a normal part of the economic cycle, and that only by raising tariffs, allowing deflation and the liquidation of industry, would the private sector adjust its production to meet changing demand.[12] The prevailing economic views of the time were thus against any intervention by the state. If mass unemployment was physiological to the economic cycle, as painful as it might be to the workers and their families, it was for the good of the marketplace. Fiscal austerity, and more *laissez faire*, were the cure.[13]

The human suffering that this cure entailed was undeniable, yet the prevailing culture and racial conflicts made it even worse. Public institutions held that handouts were morally corrupting, that they would encourage only idleness and entitlement.[14] These views kept the government from intervening directly in the marketplace as a provider of food, employment or other basic social protections, in the belief that it would undermine the sound moral judgment of the population. These views – that accepting charity was a moral failure – were widely internalized by destitute men as well, who even refused help that was offered out of shame. Indeed, some historians argue that widespread hardship in the United States did not lead to populist uprisings, as it did in Europe, due to these feelings of shame in unemployed men, who blamed themselves for their inability to provide for their families.[15]

[12] Ibid 51.

[13] Originating in the French Physiocrat school in the eighteenth century, the idea markets function properly when property rights are guaranteed and there is no outside interference in their workings, which is at the core of the *laissez faire* approach to market regulation, was taken up by Adam Smith in his 1776 work *An Inquiry into the Nature and Causes of the Wealth of Nations*.

[14] Kennedy (n 8) 172.

[15] As Kennedy describes, 'Indeed, contempt for the Depression's victims, ironically enough, often lodged most deeply in the hearts and minds of the victims themselves. Social investigators in the 1930s repeatedly encountered feelings of guilt and self-recrimination among the unemployed, despite the transparent reality that their plight owed to a systemic economic breakdown, not to their own personal shortcomings. The Depression thus revealed one of the perverse implications of American society's vaunted celebration of individualism. In a culture that ascribed all success

Besides clinging to the gold standard, the initial response of President Hoover to the Great Depression left the underlying structure of industry intact. To combat unemployment, he relied upon strictly voluntary agreements with industrial leaders and agricultural middlemen to ease some of the suffering mass layoffs and deflation brought. These informal agreements included commitments to limit the hours of workers while leaving wages intact so as to preserve the employment of as many people as possible.[16] Voluntary agreements were also made to not employ children or married women. These commitments were not made out of concern for child labour: they were primarily so that children and women would not compete with heads of families – i.e. men – for jobs, which would thus ensure that more families would avoid total destitution. This voluntary approach was a means to address the moment of crisis without fundamentally questioning the non-interventionist approach of the state or the *laissez faire* logic of the market. After all, these agreements were voluntary and temporary, a way to pre-empt the growing unrest, unauthorized strikes and sit-downs that may have threatened the continued existence of American capitalism.[17]

While the voluntary approach worked for a time, it was soon revealed to be wholly inadequate, as industrialists turned their backs on their commitments and began to cut wages and close more factories. Agricultural prices dropped even further in 1931, leading to food shortages in the cities even as produce rotted unpicked in the countryside. Farms were foreclosed upon and families made homeless. The newly evicted migrated to become day labourers in California, or else fled to urban centres like Chicago where charity soup kitchens would at least prevent starvation.

Whatever its starting point, by the time Franklin Delano Roosevelt took office in March 1933, the economic crisis was only deepening, and it was clear that a far more radical approach was needed. Over the next four years, he enacted a series of legal and policy reforms, what we now refer to as the New Deal. What made the New Deal reforms so revolutionary is that they brought about a fundamental transformation in

to individual striving, it seemed to follow axiomatically that failure was due to individual inadequacy.' Ibid 174.

[16] Ibid 52-56.

[17] Howard Zinn argues that the New Deal reforms of Roosevelt were intended not to reform capitalism, but 'to reorganize capitalism in such a way to overcome the crisis and stabilize the system; also, to head off the alarming growth of spontaneous rebellion in the early years of the Roosevelt administration – organization of tenants and the unemployed, movements of self-help, general strikes in several cities.' Howard Zinn, *A people's history of the United States* (Harper New York 2017) 392.

the role of the state and in the role of the marketplace, giving rise to a new value and integrating it into the actions of both public and private actors: guaranteeing a core of social and economic rights for all.[18]

It started with the National Industrial Recovery Act (NIRA), a massive bill adopted within the first hundred days of Roosevelt's presidency. The NIRA continued with the voluntary approach adopted by his predecessor, though, by empowering the President to adopt 'sectoral codes of conduct' applicable to entire industries. These codes would determine minimum wages, maximum working hours, and other conditions of employment. The drafting of these codes of conduct, as well as their enforcement, was however delegated to industry associations and representatives, allowing them to self-govern and thus avoid legal regulation.

The NIRA also created the first public infrastructure investment agency, the Public Works Administration (PWA). The PWA was given $3.3 billion in funding to be spent within its first year ($78 trillion today). To do so, the NIRA massively expanded the powers of the federal government to collect revenue and to use it to provide a minimum social safety net, and not just in times of crisis. Other public works agencies worked alongside the PWA: the Civilian Conservation Corps and the Tennessee Valley Authority in 1933, followed by the Work Progress Administration (WPA) in 1935, which received a further $5 billion in funding ($112 trillion today). These agencies put millions of unemployed men back to work building roads, electrical grids, dams and aqueducts, and electrifying the countryside for the first time. The employment enabled men (and some women) to earn their wages instead of receiving handouts, which helped them to regain a sense of dignity and to avoid starvation while modernizing the nation's infrastructure. The WPA alone employed 8.5 million people over its lifetime.[19]

Massive public spending, like that of the WPA, was only possible because President Roosevelt was willing to challenge the macroeconomic economic orthodoxy

[18] Not all historians agree; cfr. Zinn: ibid 386-406. Nonetheless, the outcomes of the New Deal reforms are clear, whatever the broader political intentions behind them were: a redefinition of the role of the federal government in the provision of social services (albeit at an arguably insufficient level) and the imposition of regulation on the operations of the marketplace, from banks to factories to agriculture, in view of social objectives.

[19] Including the grandfather of the author, who spent several years building roads in remote areas of Western states before enlisting in the Navy at the outbreak of WWII.

of the time, including the gold standard.[20] By freeing the US dollar from the gold standard, he was able to spend on deficit, as advocated by the great economist John Maynard Keynes at the time.[21] Moreover, the New Deal rejected *laissez faire* economics and the idea that economic depressions were a normal and even beneficial readjustment of production. By 1935, the voluntary approach set out in the NIRA was also abandoned and the federal government took on a greater role in regulating employment conditions directly,[22] including wages and working conditions for the first time, recognizing the right to labour organization and collective bargaining.[23] Legal reforms set limits on the excesses of the financial and banking sectors. They also established the power of the federal government to buy agricultural products directly, as well a right of farmers to create cooperatives so that they could negotiate prices as a block. All these reforms, in essence, integrated greater social objectives into the workings of the marketplace for the first time.

With the New Deal, Roosevelt used a moment of great crisis to address some of the structural issues that led to the Great Depression and worsened its effects. Over the course of the 1930's, he set in place the basic social welfare institutions that provide a minimum social safety net in the United States to this day. It was more far-reaching than it needed to be to get through the economic crisis of the 1930's: indeed, the historian David Kennedy speculates that Roosevelt saw the crisis as a chance to reshape the United States from the ground up. He argues that it was reactionary forces and poor political decisions that closed the window of opportunity for the New Deal by 1938, sooner than Roosevelt would have wanted.[24]

Certainly the New Deal could have gone further. For one, it left intact the deep-rooted racial inequality found throughout the United States.[25] Black, Mexican and Chinese Americans were segregated within WPA projects, if they were even admitted,

[20] Kennedy (n 8) 75-82.

[21] Ben Bernake and Harold James, 'The Gold Standard, Deflation, and Financial Crisis in the Great Depression: An International Comparison' in Ben Bernanke, *Essays on the Great Depression* (Princeton University Press 2000) 70.

[22] This part of the NRA was later ruled unconstitutional *in Schechter Poultry Corp v United States* [295 U.S. 495 (1935)] for delegating excessive regulatory powers to the executive branch.

[23] This was set out in the Wagner National Labor Relations Act of 1935.

[24] Kennedy (n 8) 323-362.

[25] Notable is Roosevelt's decision to not challenge racial politics in southern states, leading to the failure of efforts to make lynching a federal crime: ibid 342-344.

and given lesser wages. Social benefits created under New Deal reforms, like Social Security and housing assistance, excluded African-Americans by direct and indirect means, such as exempting persons engaged in certain categories of employment and enforcing red-lining.[26] Some argue that the New Deal entrenched and even increased economic inequality along class and racial lines.[27] Yet by affirming the value of social protections and the role of the state – and employers – in providing them, it set in motion the struggle to expand social rights, including to marginalized groups, that continues to this day.

3. The New Deal and the European Green Deal

Exploring the parallels between the New Deal and the European Green Deal could offer insight into the EGD's underlying values and reveal whether the connection between the two 'deals' is more than just a shared title.

As mentioned, the New Deal represented not just a series of reforms and investments, but something more substantial: a shift in the fundamental role of the State. Its normative core can be understood in terms of a category of norms that Dworkin refers to as 'policy', which he defines as, 'a kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community.'[28] What the New Deal did was it shifted the normative 'policy' of the United States to embrace certain fundamental social and economic rights objectives for the first time, rights such as freedom from hunger, access to dignified employment, collective bargaining, minimum wages and minimum working conditions, housing.

Within the European Union, it can be argued that Dworkin's category of 'policy' describes the Union's 'values' as set out in Article 2 of the Treaty on European Union (TEU). The values of the Union have a constitutive function, as they are identity-

[26] Richard Rothstein, *The color of law: a forgotten history of how our government segregated America* (Liveright 2017) 154-157.

[27] Zinn (n 17) 404-407.

[28] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 22.

forming, not just policy-informing.[29] For the Court of Justice, the very existence of the Union, 'is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU.'[30]

Like the New Deal, the European Green Deal can be seen as fundamentally shifting these underlying values by increasing the weight of environmental objectives within the purposes of the marketplace and of the state, and by shifting the distribution of responsibility for sustaining environmental actions away from consumers and towards producers.

3.1. The EGD: a challenge to economic orthodoxy?

At its core, the EGD seeks to reform the notion of sustainability as it has been understood in the internal market to date. Indeed, the Green Deal communication states that, '[I]t is essential to increase the value given to protecting and restoring natural ecosystems, to the sustainable use of resources and to improving human health.'[31] It is true that environmental objectives are not new to the Union, nor is the insertion of non-market objectives and values within the operations of the internal market, including environmental values.[32] What has changed is their relative weight compared to other objectives: it is argued that the EGD gives greater weight to environmental objectives within the internal market, just as the New Deal did for social objectives. This has been reflected in the numerous legal instruments – soft law, legislative proposals, international

[29] Ana Maria Guerra Martins, 'Equality and Non-Discrimination as an Integral Part of the EU Constitutional Identity' in Thomas Giegerich (ed), *The European Union as Protector and Promoter of Equality* (2020) 25; Stefan Kadelbach, 'Are Equality and Non-Discrimination Part of the EU's Constitutional Identity?' idem 13.

[30] Opinion 2/13, para. 166-167; see also Case C-896/19 *Repubblika v Il-Prim Ministru* [2021] ECLI:EU:C:2021:311, para. 62-6; Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para. 124-127; Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:98, para. 142-146, 264-266. On the latter, see Luke Dieker, 'The conflict over the Polish disciplinary regime for judges – an acid test for judicial independence, Union values and the primacy of EU law: Commission v. Poland' [2022] Common Market Law Review. Comparative constitutional studies can be used to shape the interpretation of European values; on this practice and its limits, see Sergio Bartole, 'Comparative Constitutional Law – an Indispensable Tool for the Creation of Transnational Law' (2017] 13 European Constitutional Law Review 601.

[31] EGD, para. 4.

[32] Bruno de Witte, 'Non-market values in internal market legislation' in Niamh N Shuibhne (ed), *Regulating the Internal Market* (Edward Elgar Publishing 2006) 62.

actions – that have followed in the last four years.

Before the Green Deal, the legitimacy of actions to protect and restore natural ecosystems was recognized in the Union's primary and secondary law, in decisions of the CJEU,[33] and in soft law. There were even some communications broadly similar to the Green Deal, such as the 2010 Communication 'Europe 2020: A strategy for smart, sustainable and inclusive growth'.[34] This communication, a response to the 2008 economic crisis, set among its ambitions that of promoting a 'Resource efficient Europe', under which the Union aimed to 'decouple economic growth from the use of resources, support the shift towards a low carbon economy, increase the use of renewable energy sources, modernise our transport sector and promote energy efficiency.'[35] Indeed, reading the Europe 2020 communication, we find environmental objectives placed alongside numerous other economic and social objectives. This three-legged stool model of sustainability sees the three objectives as potentially in conflict, envisaging that trade-offs are needed and that one will take precedence over the others at various moments.[36]

Instead of this model of 'sustainable growth' that puts environmental objectives on equal footing with social and economic objectives, the Green Deal seeks to give a more central role to environmental objectives. Indeed, recognizing the deep interdependence of the three 'limbs' of sustainability, the Green Deal emphasizes the need to integrate environmental objectives into areas of law and policy where they had previously been marginal at best, stating clearly that '[a]ll EU policies should contribute

[33] See, *inter alia*, the case Case C-281/16 *Vereniging Hoekschewaards Landschap v Staatssecretaris van Economische Zaken* [2017] ECLI:EU:C:2017:774, where the CJEU recognized the validity of including a cultivated area in a polder that had potential for restoration within a Site of Community Interest, even if the land was currently under cultivation and of little ecological value.

