Louvain School of Management

The greening process of European competition law: a critical analysis of the new Horizontal Guidelines through the Consumer Detergents case and Car Emissions case

Author: Cristina Montes y Camino
Supervisor: Jean-Christophe Defraigne
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Introduction

"I want Europe to become the first climate neutral continent in the world by 2050", this was the announcement of the President of the European Commission on December 11, 2019 at the launch of the European Green Deal (von der Leyen, 2019). In order to have a chance of being achieved, this ambitious objective must be shared by all actors of society and by all European policies with no exception made to competition law (European Commission, 2021b). Indeed, the Commission has recognized the need for interaction between environmental regulations and competition policies in order for the new European modern growth strategy to be successful (Commission Européenne, 2021).

In 2020, a call for contributions was launched to gather opinions and stimulate the debate on how competition law can evolve to support the Green Deal. More specifically, an assessment of the rules related to horizontal agreements between competitors has revealed areas of improvements in antitrust guidelines. These have been taken into consideration in a revised version of the Horizontal Guidelines proposed by the Commission, which were in turn subject to a public consultation addressed to citizens, organizations, and public authorities with the aim to get feedbacks. It is on this dimension of competition law that this work will focus by bringing a critical analysis of these new rules, thus contributing to the public consultation. In this perspective, this paper tries to answer the following question: *to what extent do the new Horizontal Guidelines meet the sustainability objectives set by the Green Deal while preserving traditional interests?*

To answer these questions, this research will be structured around two main chapters. In the first one, the aim will be first to outline the history of European competition law in order to understand its importance within the European Union. Second, an explanation will be given on how the rules on horizontal agreements are currently applied and what changes are proposed by the Commission for the future. Finally, a brief overview of national initiatives will be given in this regard to provide some food for thought. In the second chapter, a reading of two previous cases will be provided in the light of the new Commission proposal: the Consumer Detergents and Car Emissions case. The relevance of these practical cases lies in the fact that they were previously judged as cartels by the Commission, which imposed sanctions on the companies involved. Given the fact that sustainability issues were involved, it is therefore interesting to analyze what the Commission's thinking could be under the new rules. Indeed, this reflexive analysis will then allow to apprehend the strengths and weaknesses of the Guidelines proposed as well as bringing leads for improvements.

Chapter 1: European competition law history and growing sustainability considerations in Article 101 enforcement for horizontal agreements

History

Competition law has been present in European law since the earliest stages of the integration process since it was directly incorporated into the Treaty of Paris when the European Coal and Steel Community (ECSC) was created in 1951 (Weitbrecht, 2008; Wise, 2007). However, its creation was not made from scratch since German ideas influenced its development until the 1990s (Herrera Anchustegui, 2015; Weitbrecht, 2008). After that, European law was inspired by the American concept of consumer welfare put forward by the Chicago School, which became one of the main goal of competition law (Weitbrecht, 2008). Focusing on a historical account of its creation and evolution, this section aims to demonstrate the importance of European competition law in the European Union construction process and functioning.

First Community provisions in competition law

In order to understand the context in which competition law emerged, it is interesting to highlight the presence of cartels in the European economy at the end of the 19th century, which was especially specific to the German economy. The creation of cartels in the market was a method used to recover from periods of economic depression and turned out to be helpful to Germany during the First World War. Indeed, based on existing industrial concentrations, an organization of cartels by products set up by Walter Rathenau[1] allowed Germany to control the production of war raw materials thanks to an efficient cooperation between the State and the industry. (Barjot, 2013)

During the inter-war period, while Germany had led the way, Europe was experiencing a proliferation of cartels in other countries such as France, the Netherlands, Italy and the United Kingdom as they were considered effective to recover the weakened European economy (Barjot, 2013; Khodakovskyy, 2021). However, according to Crane (2020), this economy of

[1] Walter Rathenau was a German businessman, engineer and politician who lived between 1867 and 1922 and had a great influence in the management of the German economy during the first world conflict (Barjot, 2013; Universalis, n.d.).

state-controlled monopolies contributed to the strengthening of Nazi power leading to the Second World War. As a result, the post-war period saw the emergence of a paradigm constructing a positive link between industrial concentration and the emergence of authoritarian political regimes (Newman, 1948). If this connection remains to be demonstrated in other contexts, it undeniably opened the way to antitrust law as we know it today with its aim of preventing excessive concentration of economic power to protect the European fundamental value of democracy (Crane, 2020).