[34] *Europe 2020: A strategy for smart, sustainable and inclusive growth* (2010) COM/2010/2020 final.

[35] Ibid.

[36] On the uncertain role of environmental objectives in the internal market prior to the EGD, see Nicolas de Sadeleer, 'Environmental Measures as an Obstacle to Free Movement of Goods in the Internal Market' in Eléonore Maitre-Ekern, Carl Dalhammar and Hans C Bugge (eds), *Preventing Environmental Damage from Products: An Analysis of the Policy and Regulatory Framework in Europe* (Cambridge University Press 2018) 6. For criticism of 'three-legged stool' model of sustainability, see Sumudu A Atapattu, Carmen G Gonzalez and Sara L Seck, 'Intersections of Environmental Justice and Sustainable Development: Framing the Issues' in Sumudu A Atapattu, Carmen G Gonzalez and Sara LSeck (eds), *The Cambridge Handbook of Environmental Justice and Sustainable Development* (Cambridge University Press 2021) 1.

to preserving and restoring Europe's natural capital.'[37]

There is a clear parallel here with the New Deal and its aim of integrating social objectives where they had previously been seen as not just extraneous, but an outright interference in the functioning of the market.

Nonetheless, the EGD does not go as far as many would hope when it comes to shifting the premises of the European economy. Advocates of de-growth, for one, would wish to see a re-thinking of the very need for development and economic expansion, which they argue is incompatible with planetary boundaries.[38] Others do not question the need for development, but how it is measured, arguing that the metric of the Gross Domestic Product (GDP) should be set aside in favour of more holistic indicators of well-being that encompass environmental and social dimensions.[39] It could be argued that belief in growth and the GDP are the gold standard of our times, which the European Green Deal leaves intact. Nonetheless, it does enshrine environmental values in a more profound way into the economic logic of the European market, which could possibly leave space for a less growth-oriented approach to development.[40] Still, the EGD arguably sets out a statement of policy that demands a greater integration of environmental objectives within the internal market.

[37]COM/2010/2020 final 13.

[38] *Inter alia,* see Giorgos Kallis and others, *The case for degrowth* (Polity Cambridge 2020).

[39] The beyond GDP movement was brought into mainstream economics in Joseph E Stiglitz, Amartya Sen and Jean-Paul Fitoussi, 'Report by the Commission on the Measurement of Economic Performance and Social Progress' [2009]. See also Joseph E Stiglitz, Jean-Paul Fitoussi and Martine Durand, *Beyond GDP: Measuring What Counts for Economic and Social Performance* (OECD Publishing 2018).

[40] Marinus Ossewaarde and Roshnee Ossewaarde-Lowtoo, 'The EU's Green Deal: A Third Alternative to Green Growth and Degrowth?' [2020] 12 Sustainability 9825; for analogous considerations in relation to the proposed (but never adopted) Green New Deal in the United States, see Riccardo Mastini, Giorgos Kallis and Jason Hickel, 'A Green New Deal without growth?' (2021] 179 Ecological Economics 106832. This is the approach that the recent update of the famous report *The Limits to Growth*, by the Club of Rome, supports: see Sandrine Dixson-Declève and others, *Earth for all: a survival guide for humanity: a report to the Club of Rome (2022), fifty years after The limits of growth (1972)* (New Society Publishers 2022).

3.2. Shifting the responsibilities for environmental protection from consumers to producers

There is no doubt that certain forms of consumption have high environmental costs, yet it is unclear who should be held responsible for such externalities: the consumers who purchase harmful goods and services, the producers who offer them, or the distributors who facilitate their circulation in the internal market. If we take the example of fast fashion, it is clear to see how each of the three parties may bear some responsibility, yet until recently, the burden of transforming of the internal market towards sustainability has been seen by many as the primary responsibility of consumers. Placing the onus on the consumer to drive the 'greening' the marketplace was supported by economic theories, which attributed environmental externalities associated with the consumption of goods and services only in small part to the producer of those goods or their distributors, with the majority attributed instead to the downstream consumer.[41] A much-cited 2010 article by the economist Peattie clearly sets out this distribution of responsibilities: 'Developing more environmentally sustainable consumption and production systems depends upon consumers' willingness to engage in "greener" consumption behaviors.'[42] In other words, production systems cannot be expected to change if consumers are unwilling (for whatever reason) to choose less environmentally impactful products. This implies that it is the responsibility of consumers to push corporate managers and shareholders to improve the sustainability of their operations, while public authorities should take a step back and let market dynamics play out.[43]

In line with this view, transforming consumer culture towards sustainability has been a priority within the EU,[44] resulting in public awareness campaigns to shift consumer preferences and efforts to guarantee consumer protections to help consumers make choices informed by the environmental impacts of the goods and services on

[41] João Rodrigues and Tiago Domingos, 'Consumer and producer environmental responsibility: Comparing two approaches' (2008) 66 Ecological Economics 533.

[42] Ken Peattie, 'Green Consumption: Behavior and Norms' (2010) 35 Annual Review of Environment and Resources.

[43] For detailed analysis of the role of consumers, corporations and public institutions in the 'greening' of the internal market prior to the Green Deal, and the prevalence of a 'voluntary' approach, see Sandra Eckert, *Corporate power and regulation: consumers and the environment in the European Union* (Palgrave Macmillan 2019).

[44] This priority is expressed clearly in the 2008 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan (2008) COM(2008) 397 final.

offer.[45] Indeed, the idea behind eco-labels[46] and voluntary sustainability reporting[47] is that they should enable consumers to make more pro-environment choices based on complete and accurate information. In part, this focus on demand and on the consequent need to foster a culture of green consumption has been consciously cultivated by the same companies that produce environmentally harmful products, in the belief that shifting the burden of responsibility onto the consumer would help them to prevent demands for greater regulation.[48]

[45] On consumer protections in the EU, the literature is vast, and there has been contrasting tendencies towards harmonization and deregulation over the past decade. See, *inter alia*, Ludwig Krämer, 'The Origins of Consumer Law and Policy at EU Level' in Hans-W Micklitz (ed), *The making of consumer law and policy in Europe* (Hart 2021) 13; Vanessa Mak, 'Two levels, one standard? The multi-level regulation of consumer protection in Europe' in James Devenney and Mel Kenny (eds), *European Consumer Protection. Theory and Practice* (Cambridge University Press 2012) 21; Mel Kenny and James Devenney, 'European consumer protection: theory and practice' idem; Raffaele Torino, *Lezioni di diritto europeo dei consumatori* (Giappichelli 2010). On the integration of sustainability objectives into consumer law in Europe, see Evelyne Terryn, 'Can Consumer Law Become Sustainable?' in Hans-W Micklitz and Christian Twigg-Flesner (eds), *The Transformation of Consumer Law and Policy in Europe* (Bloombury-Hart 2023) 159; Felix Ekardt and Jutta Wieding, 'Environmental Protection by Means of Consumer Law? Sustainability and Civil Law: The Example of Climate Protection' in Klaus Mathis and Avishalom Tor (eds), *Consumer Law and Economics* (2021) 299: Bert Keirsbilck and Evelyne Terryn, *Consumer protection in a circular economy* (Intersentia 2019). The challenges in applying voluntary labelling schemes to products containing palm oil are illustrative: see Pamela Lattanzi, 'Olio di palma ed etichettatura degli alimenti' in *Studi in onore di Luigi Costato*, vol 2 (Jovene 2014) 239.

[46] Regulation (EC) no 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (2009) OJ L 27/1. It should be pointed out that the EU's ecolabel scheme does not apply to food products. The possibility of extending the ecolabel scheme was studied by the Commission but ultimately rejected due to technical issues and potential opposition; see EU Ecolabel for food and feed products – feasibility study (2011) ENV.C.1/ETU/2010/0025. The problem is discussed in Giuseppe Spoto, 'Tutela del consumatore, etichette a semaforo e informazioni "negative"' (2018) XII Rivista di diritto alimentare 28; Silvia Bolognini, *La disciplina della comunicazione business to consumer nel mercato agro-alimentare europeo* (Giappichelli 2012) 189.

[47] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (2014) OJ L 330/1.

[48] Numerous examples of responsibility-shifting public relations campaigns created by corporations can be found, including the triangle recycling symbol (Davis Allen and others, 'The Fraud of Plastic Recycling: How Big Oil and the plastics industry deceived the public for decades and caused the plastic waste crisis' (Center for Climate Integrity 2024), available at <https://climateintegrity.org/uploads/media/Fraud-of-Plastic-Recycling-2024.pdf> accessed 22 May 2024) and the idea of the so-called 'carbon footprint' (Mark Kaufman, 'The carbon footprint sham' (Mashable 2021), available at <https://mashable.com/feature/carbon-footprint-pr-campaign-sham> accessed 22 May 2024). For a recent expression of this deliberate shifting of the responsibility from consumers, see Dharna Noor and Oliver Milman, 'Fury after Exxon chief says public to blame for climate failures' (The Guardian, 4 March 2024), available

Kaplan refers to corporate leaders' insistence on a voluntary self-regulation as an effort to privatise environmental governance. He finds it to be motivated by a desire to maintain control over environmental regulation and argues that its success to date has been facilitated by the absence of strong public actors.[49]

Placing the primary responsibility on citizens as consumers is based on trust in marketplace dynamics as well as the power of corporations and industry to self-regulate in response to market signals.[50] If this approach were valid, then consumer and competition protections guaranteed under the Treaties, starting from Article 12 of the Treaty on the Functioning of the European Union (TFEU), should be sufficient to enable the greening of the internal market, if this is what consumers actually desire.[51] Belief in the functioning of this system has, until recently, led to a largely voluntary approach when it comes to improving the sustainability of companies in Europe. Some companies voluntarily participate in reporting schemes like the Carbon Disclosure Project,[52] or undertake carbon offsetting activities. There are a few notable exceptions of more incisive regulation, like the Emissions Trading System (ETS)[53] and Ecodesign directive.[54]

at <https://www.theguardian.com/us-news/2024/mar/04/exxon-chief-public-climate-failures> accessed 22 May 2024.

[49] Rami Kaplan, "Rather Than Follow Change, Business Must Lead this Transformation": Global business's institutional project to privatize global environmental governance, 1990–2010' (2023) 45 Organization Studies 161.

[50] Eckert (n 43).

[51] In reality, there are numerous reasons that consumer law has failed to effectively allow consumers to express their non-market values through their consumption choices: see Cristina Poncibò, 'A modernisation for European consumer law?' in Devenney and Kenny (n 45).

[52] The Carbon Disclosure Project relies on companies voluntarily filling in a questionnaire about their annual emissions and impacts, on the premise that doing so will make executives, shareholders and the public aware of the climate impact of the company and eventually motivate them to improve their sustainability over time. See the data and documentation available at <https://www.cdp.net> accessed 22 May 2024.

[53] The ETS system is built on the premise that market forces can be harnessed to push European companies to reduce their greenhouse gas emissions. Regulation (EU) 2023/957 of the European Parliament and of the Council of 10 May 2023 amending Regulation (EU) 2015/757 in order to provide for the inclusion of maritime transport activities in the EU Emissions Trading System and for the monitoring, reporting and verification of emissions of additional greenhouse gases and emissions from additional ship types (2023) OJ L 130/105.

[54] Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (recast) (2009) OJ L 285 10. This is currently under revision, with a definitive text expected to be adopted before the upcoming European Parliament elections. The proposed revision is Proposal for a Regulation of the European Parliament and of the Council

We can find a clear historical parallel here in the New Deal. The initial response to the Great Depression relied on voluntary agreements between the state and economic actors, including banks, corporations, industrialists, and agricultural intermediaries, who were asked to exercise self-restraint in the interest of the common good. Such an approach, while it worked for a time, was largely inadequate, as companies either hid actions contrary to their public promises or else abandoned these promises when they came to impact their profits beyond what they were ready to bear.

When it comes to sustainability, the voluntary approach has also been shown to be ineffective for multiple reasons. For one, the environmental costs of goods and services voluntarily disclosed by companies can be far less than their actual impact. This is particularly the case when reports exclude certain categories of emissions, such as their so-called scope 3 emissions, those that are caused by the use of their products by consumers.[55] For another, many of the claims of sustainability, carbon offsetting and climate-neutrality have been revealed to be wholly misleading.[56] Even when consumer pressure works and companies make commitments to invest in renewables or reduce their greenhouse gas emissions, these commitments can be radically revised when leadership changes, as happened when Wael Sawan took over control of Shell from its previous CEO Ben van Buerden in January 2023, as shareholders have the ultimate say.[57] Thus, consumer protections and voluntary disclosures have failed to achieve their

establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC (2022) COM(2022) 142 final.