In the chaotic political context of the post-war period, having learned from their mistakes, European countries opted for a completely different strategy to promote development and economic growth. In fact, the European challenge consisted of countering abuse of national monopolies to open the way to a competitive economy associated with economic recovery (Ilzkovitz & Dierx, 2018). In particular, the coal and steel sectors were the first to be considered, with the creation of the ECSC in 1951, of which France, Italy, the Netherlands, Belgium, Luxembourg, and West Germany, signatories of the Treaty of Paris, were members. At that time, the importance of the notion of competition increased, as it was seen as the only way to initiate Community integration and cooperation in these strategic sectors while protecting Member States from powerful German monopolies (Ilzkovitz & Dierx, 2018). In that perspective, the ECSC, as the first European institution, prohibited agreements that had the effect of restricting competition on the market (with some controlled exceptions) and regulated public aid as well as mergers between companies. However, the way of controlling abuses of dominant positions was not fundamentally strengthened in Europe by this seminal Treaty. Moreover, even though these legal provisions are predecessors of the European competition law, they were rarely enforced before the establishment of the Treaty of Rome in 1957. (Wise, 2007).

The Freiburg School of Law and Economics influence and its Ordo-liberal ideology

Between the two World Wars, while Germany has been considered *"the land of the cartels"* (Khodakovskyy, 2021), it has concurrently seen the emergence of an ideological trend called Ordoliberalism, which perceives the economic power of private enterprises as dangerous to the social order of society. Indeed, seeing how Hitler's totalitarian power instrumentalized the

German industrial cartels to implement its policies, some thinkers developed this new order of thoughts (Sibony, 2022). This movement constitutes a liberal ideology that tends to protect the private sphere from public intervention while putting forward the need for institutional State support to ensure the protection of individual freedoms that cannot be achieved spontaneously (Herrera Anchustegui, 2015). The father of Ordoliberalism, Walter Eucken, looked for a middle ground between an economy ruled by a central planner resulting in social enslavement and a total *laissez-faire* market which, in the same way, fails to establish a sustainable and prosperous social welfare. According to him, individual economic freedoms are protected by free competition within the market, ensured by the state in its regulatory power through an economic constitution[2] (Dévoluy, 2016).

The emergence of what can also be called *German neo-liberalism* (Herrera Anchustegui, 2015) was legally addressed by Germany in 1949, since a process of creating national competition law led to the adoption in 1957 of an *Act against Restraints on Competition* (Khodakovskyy, 2021) in order to apply this new way of thinking (Weitbrecht, 2008). The concomitance between the national and European competition law construction processes created a German power of influence on what would become European competition law in the Treaty of Rome in 1957 (Dévoluy, 2016; Ilzkovitz & Dierx, 2018; Weitbrecht, 2008).

The 2nd generation of competition law and the leading role of the Commission

The Treaty of Rome, associated with the creation of the European Economic Community (EEC), based its competition rules on the provisions of the ECSC while making certain modifications (Chiriţã, 2014). For instance, it further specifies the prohibition of agreements between companies that restrict competition (art. 85) and outlaws the abuse of dominant positions within the market (art. 86). Besides, the new rules do not regulate mergers between companies, which constitutes a removal from the previous regulatory framework (Wise, 2007). According to Weitbrecht (2008), this is due to the German influence which considered that merger control was not necessary within national law.

[2] *"An economic constitution is a political instrument that defines the rules of the game under which economic activities can be carried"* (Herrera Anchustegui, 2015, p. 147)

In 1962, the power to enforce the competition rules incorporated in the Treaty of Rome has been to a large extend officially conferred on the Commission, which had acquired a monopolistic responsibility of granting exception under article 85 (3) (Weitbrecht, 2008). In fact, the Council Regulation 17/62 on the implementation of the Treaty rules weakened the role of national courts in the field of competition (Wise, 2007). This provided the keys to the Commission to pursue its objective of integrating the Common Market which was, beyond the protection of competition, its absolute priority. Indeed, in a desire to establish free commercial flows between Member States, the Commission has been able, thanks to this power, to prevent certain practices in the private sector from having a restrictive effect on trade (Weitbrecht, 2008). For example, in the Grundig/Consten seminal case, the Court of Justice, supporting the Commission, ruled that a vertical exclusive distribution agreement granting the distributor absolute territorial protection is contrary to competition law as it contributes to put barriers to trade between countries (LawTeacher, 2019). This case also illustrates the support that the Court of Justice has given to the Commission in the task of determining the practical enforcement of the Treaty general legal provisions. This has helped to legitimize the Commission's decisions within the Member States and has *a fortiori* contributed to fostering the integration of the Common Market (Wise, 2007). However, the limits of the Commission's autonomy in enforcing competition rules were rapidly demonstrated as the amount of notification sent by companies requesting exemptions proved to be a significant burden for the Institution. As a result, in 1965, the first block exemption rules were issued by the Commission creating general guidelines (Wise, 2007) even if the notification system and Commission monopoly remained in place until the beginning of the 21st century.