[55] Greenhouse gas emissions are typically accounted for in three categories: scope 1 emissions are those directly emitted by the producer during the production process, such as coke burned during the production of steel, or methane emissions from leaky oil wells; scope 2 emissions are those produced upstream of production, such as by the producers of electricity used to power the production process; scope 3 emissions are those produced downstream of production through the consumption of the product, including by the consumer. For oil and gas producers, their scope 3 emission far outweigh their scope 1 and 2 emissions, so any commitments to a 'net zero' target that exclude this category of emissions can be deceptive. This was at issue in the case successfully brought against Shell: *Vereniging Milieudefensie v Royal Dutch Shell plc and ors*, ECLI:NL:GHDHA:2021:134. On the case, see Otto Spijkers, 'Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell' (2021) 5 Chinese Journal of Environmental Law 237; Chiara Macchi and Josephine Zeben, 'Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell' (2021) 30 Review of European, Comparative & International Environmental Law 409.

[56] Patrick Greenfield, 'Revealed: more than 90% of rainforest carbon offsets by biggest certifier are worthless, analysis shows' *The Guardian* (London, 18 January 2023) <https://www.theguardian.com/environment/2023/jan/18/revealed-forest-carbon-offsets-biggest-provider-worthless-verra-aoe> accessed 22 May 2024.

aims of permitting consumers to exert pressure on companies to effectively 'green' the internal market.

The EGD sets out a change in policy to address the failures of this voluntary approach to integrating environmental objectives into corporate decision-making.

For one, it acknowledges that the power of consumers is vastly unequal to that of producers. The distribution of responsibilities in the Green Deal reflects this fundamental inequality and shifts the onus onto producers through a combination of incentives and regulations, including extended producer responsibility schemes. An example can be found in the sector of forestry. Under Article 4 of the 2010 Timber Regulation,[58] timber and wood product importers had a duty to exercise due diligence to prevent illegally harvested wood and its derivatives from entering into the EU market. However, it is known that most deforestation occurs not to provide wood and paper, but commodity products such as beef, coffee, rubber, cocoa, soy, palm oil.[59] Until recently, the onus was on consumers to choose deforestation-free products, relying on ecolabels or corporate sustainability commitments. However, the 2010 Timber Regulation has now been replaced by the Deforestation Regulation,[60] which entered into force in June 2023 and will become applicable starting in December 2024. The Deforestation Regulation sets strict rules on importers of cattle, cocoa, coffee, oil palm, rubber, soya and wood products and their derivatives, products that are at risk of being produced through deforestation. Importers must not only exercise due diligence, but they must certify that their imported products are 'deforestation-free', otherwise they cannot be sold in the internal market and sanctions will be applied. In this way, it reduces the place of the complex and ineffective governance mechanisms for timber,[61]

[57] The shift back to its focus on increasing oil and gas production following the appointment of CEO Sawan led to the resignation of the former head of renewables production Thomas Brostrom in June 2023; see Ron Bousso, 'Exclusive: Shell CEO comes under pressure from within on renewables shift' *Reuters* (27 September 2023) <https://www.reuters.com/sustainability/shell-ceo-comes-under-pressure-within-renewables-shift-2023-09-27/> accessed 22 May 2024.

[58] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (2010) OJ L 295/23.

[59] Nguyen Tien Hoang and Keiichiro Kanemoto, 'Mapping the deforestation footprint of nations reveals growing threat to tropical forests' (2021) 5 Nature Ecology & Evolution 845.

[60] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (2023) OJ L 150/206.

and that of voluntary certifications for other products like palm oil and cocoa.[62] While there are some elements of the Deforestation Regulation that can be criticized (particularly the way it defines 'deforestation-free' according to the national law applicable where the product is grown, and given the complexities in recording source data where products are prevalently grown by smallholders),[63] it certainly represents a shift away from the prior voluntary, consumer-centred approach.

We find this shifting of responsibility from consumers to producers across all areas of EU environmental law, from waste and packing, to chemicals and wastewater, transport and energy, biodiversity and climate change. Article 25 of the proposed Sustainability Due Diligence directive states clearly that 'Member States shall ensure that, when fulfilling their duty to act in the best interest of the company, directors of companies […] take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term.'[64]

To be clear, the responsibility of the consumer has not been eliminated: in fact, initiatives to promote green certifications in the financial sector,[65] to combat

[61] Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community (2005) OJ L 347/1. For an evaluation of the impact of the FLEGT regulation, see the conclusions of Fitness Check on Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (the EU Timber Regulation) and on Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community (FLEGT Regulation) (2021) SWD(2021) 328 final.

[62] Laila Berning and Metodi Sotirov, 'The coalitional politics of the European Union Regulation on deforestation-free products' (2024) 158 Forest Policy and Economics 103102.

[63] For example, see Patricia Figueiredo, 'The EU's deforestation law was cheered here. Brazilian experts and farmers are skeptical' *Euronews* (31 August 2023) <https://www.euronews.com/my-europe/2023/08/31/the-eus-deforestation-law-was-cheered-here-brazilian-experts-and-farmers-are-skeptical> accessed 22 May 2024.

[64] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (2022) COM(2022) 71 final. A compromise on the proposal was reached on March 19, 2024. The compromise would reduce the applicability of the directive to European corporations with over 1,000 employees and global turnover over €450 million, or foreign-based corporations with annual turnover over €450 million in the European Union, a significant increase from the Commission's initial proposal of 500 employees and €150 million in turnover. The proposal currently awaits formal adoption by the European Parliament and the Council.

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

greenwashing,[66] to promote sustainability reporting,[67] all aim to enhance consumers' ability to accurately express their values through their consumption choices. But this has become secondary. Instead, the Green Deal shifts environmental governance away from the privatized model described by Kaplan, instead giving public powers the power to create and enforce rules, forcibly redistributing the responsibility for pursuing these common values in a way that better reflects the value of equality.

Certainly the integration of environmental objectives into the European marketplace has met with considerable opposition, especially in the months leading up to June 2024 elections of the European Parliament. This resistance has targeted proposals in matters affecting the agricultural sector in particular, leading to the failure of the proposed Sustainable Use Regulation,[68] the rejection of the proposal to extend the scope of the Industrial Emissions Directive to more types of intensive zootechnic installations,[69] and the elimination of specific obligations to restore agricultural biodiversity in the proposed Nature Restoration Regulation.[70] It has led to the proposal

[66] Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information (2022) COM(2022) 143 final; Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive) (2023) COM(2023) 166 final.

[67] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (2022) COM(2022) 71 final.

[68] Proposal for a Regulation of the European Parliament and of the Council on the sustainable use of plant protection products and amending Regulation (EU) 2021/2115 (2022) COM(2022) 305 final. This proposal would have strengthened regulations over the use of pesticides and herbicides, such as by prohibiting aerial spraying in favour of targeted delivery, and created obligations to Member States to reduce the quantity of plant protection products over time. This was forcefully opposed by agricultural lobbies. Despite the fact that a trilogue compromised was approved by the European Parliament on 22 November 2023, Commission president Ursula Von der Leyen announced on 6 February 2024 that the Commission would formally withdraw the proposal.

[69] Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) and Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste (2022) COM(2022) 156 final. As it stands, Member States must require emissions authorization under the Industrial Emissions Directive 2010/75/EU for installations with over 40,000 chickens, 2,000 pigs or 750 sows. The revision would have reduced this threshold to about 10,000 egg-producing chickens, 500 pigs or 300 sows, and included cattle for the first time. However, this compromise text agreed upon in trilogues leaves the previous thresholds largely intact, including the exemption of beef and dairy lots from the need for emissions authorization.

[70] Proposal for a Regulation of the European Parliament and of the Council on nature restoration (2022) COM(2022) 304 final. Article 9 of the Commission's proposal would have required Member States to set in place

to suspend environmental conditionality requirements in the PAC, and delayed perhaps indefinitely the revision of chemicals regulation under REACH.[71]

While these setbacks are disappointing, they should not come as a surprise. Even the New Deal faced opposition, setbacks and delays. However, by affirming that new values – whether they be social or environmental – have a place in the market, and that it is the states' task to pursue them, these deals have set in motion a process that will continue to evolve, albeit imperfectly, long after. The question is whether enough progress can be made in the short term to avoid crossing the planetary boundaries that would render all further progress in vain.[72]

4. Conclusions

Mark Twain is credited with saying that history may not repeat itself, but it does rhyme. When we look at the underlying objectives and approach of the New Deal and the European Green Deal, there seem to be clear parallels between the two. Both seek to transform the marketplace by integrating previously extraneous values into its underlying structure. Both seek to change the role of the state in pursuing the values, including through public investment and new areas of regulation. Both do so by moving away from forms of voluntary co-operation towards models of governance in which the public authorities have a greater part to play. Both address the fact that progress has been stalled by a culture that blames individuals rather than systems for crises, be it a social and economic crisis in the case of the New Deal, or an environmental crisis in the case of the EGD.

The recent setbacks in Europe may raise fears that the momentum of the EGD

restoration measures to enhance agricultural biodiversity and showing increasing trends in several indicators of agricultural biodiversity. The compromise text weakened these obligations, yet still gave rise to enough opposition to. See Morgan E Harris, 'The Nature Restoration Regulation: Prospects for Reviving Europe's Biodiversity' [2024] Diritti Comparati blog <https://www.dirittocomparati.it/the-nature-restoration-regulation-prospects-for-reviving-europes-biodiversity/> accessed 22 May 2024.

[71] Antonia Reihlen and others, 'Waiting for REACH: The negative impacts of delaying reform of EU chemical laws' [2023] EEB Report.

[72] Will Steffen and others, 'Sustainability. Planetary boundaries: guiding human development on a changing planet' (2015) 347 Science.

will further slow, if not come to a complete standstill. It is helpful to recall that the New Deal also was slow, despite the urgent needs of so many. Negotiations over many reforms dragged on for years; some were never completed, while others were enacted only to be annulled in the courts. By the end of 1937, the United States' economy was recovering as wartime production increased, making the kind of social reforms Roosevelt still intended to pursue less urgent and therefore easier to oppose. The New Deal he envisaged was never fully realized, yet this does not detract from the remarkable progress it achieved.

This suggests that, despite recent setbacks, if European leadership can hold fast to the values that underpin the Green Deal and the project of European unification, and if the peoples of Europe continue to demand change and to welcome it, even when it affects their lives,[73] then the project of the Green Deal will be able to continue over the next five years and beyond. In many ways, it is a New Deal for our times, with all the challenges that entails.

[73] As Baute shows, the perception that the regulatory framework fairly distributes the costs and responsibilities for the pursuit of environmental objectives is key to guaranteeing public support: Sharon Baute, 'European solidarity in the green transition: Evidence from a conjoint experiment' [2023] Sciences Po LIEPP Working Paper No 156.

GABRIELLA MUSCOLO[*]

SUSTAINABILITY AND MARKET FAILURE: REGULATION V. COMPETITION

ABSTRACT. *The paper deals with the trade-off between competition enforcement and regulation when it comes to sustainability policies. It starts from public policy analysis in its traditional, three steps, economic approach: identifying the economic problem and market failures; outlining the options in solutions; balancing the pros and cons of regulation versus competition enforcement, in the light of the initiatives on sustainable competition already taken by National Competition Authorities. The article concludes on a focal role for antitrust law and policy in the ecological transition envisaged by the Green Deal, as far as dynamic competition promotes green innovations.*

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1. Introduction: sustainability and public policy analysis

As stated by UN Secretary-General Guterres, climate change is the defining challenge of our time.[1]

There is a general consensus that sector-specific responses to this will fail. Action must involve "*all sectors of the society and the economy, including industry.*"[2]

This has led to calls for a rethink of the relationship between economic and environmental policies at the highest political level.

In analysing the market failure of sustainability and the debate about opting for regulation or competition enforcement as solutions, I will outline a scheme that starts from the traditional structure of public policy analysis, that is, on the one hand, still entitled in the institutional community and is, on the other hand, intertwined with the antitrust enforcement issue.[3]

In fact, there is a traditional three-step economic approach to public policy: for many years the OECD has advocated for Regulatory Impact Analysis, which starts with these three basic questions.[4]

1) The first step is to identify the economic problem to be solved or the grounds for intervention in the form of a "market failure" that could justify intervention

[1] European Commission, 'Mergers: Commission prohibits Siemens' proposed acquisition of Alstom', press release IP/19/881 of 6 February 2019.

[2] European Parliament, 'Resolution declaring a climate and environmental emergency', 2019/2930 (RSP) of 28 November 2019.

[3] Other approaches to environmental regulation emerged, that are worth mentioning: the market-based approach, see among others Ted Gayer and John K Horowitz, *Market-based Approaches to Environmental Regulation, Foundations and Trends* (now publishers 2006) 1-129; the adaptative governance approach, see, for instance, Marijn Janssen and Haiko van der Voort, 'Adaptive governance: Towards a stable, accountable and responsive government' (2016) 33(1) Gov Inf Q 1; the transformative change approach (for an overview, see Giacomo Fedele and others, 'Transformative adaptation to climate change for sustainable social-ecological systems' (2019) 101 Environ Sci Policy 116; the community-led approach (see Katy Simon, Gradon Diprose and Amanda G Thomas, 'Community-led initiatives for climate adaptation and mitigation' (2019) 15(1) Kōtuitui: New Zealand Journal of Social Sciences Online 93), and the transnational cooperation approach (see Clément Bultheel, Romain Morel and Emilie Alberola, 'Climate governance & the Paris Agreement: the bold gamble of transnational cooperation', (2016) Climate brief n. 40 (I4CE - Institute for Climate Economics) 1-12; on its modest results, see also Pedro Mariani, 'Climate Change and International Cooperation', 2 February 2024, www.sir.advancedleadership.harvard.edu). However all the alternative methods seem to give less room to the competitive discourse than the traditional analysis.

[4] See OECD, 'Introductory Handbook for Undertaking Regulatory Impact Analysis' (2008).

by Governments. This market failure must be linked to a reduction in economic welfare.

2) The second step is to establish the options for addressing this economic problem and

3) The third step is to assess the costs and benefits of these options, including that of doing nothing.

The mere identification of a problem is not sufficient to justify the need for intervention. The policy analyst must pay explicit attention to the practical difficulties of implementing various forms of it, including incentives, information, and the governance of the enforcement institution (sometimes known as "government failure").[5]

2. First step: identifying the economic problem. The market failure issue

At one level, this three-step process could be seen as common sense. After all, an important first step in any quality decision-making process is to clearly define the problem to be solved. It is acknowledged[6] that economic activities can have a negative impact on sustainability.

This relationship between the economy and sustainability is most notably captured by the discussion surrounding market failure and sustainability.[7]

Markets are failing to ensure sustainable economic and social outcomes, slowing progress towards the Sustainable Development Goals, experts said at the United Nations Conference on Trade and Development UNCTAD's Ad Hoc Expert Meeting on Competition, Consumer Protection and Sustainability on 28 September 2022.[8]

[5] Darryl Biggar, 'Public policy for regulators: Is "market failure" passé?' (2022) 85 Network 1.

[6] See, Michael Common and Sigrid Stagl, 'Ecological economics: an introduction' (CUP 2005). Return to ref 1 in article EEA. State of nature in the EU: Results from reporting under the nature directives 2013-2018. European Environmental Agency; 2020. Contract No: 10. EEA. Is Europe living within the limits of our planet? An assessment of Europe's environmental footprints in relation to planetary boundaries. European Environment Agency, Swiss Federal Office for the Environment; 2020.

[7] Katharina Biely and Steven van Passel, 'Market power and sustainability: a new research agenda' (2022), 3 Discov Sustain 5. <https://doi.org/10.1007/s43621-022-00073-y>.

[8] UNCTAD, 'Ad Hoc Expert Meeting on Competition, Consumer Protection and Sustainability' 20 September 2022.

Perfectly operating markets exist only in theory. It is well known that market failures not only inhibit the proper functioning of the market, but also affect sustainability and thus a sustainability transition. In this regard, much attention has been paid to externalities or missing markets, which are conceivable as reductions in economic welfare, even though these are not the only market failures.

Conceptually, *sustainability* requires a restructured market economy that prohibits externalities – forbidding production or consumption that results in environmental harms being inflicted on others. Pollution should no longer be accepted as a necessary by-product of industrial production and justified on a benefit-cost basis. Nor should the private use of public resources – water, timber, minerals, or other natural resources – be condoned at less than the full-price paid by society for the privilege.[9]

According to economic theory, a market should not create inefficiencies such as environmental destruction or human exploitation. Such negative impacts are understood to be partly the result of market failures that hamper efficient market allocation.[10]

The market failures blamed are usually externalities, missing markets, public goods, and inadequately assigned property rights.

It is assumed that by solving the problems of market failures, inefficiencies and thus sustainability problems would disappear. Therefore, the key to facilitating a sustainable transition is at least to reduce market failures.[11]

3. Second step: identifying the options

To turn the tide of businesses maximizing profits to the detriment of the planet, Countries should address market failures through public policies, including those on regulation, competition and consumer protection.[12] The objective of regulatory policy is to ensure that regulations are in the public interest.

It addresses the ongoing need to ensure that regulations and regulatory frame-

[9] Dan Esty, 'Mastering the Labyrinth of Sustainability: Toward a New Foundation for the Market Economy' (2022) 4 Rethinking Capitalism 1.

[10] Richard Lipsey and Alec Chrystal, *Economics* (11th edn, OUP 2007).

[11] Biely Passel (n 7).

[12] UNCTAD (n 8).

works are justified, of good quality and "fit for purpose." An effective regulatory policy supports economic development and the rule of law by helping policymakers reach informed decisions about what, whom, and how to regulate.[13]

The goal of regulatory reform is to improve national economies and enhance their ability to adapt to change. Better regulation and structural reforms are necessary complements to sound fiscal and macroeconomic policies.[14]

Within the EU's sustainability regulation, this aim is reflected in the European Green Deal, which is founded on an all-economy approach to environmental protection and calls for "*deeply transformative policies*" underpinned by an economic model that properly values environmental and natural resources.[15]

In addition, we are seeing groundbreaking framework climate legislation that places obligations upon Member States to achieve economy-wide binding targets in line with the Paris Agreement.[16]

The 2021 European Climate Law imposes a legal obligation to achieve climate neutrality by 2050 and a 55% reduction in greenhouse gas emissions by 2030 compared to 1990 levels.[17]

Further, the Commission has a legal obligation to take the "*necessary measures*" to ensure that the legally binding objective of climate neutrality in the Union is attained by 2050 and to eliminate inconsistent Union measures.

These obligations, by their very nature, impose legally binding requirements on the EU to achieve targets that, it is argued, are inherently dependent not only on State action, but also on the actions of the private sector.

The role of private businesses and consumers in investment, innovation and purchasing decisions is seen as essential to meeting these obligations. Businesses around

[13] OECD, 'Regulatory Policy and the Road to Sustainable Growth', Draft.

[14] *Ibid*.

[15] European Commission, 'The European Green Deal', COM (2019) 640 final, Communication of 11 December 2019, section 2.1.

[16] See Thomas L Muinzer (ed.), *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation*, (Hart Publishing 2020).

[17] European Parliament and Council, Regulation (EU) 2021/1119 of the of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243, 9.7.2021, 1.

the world are increasingly taking responsibility for promoting sustainability by setting higher standards than required by applicable laws. They often act individually, but sometimes co-ordinated action with their competitors may be needed.

Competition law, in principle, prohibits cooperation agreements and could stand in the way of pursuing sustainability objectives. However, against this framework, National Competition Authorities (NCAs) are increasingly providing guidance on the types of sustainability agreements that may or may not restrict competition.

On a more general level, this has led to a rethinking of competition policies. In the debate on Sustainable Competition and the Consumer Welfare Standard (CWS), originated on the other side of the Atlantic and now raging also in Europe, two different doctrines contend with each other: one in favor of a more flexible antitrust, and one against it.

Indeed, on the one hand some scholars argue that sustainability is covered by specific constitutional rules, such as in the EU, art. 11 of the TFEU[18] and accordingly, the EU competition law could legitimately pursue sustainable development goals and balance the potentially conflicting goals of the Union.[19]

On the other hand, it has been opposed that a more flexible antitrust would bring a lack of predictability for markets players together with the risk of a progressive politicization of competition law and of a lessening of independence of NCAs.[20] If NCAs should be asked to strike a balance between competition and non-economics interest, at the end of the day it could be predicted they will make a political choice.

More in particular, and in practice, the Netherlands' Authority for Consumers and Markets (ACM) has been a frontrunner, being the first NCA to publish guidelines[21] and call on the European Commission (EC) to take an EU-wide initiative. The EC re-

[19] Pursuant to article 11 of the Treaty of the Functioning of the European Union "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*."

[19] Julian Nowag, *The Environmental Integration Obligation of Article 11 TFEU*, *Environmental Integration in Competition and Free-Movement Laws* (OUP 2016) 15-50. For additional constitutional references, see Suzanne Kingston, 'Competition and Sustainability in EU Law: Nearer Resolution of the Old Debate?' (2023) (1) Concurrences 6.

[20] Jurgita Malinauskaite, Fatih Buğra Erdem, 'Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities' (2023) 61 JCMS 1211.

[21] ACM, Second draft version: 'Guidelines on Sustainability Agreements – Opportunities within competition law', 26 January 2021, <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf>.

sponded to that request and introduced a new chapter on sustainability agreements in its revised draft Horizontal Guidelines.[22]

Other NCAs have followed suit: on 27 January, the Competition and Markets Authority (CMA) published an information sheet to help businesses and trade associations better understand how competition law applies to sustainability agreements, and where issues may arise.[23]

And on 12 October 2023, the CMA published guidance on green agreements – providing welcome clarity for businesses, trade associations and NGOs on how to collaborate on environmental sustainability objectives without infringing competition law.

It also opens the door to an ongoing, constructive discussion between industry participants and the CMA on how the benefits of sustainability agreements to UK consumers should be properly assessed and quantified.[24]

Greece's Hellenic Competition Commission (HCC) created a so-called sandbox where companies can submit initiatives for examination.[25] In its assessment, the HCC will refer to its Technical Report for Sustainable Development, which it commissioned jointly with the ACM.[26]

Austria's Federal Competition Authority (AFCA) published final guidelines on sustainability agreements in September 2022[27], providing guidance on the so-called sustainability exemption introduced in September 2021 in the Austrian Cartel Act[28] for corporate agreements that restrict competition but contribute significantly to an ecologically sustainable or carbon-neutral economy.

[22] Draft revised 'Horizontal Guidelines', available at <https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en>.

[23]CMA, Guidance, 'Environmental sustainability agreements and competition law', 27 January 2021, <https://www.gov.uk/government/publications/environmental-sustainability->.

[24] CMA, 'CMA launches Green Agreements Guidance to help businesses co-operate on environmental goals', Press release of 12 October 2023.

[25] For further information on the Sustainability Sandbox, see <https://www.epant.gr/en/enimerosi/sandbox.html>.

[26] ACM and HCC, 'Technical Report on Sustainability and Competition', January 2021, <https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf>.

[27] AFCA, 'Leitlinien zur Anwendung von § 2 Abs 1 KartG auf Nachhaltigkeitskooperationen (Nachhaltigkeits-LL)' (2022).

[28] Federal Act against Cartels and other Restrictions of Competition (Cartel Act 2005 – KartG 2005), as amended.

France's Autorité de la Concurrence did not issue guidelines but has recently appointed a new head of its sustainability development network.[29] In its press release, the Authority stated that this appointment is part of its commitment to the sustainable development objectives set at national, European and international level.

Further, the EU introduced a specific sustainability exemption for certain agricultural agreements: Article 210a of the EU CMO Regulation[30] exempts agricultural agreements from the application of Article 101 TFEU if these agreements (i) contribute to environmental objectives, sustainable production (reduction of pesticides) or animal welfare; (ii) aim to apply higher sustainability standards than those mandated by EU or national law; and (iii) their restrictions are indispensable to attaining that standard.

The ACM issued new guidelines regarding collaborations between farmers, including a section on sustainability collaborations.[31]

4. Third step: pros and cons of competition and regulation over sustainability

On one hand, evaluation of regulatory outcomes informs policymakers of successes, failures and the need for change or adjustment to regulation so that it continues to offer effective support for public policy goals. [32]

The nature of these sustainability challenges has blurred traditional conceptions of the role of the public and private sectors in environmental regulation.

The idea that legislation is, in itself, the entire solution to environmental degra-

[29] Fr. NCA, 'Elise Provost is appointed adviser to the General Rapporteur and head of the sustainable development network of the Autorité de la concurrence', press release of 7 September 2022, <https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/elise-provost-appointed-adviser-general-rapporteur-and-head-sustainable>.

[30] Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 amending Regulations (EU) No. 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No. 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No. 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and (EU) No. 228/2013 laying down specific measures for agriculture in the outermost regions of the Union, OJ L 435, 6.12.2021, p. 262.

[31] ACM, 'Guidelines regarding collaborations between farmers' 7 September 2022, <https://www.acm.nl/en/publications/many-arrangements-within-production-chains-regarding-sustainable-agriculture-are-allowed>.

[32] OECD (n 8).

dation has been questioned.[33]

It has been argued that it is impossible for the State alone to address many of today's environmental problems rapidly or effectively enough.

Further, it has been argued that the environmental problems that threaten the existence of society as we know it – in particular climate change – do not respect the jurisdictional boundaries associated with traditional environmental regulation. These problems are in many cases caused by, and may most effectively be solved by, private transnational corporations.

Whereas traditional environmental regulation looked to the State to fashion and enforce environmental rules, there is now a consensus that private environmental initiatives form an important part of the policy mix.[34][35]

Furthermore, the impact of the European climate regulatory framework should not be completely overlooked even in a wider, global perspective. Alongside the promotion of regulatory cooperation[36] through formal trade agreements with third Countries, the so-called 'Brussels effect'[37] may also play a role outside the internal market's borders, where foreign corporations can be induced to voluntarily adhere to European standards.