Between 1970 and 1985, developments in European competition law slowed down to a certain extent. However, a desire to explore the limits of Article 86 concerning abuses of dominant positions emerged. In particular, the Commission began, once again with the support of the Court of Justice, to apply this article to company mergers (Weitbrecht, 2008).

In 1985, the single market program initiated by Jacques Delors gave a new impetus to European integration and consequently to European competition law which led to the adoption in 1989 of the Merger Control Regulation 4064/89 (Weitbrecht, 2008; Wise, 2007).

This contributed to empower the Commission even more in its enforcement role and has given Community competition law additional weight (Wise, 2007). At the same time, while the regulation was based on the principle of the *substantive test* emanating from German law, it marked a paradigm shift as an American influence began to be perceived. In fact, from the objective of protecting individual economic freedoms inherited from Ordoliberalism and through the European integration goal, the Commission has gradually introduced a new r*aison d'être* for competition policy, which is to protect consumer welfare. This change was made without any real public debate or intervention by the legislator and reflects the European translation, in 1990, of the American model of the Chicago school (Weitbrecht, 2008).

The Chicago school influence

In the United States, competition law exists for much longer since it was put in place by the Sherman Anti-trust Act in 1890. The aim was to encourage the emergence of small companies on the market by eliminating the American trusts which monopolized important sectors of the industry at that time (Bostoen, 2022). In view of its experience in terms of competition law, the United States conditioned the aid provided by the Marshall Plan to Europe after WWII on the implementation of rules governing competition and ensuring an efficiently functioning market economy (Chiriţã, 2014). Moreover, American experts contributed to the drafting of the texts of the Treaty of Rome regarding competition law. This attests that the American influence was present from the beginning alongside the Freiburg School's Ordoliberalism (Sibony, 2022).

However, it was only later, when U.S. antitrust law had changed paradigm, that the Commission became further influenced by American notions of competition law (Weitbrecht, 2008). Indeed, in the 1960s, the Chicago School developed a new way of understanding competition law that no longer focused on protecting individual competitors in the market, but rather consumer welfare through economic market efficiency (Drivas, 2019). The central idea of this new approach is the *net allocative efficiency* according to which the losses incurred by the “losers” are fully compensated by the gains perceived by the “winners” (Bartalevich, 2016). While a certain degree of influence of the Chicago school theory is undeniable, the Commission has nevertheless maintained a vision that can sometimes deviate from American considerations in the practical application of its competition law (Bradford et al., 2019). This is probably because it has continued to promote European integration and protect an effective economic union (Bartalevich, 2016; Chatillon & Henno, 2020). However, consumer welfare is still a central notion today that strongly influences the Commission's decisions (Ilzkovitz & Dierx, 2018; Sibony, 2022). This is highlighted in the judgment of the Post Danmark I case which states that *“competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation”*[3].

This historical overview has highlighted several observations that will turn out to be useful for the rest of the analysis. First, competition law, given the context in which it was conceived at first, has been a cornerstone of European integration from its inception (Bartalevich, 2016). This has been true throughout its development since the strengthening of European integration goes along with the evolution of competition law. Today, while integration has made significant progress, competition law continues to play an important role in EU enforcement of fundamental freedoms facilitating trade between Member States. Its role is therefore of particular importance in the functioning of the EU and history proves its effectiveness in the achievement of large-scale objectives (Chiriţã, 2014). Secondly, the mixed influence of German Ordo-liberalism and American Chicago School theories shows flexibility in the construction of the law, which does not prevent the Commission from applying it in its own way and according to its proper evolving objectives (Bartalevich, 2016). In that perspective, Member States visions or even developments taking place outside the EU are legitimate sources for exploring the future of European competition law. Finally, the current focus on consumer protection is important to consider if we want to understand the choices made by the Commission in its challenge of greening European competition law.

[3] Judgment of the Court (Grand Chamber), 27 March 2012. Post Danmark A/S v Konkurrencerådet. Case C-209/10, para 22. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62010CJ0209

Current and future enforcement of horizontal agreements rules in the EU

As already mentioned in the first part of this work, competition law has different perspectives of enforcement that are featured in appendix 1. However, to provide a targeted rather than a general analysis, it seems appropriate to focus on one of these approaches. For this reason, this work will be devoted to the enforcement of Article 101 related to horizontal cooperation agreements since the sustainable nature of this type of agreement is the object of an entire chapter of the Commission's new proposition. Therefore, the following section will describe its current objectives and enforcement, while presenting Commission proposition for amendments.

Current rules

Treaty provision

On the one hand, Article 101 (1) of the TFEU protects the EU market from anti-competitive agreements between companies (appendix 2). The second paragraph of the same article states that such agreements shall be automatically void and the third one describes the conditions under which exemptions can be applied. Indeed, some agreements falling within the scope of Article 101 (1) can finally be legitimized if three main conditions are met (Gerard, 2022) :

1. the agreement generates efficiencies or economic benefits whose main beneficiaries are consumers (through the production or distribution of goods or the promotion of technical or economic progress).
2. the restriction of competition caused cannot go beyond what is necessary to achieve the benefit generated.
3. even when the first two conditions are met, a significant level of competition must be preserved in the market.