Especially where the non-divisibility of production across global markets entails that greater benefits arise from adhering to a single global standard than from taking advantage of lenient ones, complying with higher standards proves convenient in the light of ensuring foreign businesses' competitiveness, notably if they are interested in trading within the European market and in gaining a reputational advantage, also in

[33] See generally, Veerle Heyvaert, *Transnational Environmental Regulation and Governance: Purpose, Strategies and Principles* (CUP 2018).

[34] This is reflected, for instance, in the UN Sustainable Development Goals, including UN SDG 12, addressing sustainable consumption and production patterns. See Michael P Vandenbergh, 'Private Environmental Governance' (2013) 99 (1) Cornell LR 129.

[35] Marjolein De Backer and others, 'Sustainability and competition policy' (2023) (1) Concurrences.

[36] See footnote 3 and the mentioned international cooperation approach.

[37] This telling expression, coined by Anu Bradford in 2012, has become customary to refer to the fact that, despite its multiple weaknesses, the European Union influences the shaping of policy actions outside its borders acting as a globally hegemonic regulatory regime (see Anu Bradford, 'The European Union in a globalised world: the "Brussels effect"' (2021) (2) Revue Européenne du Droit 75).

terms of consumers' trust.[38]

This could also be seen as a side effect of the global dimension of the climate issue, in a panorama in which the European climate policy appears to be the most ambitious and is perceived as coming from an experienced policy-making agent, acting through a robust evaluation process and able to provide actors with solid legal certainty.

As for now, however, the Brussels effect in the climate policy area seems to be limited compared to other policy areas such as data privacy and product safety. Still, it can be substantially perceived when it comes to ESG reporting, given that many global companies are choosing to comply with the European regulatory obligations,[39] even if stricter, rather than juggle mixed international standards.[40] Moreover, a recent study examining whether the European Union is providing a model for other countries for product requirements interestingly shows that such influence is reinforced in the environmental arena.[41]

Overall, given that the implementation and achievement of the European Green Deal goals are still in process, it is possibly still too early to assess whether the EU is succeeding in its ambition to lead the global green transition.[42]

Nevertheless, the Brussels effect is expected to develop over time, perhaps also on the back of the leverage of European measures with cross-border implications like the CBAM regulation.[43] It has also been argued that a 'mega-Brussels effect' may stem

[38] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford Academic 2020), 26. See also Anu Bradford (n 37).

[39] As the ones outlined in Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

[40] Peter Walsh, 'The Brussels Effect: How CSRD and European Union ESG Regulations Affect U.S. Global Companies', 12 March 2024, <benchmarkgensuite.com>.

[41] Cristina Herghelegiu and Fernando Martin, 'Is the European Union providing a regulatory model for other countries?' (2023) 15 Single Market Economics Papers, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (European Commission), Chief Economist Team, Luxembourg, 2023, 1-39.

[42] Sandra Eckert, 'The European Green Deal and the EU's Regulatory Power in Times of Crisis' (2021) 59 (1) Journal of Common Market Studies 81.

[43] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ L 130, 16.5.2023. 52-104.. As stated in Recital 10, it is an essential element of the Union's toolbox for meeting the objective of a climate-neutral Union in line with the Paris Agreement by addressing the risk of carbon leakage that results from the Union's increased climate ambition. It is expected to also

from the latest development in the co-ordination between EU and US' climate actions in the light of creating a single economic superbloc.[44]

On the other hand, sustainability is increasingly a dimension of competition in the market.

In the consultation as part of the revision of the EU's Horizontal Cooperation Guidelines, the European Commission noted that respondents indicated as the "*most important development*" since the prior version in 2010 "*climate change and the corresponding challenging environmental and sustainability goals. Respondents believe that this results in increased demand from consumers and businesses for sustainable, ethical and environmentally friendly business practices.*"[45]

The starting point of the analysis is the importance of sustainable development as a "core principle" of EU law, as well as the Commission's commitment to the EU Green Deal.[46]

While space precludes full discussion of the draft, it observes that "[*w]here market failures are addressed by appropriate regulation, for example, mandatory Union pollution standards, pricing mechanisms, such as the Union's Emissions Trading System ('ETS') and taxes, additional measures by undertakings, for example through cooperation agreements, may be unnecessary. However, cooperation agreements may become necessary if there are residual market failures that are not fully addressed by public policies and regulations*."[47]

The draft goes on to set out instances where sustainability agreements would not be considered to fall under Article 101(1) TFEU,[48] and principles for the assessment of those sustainability agreements that do fall under this provision, including potential application of Article 101(3) TFEU.

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contribute to promoting decarbonisation in third countries.

[44] Peter Orszag, 'Do not underestimate the 'mega-Brussels effect' of EU-US co-ordination', Financial Times, 16 October 2023, *www.ft.com*.

[45] European Commission, Factual Summary of the Contributions Received during the Public Consultation on the Evaluation of the Two Block Exemption Regulations and the Guidelines on Horizontal Cooperation Agreements, at 16, *p.HBERs_consultation_summary.pdf*.

[46] Communication from the European Commission, 'Approval of the content of a draft for a 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' OJ C 164, 19.4.2022, par. 542.

[47] *Ibid.* par.546.

[48] *Ibid*. par.572.

Here, it notes that sustainability agreements can produce efficiencies such as cleaner technologies and less pollution, thus contributing to a "*resilient internal market*," which can be taken into account if objective, concrete and verifiable.[49]

As concerns indispensability, the draft notes that, although public policy and regulations "*often take care*" of negative environmental externalities, this is not always the case, and "[t]*here may be other instances where, due to market failures, sustainability benefits cannot be achieved if left to the free interplay of market forces or can be achieved more cost efficiently if undertakings cooperate*."[50]

Furthermore, with regard to the pass-on of benefits to consumers, the draft contains an innovative new section setting out principles for the valuation not only of individual use-value and non-use value benefits, but also of collective benefits, opening the possibility of taking into account sustainability benefits to a larger group of society (so-called out-of-market benefits).[51]

Aside from qualitative considerations, advances in environmental economics make it possible to quantify and place a monetary value on environmental harms and benefits.[52]

Many Governments routinely use these techniques in undertaking cost-benefit analysis of regulatory innovations.

An excellent overview of the menu of potential quantitative valuation techniques available to competition regulators, drawing from the environmental economics literature, is provided in the 2021 Technical Report on Sustainability and Competition, jointly commissioned by the Dutch and Greek Authorities.[53]

Such work suggests that it is possible, within the consumer-welfare-based model of competition policy on its own terms, to take account of environmental considerations by using established environmental economics techniques such as revealed preference

[49] *Ibid*. par.579.

[50] Communication from the European Commission (n 46), par. 584.

[51] *Ibid.* par.601.

[52] For an excellent overview, see Charles D Kolstad, *Environmental Economics* (2nd edn, OUP 2010); see also Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (The New Press 2004).

[53]See ACM and HCC, Technical Report on Sustainability and Competition, January 2021, <https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0. pdf> (accessed 23 December 2022).

methods, contingent valuation, and discounting.[54]

From a more general perspective, we could argue that regulatory Authorities operate within an established legislative framework, with limited scope for discretion.

Even where there remains discretion, many Authorities develop guidelines and policies that make clear how they will exercise that discretion – thereby limiting the scope for decision-making.

It could be argued that the role of a Competition Authority is simply to enforce the law.

This perspective overlooks the fact that, even if the law is clear about what behaviours are permitted, NCAs retain considerable discretion in deciding whether and how to enforce the law.

We cannot know how to enforce the law (that is, how to allocate enforcement resources, how to choose which cases to take, or which remedies to accept) or which firms or behaviours should be captured by the law (i.e., the scope of the regulatory framework) without an understanding of the underlying economic harm to be addressed. In other words, we must understand the market failure that is driving the need for intervention and the link between correcting that market failure and economic welfare.

Policies, guidelines, or rules of thumb are useful tools for NCAs to expedite the enforcement process without the need to revisit first principles with every decision.

But those policies inevitably need to be updated from time to time.

In addition, many NCAs, among whom the Italian Competition Authority, have advocacy powers and an explicit public policy role – advising Governments and public entities on regulatory reforms in their domain of expertise.[55]

Almost certainly, an NCA will be consulted before major changes to their regulatory framework.[56]

[54] De Backer (n 35).

[55] Art. 22, L. n. 287/1990.

[56] Biggar (n 5).

5. Conclusions: competition policies and the promotion of green innovations

The need to integrate sustainability considerations into all modern competition policies is more important than ever in the light of three factors: the increasingly evident effects of climate change; the inadequate policy and regulatory responses; and the growing evidence that many businesses are looking to work together to fight climate change – but often fear that competition law limits what they can do.[57]

Despite the crucial role that regulation plays in supporting the reduction of greenhouse gas emissions, however, its interdependence with competition emerges as the former is subject to a number of conditions, including proportionality, timeliness, proper enforcement and administrative management, which do not ensure its timely effectiveness.

For this reason, complementary market-based alternatives to legislation (e.g. environmental agreements between companies) are a necessary part of the green transition. In this context, competition law is a more than effective solution for environmental protection.[58]

The growing importance of the role of competition law has also been evident in the increasing attention paid by NCAs as well as by the European Commission, which are trying to supplement the regulatory framework through new guidelines and explanatory guidance.

This awareness was already evident in 2020, when dedicated public consultations addressed the topic of how competition law and policies could contribute to the Green Deal.[59]

The overall result received from stakeholders aligns with the general perception of a focal role for competition law and policy in the ecological transition envisaged by the Green Deal.

The economic objectives of competition policy might suggest that it is at odds with environmental protection. Not infrequently, its aims pursue the intensification of

[57] De Backer (n 35).

[58] ClientEarth, 'Competition Policy supporting the Green Deal – Our call for a sustainable competition policy' (2020) <www.clientearth.org>, accessed 6.6.2022.

[59] European Commission, DG Competition, 'Competition Policy supporting the Green Deal Call for contributions', 13 October 2020, <https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf>, accessed 7 June 2022.

production and a reduction in prices, thereby favouring an excessive consumption of limited natural resources.

However, it must be considered that the aims of competition policies include improving the quality of products/services, broadening their choice and stimulating innovations.

These objectives therefore correspondingly imply sustainability (quality), greater ecological variety (widening of choice) and, finally, the promotion of green innovations.[60]

[60] OECD, 'Environmental considerations in competition enforcement' DAF/COMP(2021)4, 18 November 2021, <https://one.oecd.org/document/DAF/COMP(2021)4/en/pdf>, accessed 7 June 2022.

ANDREA PEZZOLI[*]

SUSTAINABILITY AND ANTITRUST: CONFLICT, TRADE-OFF OR GOOD FRIENDS?

ABSTRACT. *How can competition law contribute to the promotion of sustainability? Should sustainability be an explicit goal for competition law? Are antitrust authorities equipped for the assessment of environmental effects that do not affect consumers in the market? And, if not, could they still have a significant role, without distorting their mission and their independence? This brief paper tries to provide some tentative answers to these challenging questions.*

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1. Preliminary remarks

«Sustainability has gone from being something we talk about, to a central goal of policies around the world. All of Europe's policies – including competition policy – have a role to play to get us there» (Margarethe Vestager, Conference on Sustainability and Competition Policy, 24 October 2019).

This brief paper tries to illustrate what kind of contribution can be provided by competition policy without distorting its original mission, either if we confine it to the improvement of the consumer welfare (whatever it means or however we would define it) or to the protection of the competitive process (and indirectly to the improvement of the consumer welfare).

The approaches privileged within the antitrust community are not uniform as far as the relationship between sustainability and competition is concerned. On one side there is the "purity team", i.e. those who view sustainability as a public interest outside the scope of competition law. On the other side of the spectrum there are those who would like to attribute to antitrust agencies multiple tasks concerning public interests like environmental and social sustainability, the fight against inequality, employment, privacy, etc… In other words, those who consider sustainability as an explicit goal of competition law.

A third group focuses its attention only on the potential conflict between competition and sustainability, arguing that antitrust law risks being a myopic obstacle against virtuous cooperation among competitors aimed at achieving sustainability goals. In other words, antitrust law rather than encouraging sustainability or at least rather than being neutral would discourage sustainable initiatives.

Lastly, we can identify an approach which is extremely sensitive to environmental issues but at the same time is conscious of the distinctive features of competition law and of the antitrust agencies. In other word, an approach that, on the one hand, applies sustainability considerations to concepts like quality, innovation, long term efficiency, and on the other hand, suggests embedding sustainability considerations in case prioritization. Public interests would not be included among the explicit goals of competition law but would be "just" conscious and virtuous externalities.

The paper is structured as follows. Section 2 sketches the relationships between competition and sustainability, clarifying that more often than generally perceived the improvement of the competitive process may be beneficial also for sustainability. Conflict between the two objectives may certainly emerge but can largely be solved within

an antitrust framework. If it cannot, appropriate public policies should provide the most adequate solution.

Section 3 deals with some of the issues concerning the application of article 101 (3) of the Treaty to sustainable agreements and with the opportunity of guidelines when the case law is still quite "thin". In the final section some tentative conclusions will be drawn.

2. Friends or Foes?

In the business community the opinion according to which competition quite often conflicts with sustainability and antitrust rules might discourage cooperation which is beneficial in an environmental perspective seems to be increasingly popular. Nevertheless, this opinion does not seem to be supported by sound evidence and at present it might look like an alibi aimed at softening the application of antitrust rules rather than an actual problem.

However, before coping directly with this argument, it is worth stressing that the severe application of antitrust rules rather than being an obstacle for initiative pro-sustainability may be part of a broader policy aimed at achieving a more sustainable world. Competition and sustainability go hand to hand whenever competition improves the efficiency of markets that are crucial for a better environment, as waste management, local public transport or electric mobility. Competition enforcement can increase sustainability when the anticompetitive conduct also harms the environment

It is even legitimate, wearing optimistic lens, to question the possibility for firms to survive in the long run without operating in a resource – and energy – efficient manner. Sustainability means quality, innovation… and firms compete also on quality and innovations.

It seems mandatory, at this point, to mention at least a couple of famous cases – *EU Car Emissions*[1] and *France Hard-wearing floor coverings.*[2] In this perspective the experience of the Italian Competition Authority seems also to be quite interesting.[3]

[1] EU Commission (2021), EU Car Emissions, 8 July 2021.

[2] Autorité de la cuncorrence (2017), *France Hard-wearing floor coverings*, 19 October 2017.

[3] See Elisabetta Iossa, and Francesca Mattonai, 'Il Contributo dell'AGCM allo Sviluppo della Sostenibilità', 2023, Working Paper.

In the last three years 7 investigations (both ex art. 102 and art. 101 of the Treaty) have been launched to foster the competitive process in markets whose efficiency may provide a significant positive contribution for environmental sustainability. 5 of them have been decided (2 with sanctions and 3 with commitments). 2 investigations are still ongoing (Table 1).

Table 1 – SUSTAINABILITY AND ANTITRUST. THE ENFORCMENT EXPERIENCE OF THE ITALIAN COMPETITION AUTHORITY (2025-2023)

- Agcm (2015), A476. Conai. Gestione Rifiuti da Imballaggi in Plastica, 03/09/2015, bullettin n. 33/2015 – Committments.
- Agcm (2020), A531. Riciclo Imballaggi Primari/Condotte Abusive Corepla, 27/10/2020, bullettin n. 45/2020 – Sanction.
- Agcm (2021), I838 – Restrizioni nell'acquisto degli accumulatori al piombo esausti, 15/6/2021, bullettin n.27/2021 – Committments.
- Agcm (2022), A545. Consorzio Polieco/Condotte Anticoncorrenziali, – Committments.
- Agcm (2021), A544. Erion Weee/Condotte Anticoncorrenziali – Committments.
- Agcm (2021), A529. Google/Compatibilità App EnelX Italia con Sistema Android Auto, 27/04/2021, bullettin n. 20/2021 – Sanction.
- Agcm (2023), EnelX Way EdWiva- Condotte abusive nel mercato della ricarica elettrica – 04/04/2023, bullettin n. 15/2023 – ongoing.
- Agcm (2023), A569, Consorzio Olii usati Conou – Condotte restrittive nel settore della rigenerazione, 2/10/2023, buttettin n. 39/2023 – ongoing.

Source: AGCM.

But regardless their outcome, what is remarkable is that all of them are self-evident examples of the positive relationship between competition and sustainability.

The case A531 - *Riciclo Imballaggi Primari/Condotte Abusive Corepla* is representative of how the lack of competition may quite often determine harms in terms of sustainability. In October 2020, the Italian Competition Authority fined COREPLA, the dominant consortium, euro 27 million euro for preventing a rival consortium of plastic bottle manufacturers, CORIPET, from competing on a level-playing field in the plastic waste recycling. Competing systems for collection and recycling of waste can

foster innovation with solutions that are not only efficient but also better performing from an environmental perspective. The abusive conduct had prevented the implementation of an innovative environmental project (the CORIPET project), which would have resulted in an increase in the collection and recycling of separate waste, especially in geographical areas with lower environmental performance.

In the same perspective should be mentioned at least two other recent cases concerning the development of electrical mobility (more specifically the quantitative and qualitative improvement of the infrastructures and innovative services related to the recharging of electric vehicles),[4] all the cases concerning local public transport[5] and all the advocacy interventions concerning waste management and, again, local public transport.

3. When the conflict emerges…

When we talk of sustainability optimism is very welcome (too often we risk being seduced by catastrophism) but we all know that market and competition are not enough. Markets fail both because prices do not necessarily take account of the social costs of not-sustainable products and because investment in more sustainable technologies or products may be discouraged since competitors might benefit from that investment without paying the costs. Above all, markets fail since not all consumers are willing to pay for higher «quality», more innovation, more sustainability. This is especially true when all the benefits will be enjoyed by others or by next generations.

Then, what can antitrust law do when "pure" competitive behaviour conflicts with sustainability? Is the traditional antitrust toolkit adequate to cope with this new challenge? And are distributional issues really a new challenge for antitrust?

"Virtuous" restrictions of competition are generally dealt with through the application of article 101 (3) of the Treaty. The requirements for the authorization of a re-

[4] Agcm (2021), A529. Google/Compatibilità App EnelX Italia con Sistema Android Auto, 27/04/2021, Bullettin n. 20/2021 and. Agcm (2023), EnelX Way EdWiva- Condotte abusive nel mercato della ricarica elettrica – 04/04/2023, Bullettin n. 15/2023 (ongoing)

[5] For example, Agcm (2017), A495 – Gara TPL Padova, 11/5/2017, Bullettin n. 20/2017; Agcm (2019), A516 - Gara Affidamento Servizi TPL Bolzano, 10/4/2019, Bullettin n, 17/2019; Agcm (2022), Regione Toscana. Gara per l'Affidamento del servizio di TPL, 21/6/2022, Bullettin n. 27/2022.

strictive but somehow beneficial agreement are well known.[6] Nevertheless, given the particular relevance of the Green Deal, the Commission dedicated a significant section of the new Guidelines for Horizontal Agreements (from now on the new EU Guidelines for Horizontal Agreements) to Sustainability Agreements providing numerous examples of agreements that generally fall out of the scope of art. 101(1) TFEU, showing a high degree of flexibility in the application of Art. 101(3), but still focusing on the impact of the agreements on the competitive process and on the consumers in the market.[7]

The application of the "fair share of benefits to consumers" condition when assessing whether the benefits of a sustainability agreement are such that the agreement may be exempted from antitrust rules has been widely debated.

Both the EU and the UK privileged a flexible approach – though with some minor differences concerning the so-called "climate change agreements"– according to which the condition may be satisfied when it is the entire population *and* the "relevant consumers" to be affected by the beneficial effects of the agreement.

Other antitrust authorities, as the US, have adopted a stricter view, limiting the evaluation to the consumers of the products or services related to the agreement.

On the other hand, a few European authorities, as the Dutch Competition Authority, adopted a broader approach, including "future users" and "indirect users" among the "relevant consumers", arguing that the approach recently followed with the new EU Guidelines for Horizontal Agreements would not be sufficient and that sustainability considerations should be explicitly incorporated in the antitrust framework for assessing cooperative agreements.

Given that competition law in each jurisdiction is part of a political and social construct which stems from the domestic foundations and values of society, and changes to reflect their development,[8] the explicit inclusion of sustainability in the competition provisions or in their interpretation is not without controversy.

More directly, such a "broader" approach does not seem particularly convincing

[6] i) the agreements should offer efficiency gains, improvements of quality, including sustainability benefits; ii) consumers of the products in question (i.e. consumers in the market) are allowed a fair share of the benefits; iii) the restriction of competition should be indispensable or "proportionate"; iv) competition is not eliminated in respect to a substantial part of the market.

[7] See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023) 146-166.

[8] See Ariel Ezrachi, 'Sponge' [2016] volume 49 Journal of Antitrust Enforcement 5.

for the following reasons.[9]

The expertise of Antitrust agencies lies in the assessment of the competition process not in addressing environmental effects. Sustainability harm and efficiencies can be generally recognised under the consumer welfare standard which should not be stuck to price and quantity but can easily consider innovation and qualitative factors as sustainability.[10] The evaluation of agreements along ethical or political dimensions is not comfortable for independent authorities. The expansion of their mission to the political domain (for instance the assessment of the intergenerational impact of a sustainable agreement) is questionable if we consider that their decisions are not filtered by a "democratic" process…

Not less important is that the attribution of multiple missions to the same authority may weaken her accountability and undermine the effectiveness of her interventions. In other word the possibility that the risk of "grasping all, losing all" seems quite serious.

Last but not least, the inclusion of sustainability among the explicit goals of antitrust enforcement would imply that decisions based on competition law might overlap with the mission of other regulatory bodies or of the ministry of environment itself. As Jean Tirole wisely argues "*having many agencies in charge for a given policy may imply that no-one is really accountable…too many cooks spoil the broth*".[11]

Therefore, when the assessment of a sustainable agreement (and in particular the application of the "fair share of benefits to consumers" condition) implies a mainly political evaluation concerning the achievement of public interests, and legitimately underestimates or even does not take into consideration the effects on consumers in the market, regulation or public policy provisions seem much more appropriate. Above all, the special contribution of antitrust authorities is to evaluate if the agreements might be a cover for price collusion or if environmental standards can strategically be used to raise entry barriers. Rephrasing the title of an old movie[12] we might say that antitrust

[9] See, among others. Jean Tirole, 'Socially Responsible Agencies' (contribution to the DG Comp Conference 'Making Markets Work for the People', November 2022).

[10] If sustainability efficiencies are to be taken account, appropriate techniques may need to be adjusted or further developed, also drawing insights from environmental economics.

[11] Tirole (n 10)

[12] See *How Green Was My Valley*, 1941 directed by John Ford and inspired by the book with the same title, written by Richard Llewellyn and published in 1939

main task is not to evaluate "how green is my cartel" but to verify if behind the greenish surface of the agreement there are unjustified and disproportionate restrictions.[13] If a fair share of the environmental benefits accrues to the relevant consumers (or to the whole society and *also* to the relevant consumers) the framework provided by art. 101 (3) TFEU seem adequate, and antitrust authorities can assess if the competition restrictions are proportionate. Otherwise, public policies and State intervention may be more desirable.

Still, antitrust authorities (who do not operate ignoring the broader social context) could and should play a significant role. Given the positive relationship that – more often than generally perceived – exists between sustainability and competition, antitrust enforcement may be used strategically as a complementary instrument, in a manner that could emphasize its effect on sustainability. To put it simply, enforcement action may target – more or less consciously – anticompetitive conducts in industries or markets which are particularly relevant in an environmental perspective: waste management, public transport, electrical mobility, recycled products, gas and electricity, just to mention some of them. The positive effects may be incidental by-products or the external effects of antitrust enforcement could be consciously used as a complementary tool to promote sustainability, embedding sustainability considerations in case prioritization.[14] It is evident that including sustainability in prioritization considerations may be a consequence of political judgements but – and this is the crucial point – does not affect the assessment of the anti-competitive conduct. It seems an approach fully consistent with Vestager's quotation that opens this article and that, thanks to a "virtuous hypocrisy"[15] keeps roughly untouched the "purity" (whatever it means) of the antitrust assessment.

[13] See Andrea Pezzoli, 'Come era verde il mio cartello', (2022) Analisi Giuridica dell'Economia 327-335

[14] See, in a different context, Ariel Ezrachi and Carol Decker, 'The Effects of Competition Law on Inequality – Incidental By-Product or a Path for Societal Change?' [2021] SSRN Electronic Journal, 1-27.

[15] See, Nadia Urbinati, *L'Ipocrisia Virtuosa* (Il Mulino, Bologna, 2023)

4. Concluding Remarks

Let's conclude by stressing a few points.

Market is not necessarily "immoral" and competition may be a powerful and complementary tool to promote sustainability. It seems reductive to confine the relationship between sustainability and competition just to a conflictual one and it seems unfair to look at competition law as an obstacle to virtuous cooperation among competitors that could achieve sustainability goals.

Competition and sustainability more often than perceived go hand in hand. The toolkit at disposal of the antitrust authorities (more or less "traditional") as recently enriched by the new EU Guidelines for Horizontal Agreements may be an important improvement to cope even with the more complex trade-off between competition and sustainability.

Some challenges cannot be denied. Firstly, antitrust authorities must determine which and to what extent environmental effects may be considered. Secondly, they have to decide if it is possible to take into consideration the environmental efficiencies that benefit consumers other than those directly affected by the anticompetitive conduct (e.g. future consumers). Thirdly and strictly connected with the previous point, the timeframe within which the environmental effects must be evaluated has to be designed. Lastly, the comparison and the balance between environmental effects and other economic harms or efficiencies require quantifying efforts which are not that easy.

When the assessment requires distributional evaluations (e.g. harm and benefits between different generations) the antitrust lens prove to be inadequate, the independent nature of antitrust agencies is a feature that should not be forgotten and State intervention is more appropriate not last because of its higher political accountability.

In order to explain that competition law does not hinder pro-environment initiatives, guidelines might be useful. We have already mentioned the new EU Guidelines for Horizontal Agreements and, in particular, the chapter addressing Sustainability agreements aimed at clarifying that antitrust rules do not stand in the way of agreements among competitors that pursue sustainability objectives. The Dutch Competition Authority and the Consumer and Market Authority have recently published two documents with the same objective (regardless the differences in the approaches). In particular the Dutch Competition Authority rephrased the art. 101 (3) TFEU criteria, weakening the connection between the environmental benefits and the relevant consumers. The Hellenic Competition Commission published a working paper in 2020

promising new guidelines on sustainability collaboration, following, more or less, the same approach.[16] The Austrian legislator modified art. 2(1) of the Austrian Cartel Act, which is materially identical to art. 101 (3) TFEU, supplementing a paragraph that allows the possibility of wider considerations of sustainability effects that emanate from cooperation between competitors. Other authorities have privileged informal cooperation with the business community having in mind that proper guidelines would be written only when there will be a sufficiently sound case law.[17]

[16] HCC (2020), Competition Law and Sustainability: Draft Staff Discussion Paper on Sustainability Issues and Competition Law, Athens.

[17] Useful insights on these points could be found in OECD (2021), Sustainability and Competition, Paris; OECD (2021), Environmental-Considerations in Competition Enforcement, Paris; OECD (2023) Pro-competitive Policies for a Sustainable Economy, Discussion Paper, Paris.

MARIO SIRAGUSA*

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.*

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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.

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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]

[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-herkomsttransparantie-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').

ary 2024.

[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>.

FEDERICO BONITO*, LAURA DI GIANFRANCESCO**

JEAN D'ASPREMONT LECTURES AT ROMA TRE UNIVERSITY

CONTENT. 1. International Law and The Incongruous Idea of Critique. – 2. Interpreting International Law.

Jean d'Aspremont, currently Professor of International Law and International Legal Theory at Sciences Po Law School and at the University of Manchester, conducted a visiting period at Roma Tre University between February and March of this year. During this time, he held several lectures debating his work and research in different venues. This entry will examine a seminar held within the *Dialoghi Romani* initiative and a doctoral lesson at the Roma Tre Ph.D. program '*Law and Social Change: The Challenges of Transnational Regulations*'. Both lectures were held at the Law Department of Roma Tre University.

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1. International Law and The Incongruous Idea of Critique

On the 26th of February 2024, the Law Department of Roma Tre University hosted one of the seminars organized by the *Dialoghi Romani* initiative, where academics from Roman universities come together to discuss original themes of research and debate topics of current international legal interest.[1] In each seminar, one or more guests present a topic to be discussed by the participants. The guest of the meeting was Professor Jean d'Aspremont, who discussed a forthcoming paper on an upcoming law journal founded by Professor Tarcisio Gazzini. Professor Giulio Bartolini (Roma Tre University) opened the seminar, while Professor Beatrice Bonafé (University of Rome 'Sapienza') acted as discussant.

The theme of discussion revolved around a significant criticism of the current state of critical studies and approaches in international law. In his presentation, the author claimed that the very use of the idea of critique is incongruous, inappropriate, and unjustified, to the point that there is no reason to speak of critical thinking at all in international law. Conversely, the author called for a new approach, named the 'post-critical' approach, which aims at getting rid of the shortcomings and drawbacks that critical legal thinking has brought.

The presentation began with the explanation of the interconnection between critical thinking and international law. In particular, the Professor claimed that a critical attitude toward the law has always characterized international legal thought. However, in recent decades, the idea of critique has been associated with a new approach to international law, aimed at deconstructing the liberal idea of the law. Thus, the 'crits' started a 'new approach', which shared key foundational aspects, although they have always claimed not to form a unitary school. Nevertheless, the author argued that the very idea of critique has always been around in legal scholarship. Nowadays, every international lawyer would define his or her work as critical, even though the very word 'critical' has been used to describe several scientific activities, from the way to conduct

[1] For more on this see the *Dialoghi Romani* website at <https://web.uniroma1.it/deap/en/node/6259> accessed 23 May 2024.

research to a particular type of theory of law. For instance, already in 1908, Lassa Oppenheim proclaimed that criticism should be one of the fundamental tasks of any legal scholar in interpreting international law.[2] Therefore, the author reiterated that being critical does not add much to the scholarly activity of studying international law.

Specifically, the reasons why the author claimed that the critical movement is *incongruous* rely on two significant arguments. The former is linked with history and genealogy of ideas and philosophy, while the latter intertwines with the daily practice of the international legal field. In conducting this argumentation, the author clarified that he was not refusing the scholarship the critical movement has produced, which, on the contrary, was fundamental for the advancement of international law and the development of his own ideas.

As for the first argument, the author clarified that critical thinking was born in the Enlightenment era. Scientists started to critique their object of studying, by getting rid of perceptions and necessities that came out of religion, morality, law, society, and observations themselves. Thus, the critical attitude defended by contemporary critical legal scholars is contested by the author insofar as it brings to the scientific table nothing more than what has already been brought by Kant. Moreover, modern critical thinking denotes conservativism. Under the modern critical dogma, thinkers are called to conduct a scientific trial of the object of study. In doing so, however, they reiterate prior postulations of values, rules, standards of normativity, and consolidate patterns of thought that they seek to observe and contest. Thus, critical thinking is always confined to the same elements of previous legal thinking, resulting in the continuation of the distorted features that it attempts to eradicate.

As for the second argument, the author demonstrated the tension between international legal scholars' search for critical credentials and their self-righteous continuous contribution to a virile, violent, capitalist, and Western-centric legal discipline. It is virile because the only possible way to 'do research' today is to build a strong argument aimed at proving every previous argument wrong and 'bringing the readers to their knees'. The violent feature is particularly evident in the practice of peer review, which manifests a disruptive attitude in dictating what is right and wrong,

[2] Lassa Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 AJIL 313.

despite being shielded by anonymity. It is capitalist insofar as the academic publication industry generates massive income for the main publishing houses at the expense of low-paid scholars. Lastly, it is Western-centric, as critical legal scholarship is mainly headquartered in Western institutions and reiterates the same scriptural traditions invented in the Global North, such as the footnotes. In claiming that, the author highlighted that the critical lawyers become exactly the object of their critics, making the 'critique' not only incongruous but also massively obscene.

The last part of the presentation dealt with the possible way forward. In particular, the Professor explored the feasibility of a 'post-critical' approach to international law. Outside the field of law, this is nothing new, as many philosophers and sociologists have already walked this way.[3] The aim is to envisage what post-critique international law could look like. Thus, not only should the new international legal scholarship get rid of what makes it 'incongruous', but it should also rehabilitate a whole new approach to the law and scholarship. This entails, for instance, making use of open-access platforms to share ideas, allowing narrative styles of writing, overcoming the so-called 'hermeneutic of suspicion' aimed at conceiving scholarly work as an act of constant revelation, and playing down the importance of coherence. These acts are not new as philosophical post-structuralist thought has already addressed this way forward.

After the presentation, the floor was opened to questions and comments from the audience to Professor d'Aspremont. Many observations dug into the need to differentiate between the Anglo-Saxon academia and the continental one, while others highlighted the opposition between the '*pars destruens*' and the '*pars construens*' envisaged by Professor d'Aspremont in his lecture. Specifically, Professor Bartolini remarked that in the Italian scholarly landscape, the crits did not become dominant as they did in other countries, thus the author's criticism may carry different effects depending on where it is received. Conversely, Dr. Branca noted the possible impact that abandoning critical thinking might have on teaching international law. Furthermore, Professor Riccardi remarked the disruptive consequences of the relationship between international legal scholarship and legal practice. In this regard, Professor d'Aspremont admitted that he

[3] See, *inter alia*, Gilles Deleuze, *Clinique et Critique* (Editions de Minuit 1999) and Rita Felski, *The Limits of Critique* (University of Chicago Press 2015).

conducted an exercise of 'performative contradiction', meaning that he carried out a critique of the critique. He recognized that this implies a generalization of the current academic landscape, although there are significant differences between different legal thoughts across the Western world. As for the relationship between teaching and practice, the author believes that critical legal thinking has become 'mainstream', so he refers to the whole legal scholarship, stretching 'from Antonio Cassese to David Kennedy'.

Further comments came from the intervention of Professor Bonafé. In discussing Professor d'Aspremont's ideas, the author argued that there should be a stricter delineation between critical legal thinking as a method and as a theory. Furthermore, the Italian Professor drew attention to the possible disconnection between the two parts of the presentation. She noted that in the former part, Professor d'Aspremont criticized the 'crits' as a legal movement, while in the latter the criticism encompassed the whole international legal scholarship without distinction. Professor d'Aspremont recognized that this is the consequence of the generalization on which his legal argument is based, namely the fact that critical legal thinking has become mainstream. However, he highlighted that the suggested post-critical call should be embraced despite the specific characterization of the current critical legal thinking. This call is not meant to revolutionize the current state of the art of international legal scholarship, but only to provide some reflections on what international legal science should be.

2. Interpreting International Law

On the 29th of February 2024, the Roma Tre Law Department hosted a new guest lecture by Visiting Professor Jean d'Aspremont on 'Interpreting International Law'. The guest lecture, introduced by Professor Giulio Bartolini (Roma Tre University) and discussed by Dr. Laura Di Gianfrancesco (Roma Tre University), was aimed at presenting and discussing Professor d'Aspremont's recent article 'Two Attitudes towards Textuality in International Law: The Battle for Dualism'.[4]

[4] Jean d'Aspremont, 'Two Attitudes towards Textuality in International Law: The Battle for Dualism' (2022) 42 OJLS 963.

Coming as the latest addition to Professor d'Aspremont's long-standing scientific interest for legal interpretation and legal theory in international law, and being described as a 'spin-off' to his larger monographic work on the concept of meaning,[5] the article describes two main and opposite approaches to textualism under international law. Borrowing the terminology from critical literary theory,[6] d'Aspremont refers to these two competing approaches as 'international hermeneutics' and 'international poetics'.

International hermeneutics represents the common, intuitive way legal scholarship has traditionally approached legal texts. This has been the mainstream approach to interpretation ever since Greek philosophers, particularly Aristotle. The hermeneutical approach builds on the distinction between form and substance – or between signifier and meaning – and conceives legal texts as forms carrying a pre-existing meaning. Meaning is therefore embedded in the text, which exists for the sole purpose of conveying its content. Under such an approach, the content dominates the form, for the meaning constitutes the very origin and purpose of the form that contains it. The object of the interpretive activity is thus simply to elucidate and extract such pre-determined meaning from the text: interpretation is centred on a linear quest for meaning, which starts from the text and goes backwards to find its pre-existing content.

Opposite to this traditional approach is international poetics. Such a novel approach is premised on the recognition that there is no pre-existing meaning embedded in texts, including in legal texts. Texts simply refer to other texts, in a never-ending net of inter-textual connections. This is not to say that texts have no identity: to the extent that they contain *traces*[7] of other texts, legal texts guide the reader towards other forms, which, in turn, contain traces of other forms. In this regard, meaning is always absent as it continuously slips away from the interpreter, who is consequently caught in a constant process of deferral of meaning. Under the international poetics approach, legal texts are no longer conceived as linear instruments. They are rather seen as spaces to be navigated by the interpreter through the guide of inter-textual connections. As a result

[5] Jean d'Aspremont, *After Meaning: The Sovereignty of International Legal Forms* (Edward Elgar 2021).

[6] Jonathan Culler, *Structuralist Poetics. Structuralism, Linguistics, and the Study of Literature* (Routledge 2002); Edward M Morgan, *The Aesthetics of International Law* (University of Toronto Press 2007).

[7] This notion of trace is borrowed from Jacques Derrida, *De la Grammatologie* (Editions de Minuit 1967).

of such conceptualisation, the interpretive activity becomes centred on the choice to follow a certain inter-textual pathway rather than others. By so doing, international poetics brings a significant potential for change. It also maximizes the interpreter's ethical responsibility, as it prevents the reader from hiding behind the idea of the pre-determined meaning and instead empowers him or her to select which deferral of meaning should be followed, and, consequently, which change should be pursued.

In advocating for the adoption of the latter approach to legal interpretation, Professor d'Aspremont recognized that it must be balanced with the practical need to provide interpretive solutions to actual legal problems. According to the Professor, a careful adoption of the poetics approach does not condemn the international legal interpreter to be caught in an endless process of deferral of meaning. By contrast, poetics empowers interpreters to stop the deferral of meaning once they acknowledge having referred to a sufficient number of connected texts to be able to provide a solution to the interpretive question, once again maximizing their ethical and professional responsibility. In his final remarks, the Professor acknowledged that, while hermeneutics has been traditionally described as the mainstream approach, the reality of international legal interpretation possibly confirms that international poetics has already been at work all along.

Professor d'Aspremont's presentation was then discussed by Dr. Laura Di Gianfrancesco, who focused on three issues raised by the reading of the article.

The first issue related to the very dualism of approaches described by the author. In sketching out the distinction between these two approaches, the article does recognize that these approaches stand at the opposite edges of a spectrum, with several shades of grey in between. Dr. Di Gianfrancesco noted that among these shades of grey, the article notably identifies a third approach, which it refers to as the 'soft variant' of international hermeneutics. This variant, which has today become the mainstream approach in contemporary international legal scholarship, is based on the recognition that the meaning of legal texts is not pre-determined, but to some extent *created* in the process of interpretation by the transformative power of the reader. According to the discussant, this conceptual shift already has significant implications for the interpretation of legal rules. Conceiving meaning as something pre-determined to be simply extracted from the text or conceiving it as the product of a creative effort of the interpreter makes a

difference, for instance, when it comes to evolutionary interpretation: this soft hermeneutics already allows texts to be liberated from the cage of the 'fixed' original meaning and to change over time, which appears to be the very exigency pursued by the international poetics approach. The discussant accordingly asked the speaker to elaborate on the reason why this third approach is considered to still be part of the traditional hermeneutics approach and insufficient to ensure a dynamic evolution of legal texts.

The second and third issues concerned the identification of the boundaries of the international poetics approach and its relationship with the constraints indicated by the universally accepted method of interpretation in international law, i.e. the rules of treaty interpretation under Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). While appreciating the idea of texts as legal spaces which open multiple interpretive possibilities, Dr. Di Gianfrancesco asked the Professor to elaborate on the boundaries between permissible and impermissible interpretation. In particular, taking into account that the article identifies ethical responsibility as a tool for guiding interpreters, the discussant wondered which ethical approach should be adopted and whether ethics might be considered sufficient as a boundary to safeguard the exigencies of legal certainty and predictability of the law. In this latter respect, the discussant noted that these were the very exigencies that led the International Law Commission, in the 1950s and 60s, to elaborate and identify rules for treaty interpretation, which were later incorporated in the VCLT and customary law, thus raising the question of how the international poetics approach relates to those rules, and whether the rules themselves can accommodate this new approach.

Professor d'Aspremont replied to the discussant's remarks by further clarifying several questions raised by his arguments.

First, the author acknowledged that the dualism of approaches he described is to some extent a simplification of the multiplicity of available approaches. Although the soft variant of hermeneutics is indeed the most accepted approach by legal scholars nowadays, the Professor contended that such an approach is still conceptually linked to the idea of meaning. Although this approach recognizes a partially creative role for the interpreter, it remains attached to the idea of an original meaning embedded in the text, from which the interpreter subsequently departs through its transformative activity.

In this respect, such soft variant does not radically abandon the idea of meaning, but rather continues to place meaning at the centre of its activity. The poetic attitude goes, instead, one step further, and to some extent also reduces the creative role of the interpreter. While the interpretive results of these approaches may not necessarily be distinct, they are based on two different attitudes towards the notion of meaning.

Second, Professor d'Aspremont addressed the question of boundaries by contending that the international poetics approach is not necessarily concerned with interpretive constraints. Whereas poetics revolves around the inter-textual connections indicated by textual traces, still such traces are potentially infinite, as they result from the interaction between reader and text and from the reader's inclination to constantly find new traces to build his or her own interpretive pathway. In this regard, there is no 'correct' trace to be found, but a constant deferral of meaning, created by the individual experience of text-reading. Similarly, there is no universal definition of ethics: the interpreters' engagement of their ethical responsibility rests on their personal conception of ethics. The author accordingly advocates for an abandonment of the vocabulary of objectivity when it comes to legal interpretation.

This also has repercussions for the role of the rules of treaty interpretation. While interpreters are socially bound to formally refer to such rules to justify their interpretive solutions and have to use the language of the VCLT to persuade others of the correctness of their interpretation – Articles 31 and 32 VCLT being a 'discursive protocol' for international lawyers – these rules too are themselves part of the inter-textual pathway enabled by each legal text.

Professor d'Aspremont concluded his guest lecture with a final remark addressed to Ph.D. students wishing to use the works of philosophers and legal theorists in their scientific research. He suggested young scholars to consider these authors as 'intellectual companions', by transposing their ideas and using their work functionally, without being afraid of betraying their original thought.

ROBERTO CASO*

THE RISE OF PSEUDO-INTELLECTUAL PROPERTY AND THE END OF PUBLIC DOMAIN

I. In less than two hundred pages, including images, the book edited by Daniele Manacorda (archaeologist) and Mirco Modolo (archaeologist and archivist) manages to offer an effective summary of the lively debate on the legal regime of cultural heritage images in Italy. The book collects the proceedings of a conference promoted by the *Fondazione Aglaia* and held in Florence on 12 June 2022.[1]

The work is, in essence, a multidisciplinary manifesto for the liberalization of cultural heritage images. This may be already hinted in the copyright notice, which states verbatim: 'the images published on the cover and in the following pages [...] are subject to the restrictions on the use of reproductions of public cultural heritage stated by the articles 107-108 of the Italian Code on Cultural Heritage, which are contested in this work [...]'.

In doing so, the editors immediately establish their position, and do not try to clothe themselves in pretenses of neutrality. Nonetheless, the book incorporates diverse visions, and through both the text and the bibliographical apparatus it gives voice to authors arguing against the liberalization of images, starting with representatives of the *Società Italiana di Ingegneria Culturale* (Italian Society for Cultural Engineering).

II. The book, preceded by Carolina Megale's foreword and Paolo Baldi's greetings, is composed of three parts: an introduction articulated in two chapters authored by the editors of the work, a second part that collects contributions from scholars with different expertise in the fields of law (Giorgio Resta), economics (Massimo Fantini), public

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[1] Daniele Manacorda and Mirco Modolo (eds), *Le immagini del patrimonio culturale. Un'eredità condivisa?* (Pacini 2023).

administration of cultural heritage (Laura Moro) and enjoyment of cultural heritage (Grazia Semeraro, Andrea Brugnoli) and a third and final part including some experiences from the public and private sector (Daniele Malfitana, Antonina Mazzaglia, Martina Bagnoli, Beppe Moiso, Tommaso Montonati, Claudia Baroncini, Stefano Monti, Riccardo Falcinelli, Iolanda Pensa, Fabio Viola).

In his addendum to the first introductory chapter, Daniele Manacorda recalls the most recent legislative changes. In particular, he refers to d.m.11.04.2023, n. 161, 'linee guida per la determinazione degli importi minimi dei canoni e dei corrispettivi per la concessione d'uso dei beni in consegna agli istituti e luoghi della cultura statali del Ministero della Cultura' [Ministerial Decree no. 161 of 11 April 2023, on the subject of fees and charges for the concession of use of the Italian State's cultural heritage]. In this regard, Manacorda notes: 'with this decree, we are dramatically going back in time: payment is re-established also for the reproduction of images in scientific journals, heavily striking young people in a very delicate moment of their professional growth' (my translation).

The book should be read alongside other contributions that have recently been published on the subject. I am thinking in particular of issue no. 3 of 2023 of the journal 'Aedon', in which the editors of the book engage in a dialogue with other experts in this domain, and in particular with administrative law scholars; as well as of Eleonora Landini's interview with the director of the Egyptian Museum in Turin, Christian Greco, published under the title 'La cittadinanza cresce al museo [Citizenship grows at the museum]', published in the online version of the journal 'Il Mulino'. This latter piece also touches upon Open Access to images of cultural heritage (a topic explored in depth in the chapter authored by Beppe Moiso and Tommaso Montonati, with more specific reference to the experience of the prestigious Egyptian Museum in Turin).

III. The book edited by Manacorda and Modolo helps the reader to understand the ways in which the legal regime concerning cultural heritage images is complex and contradictory. It is complex because it stands at the crossroads of at least four disciplines: intellectual property, personality rights, cultural heritage public law, and EU public sector information law (with particular reference to the Open Data Directive (EU) 2019/1024). It is also complex because it concerns the balancing of constitutional rights.

And finally, it is complex because – as Mirco Modolo's well-documented and in-depth piece explains – the current Italian legislation is the result of a long and fluctuating history, in which the drivers of liberalization have always been exposed to counterforces supporting the State's proprietary assertions. The outcome is today's messy patchwork, and its first victim is the (mythical) coherence of the legal system.

Likewise, the Italian legal regime is contradictory because one does not fully understand the reasons against the liberalization of images, which seek to legitimate the State's exclusive power to control the reproduction of cultural goods. Are these aiming at enhancing the State's prospects for profit, in the hope of comprehensively enforcing its rights (and without knowing how to do so)? Is the commercialization of images that are part of the State's cultural heritage supposed to fill cultural institutions' meagre coffers? This would be in spite of what the *Corte dei Conti* (the Italian Supreme Audit Institution] has also recently pointed out, which is also noted in some of the chapters of the book – in particular, the one by Massimo Fantini: operating costs exceed revenues. Or, finally, is this happening because the State wishes to retain the exclusive power to decide who can reproduce cultural heritage and how, and therefore exclusively assess if the use of the in question is compatible with its cultural heritage value (*decorum*)?

Of concern here is not only the phantom of censorship, as denounced in particular by Daniele Manacorda, but also a sense of the ridiculous. The same State that claims the exclusive power to evaluate the suitability of uses of cultural heritage recently launched, through the Italian Ministry of Tourism, the national promotion campaign called 'Open to meraviglia' (literally: 'open to wonder'), in which the unfortunate and innocent Botticelli's Venus has been transfigured into a young influencer.

Contradictions emerge most clearly in the cases brought before some Italian courts (in particular, Tribunale di Venezia and Tribunale di Firenze) by the Italian State, concerning well-known works such as Michelangelo's David and the Leonardo's Vitruvian Man. These cases are reconstructed in a systemic and comparative perspective in Giorgio Resta's lucid and incisive chapter. In these decisions, the State initiated an action for the unauthorized reproduction of cultural goods for commercial purposes, by well-known and commercially powerful companies (with arguably deep pockets). Did the State act in order to claim the use is incompatible with the purpose and value of the cultural heritage or to obtain, in case of infringement, the payment of damages?

If big and economically powerful companies interested in using images of the Italian cultural heritage were to 'smell a rat' and look elsewhere – towards other free sources such as the archives of several museums abroad available on open access or, with reference to images of cultural assets outside the control of the Italian state, to Wikipedia and Wikicommons – our Leviathan would most likely be left with 'poorer' customers. They would largely be niche scientific publishers (such as university presses or specialized publishers), not the large oligopolies like Elsevier and Springer-Nature.

In this scenario, the hope of making profits would dramatically collapse, and in many cases the revenue could be reduced to what is collected today through reciprocal exchanges of public money, i.e. taxpayers' money (e.g., consider the case where the university press of a public university 'X' pays State's museum 'Y' for the reproduction of the image of the item 'Z'). The issue with commercial exploitation, if any, is manifest in the role that Big Tech plays in image management (now through artificial intelligence) but this, the evidence suggests, cannot be tackled by means of state proprietary claims.

IV. Before concluding, a few words must be said about two major problems triggered by the idea of exclusive State control of cultural heritage images, which arise from the complexity and contradictions described above.

The end of the public domain. According to a proper understanding of the concept, in the public domain the fundamental freedoms of information of expression and thought are the rule, while exclusive rights constitute the exception. When legislators create exclusive rights, they necessarily limit the duration and scope of the exclusivity. For example, copyright expires seventy years after the death of the author and does not cover ideas, but only their expression. Intellectual property (understood as a macro-category including copyright, patents for invention, trademarks, industrial designs, and trade secret) broadly respects this principle. This is a pillar of democratic societies that finds a declination, also illustrated in Resta's contribution, in another principle: the *numerus clausus* of intellectual property rights. Only the legislator can establish new exclusive rights, by using the balancing techniques that are typical of private law. Judges cannot do so, nor can legislators by resorting, through public law, to the creation of masked and anomalous forms of intellectual property (or pseudo-intellectual property).

Liquid law and utter confusion. As a proud realist, the writer feels no nostalgia for a longed-for (and never existing) golden age in which law corresponded to a robust, stable and just legal 'system'. If stability exists, it is very often imposed by the strongest, and is therefore a source of injustice. As for the Italian legal regime of cultural property images, there is no stability, and no move towards more advanced models – such as the Dutch and American ones – has been made. There is only a great deal of confusion. While much of the most recent debate has focused on the above-mentioned Ministerial Decree 2023/161, incorporating the guidelines for fees and concessions, the most disturbing facet of the State's exclusive control occurs in the very inventive (and, indeed, confusing) case law on the reproduction of cultural heritage images. In the opinions written by some judges, the exclusive control of the Italian State would find its basis in the Italian Cultural Heritage Code, and in the rules of the Civil Code that protect the personality right in the image of persons (Article 10 of the Civil Code). This would be, in short, a paradigmatic example of the destruction of the public domain and a violation of the principle of the *numerus clausus* of intellectual property rights, by the judicial introduction of a pseudo-intellectual property right masked as a personality right.

Needless to say, the arguments roughly sketched here are reproposed and elaborated with skill and passion in book edited by Daniele Manacorda and Mirco Modolo, the reading of which is highly recommended.

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MEETINGS & READINGS

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