Council Regulation (EC) No 1/2003

On the other hand, Regulation 1/2003[4] sets out the rules to be followed regarding European competition law enforcement concerning Article 101 and 102 of the TFEU. This legal basis is associated with the modernization of application rules which took place in procedural, institutional and substantive terms in 2003 (Regulation 17 was its predecessor) (Gerard, 2022).

A procedural modernization has taken place since, unlike before, Article 101 in its entirety has become directly applicable. This change has had two main consequences for companies and Member States and marked the end of the notification system for exemptions.
First, this change has given businesses the possibility of invoking Article 101 (3) in the event of legal proceedings, which has contributed to the removal of the prior notification of agreements to the Commission and has strengthened the liability of businesses. Indeed, agreements between firms do not need to be approved in advance to be legally valid and firms are liable for self-assessing the compliance of their agreements with Article 101(3). (Gauer et al., 2003; Gerard, 2022).
Second, it empowered national competition authorities and courts by removing the Commission's exemption monopoly. Indeed, since competition cases can be brought before national courts, enforcement competence has been diluted between the Member States authorities and the Commission, which have concurrent jurisdiction. This is true only when trade between MS is affected as the territorial scope of application of Article 101 is limited to agreements that affect interstate commerce. States have therefore the possibility to act alone when it concerns only one territory (Gauer et al., 2003; Gerard, 2022). However, given the European political will to prevent complete nationalization of competition law enforcement in the EU, Article 3 of the regulation states that (Gauer et al., 2003):

- (1): when more than one Member State is concerned, the national authorities have the obligation to apply Article 101 in addition and cannot act alone.
- (2): when more than one Member State is concerned, the national authorities cannot prohibit an agreement if it has been authorized by the Commission.

[4] 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 (Text with EEA relevance). https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32003R0001

This procedural novelty brought an institutional modernization as the European Competition Network (ECN) was created to coordinate the exchanges between the Commission and the Member States in their enforcement task. This entity also has a political function as European and national legislators take advantage of it to discuss the policies in place (Gauer et al., 2003; Gerard, 2022).

Finally, a substantive modernization has also taken place and takes shape in two different ways (Gerber, 2007). First, it marks the emergence of consumer protection as the main objective pursued by competition law. Consequently, it contributes to the standardization of decision protocols by privileging a methodology based on economics. Therefore, what Gerber (2007) calls *"a more economic approach"* concerns the idea of measuring the impacts of a practice on the market (i.e. on the consumers) and forms the basis of what is now called a by effect analysis (Gerard, 2022).

This system of self-assessment gives companies more legal certainty because, if they consider an agreement to be in line with Article 101 (3), they can safely enter into it. This was not the case before, as they had to wait for approval from the Commission, which was overburdened and could only provide exemptions to a small number of agreements (Gauer et al., 2003). However, such procedures require standards to be set so that corporations can make informed decisions. For this reason, the Commission established the *Horizontal Block Exemption Regulations (HBERs)* and the *Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements (Horizontal guidelines)* in order to provide such certainty to companies (Gauer et al., 2003). The problem that is currently raised, is that these Commission aids present some shortcomings that the Institution want to address. Among them, we can cite the lack of details regarding agreements pursuing sustainability objectives causing companies reluctance in engaging in such agreements (Monti, 2020) since they have fewer tools to assess their compliance with competition law and, consequently, less legal certainties (European Commission, 2022a). The Commission's new proposals to overcome this issue are described in the following section.

New Commission propositions

The Commission, conscious of the weaknesses of its guidelines thanks to the elaboration of a public evaluation, has published a revised version of the HBERs and Horizontal Guidelines which has again been submitted to a public consultation for citizens, organizations, and public authorities. This consultation took place from March 1 to April 26, 2022 and is intended to help the Commission adopt the next official guidelines that will take effect on January 1, 2023 (EC, 2022; European Commission, 2022a).

The purpose of this part is not to detail every proposed change but rather to focus on those that are explicitly intended to provide more certainty for companies seeking to engage in agreements with sustainability goals. However, it is interesting to note that the proposed changes relate to the regulation of different types of agreements: R&D, specialization, production, purchasing, commercialization, information exchange, standardization, and sustainability and that each of these categories may include agreements with sustainability objectives. For example, two companies may decide to cooperate in R&D to create more environmentally friendly products. In that perspective, the Commission's desire to facilitate agreements on R&D for new products, technologies and processes can be observed. For instance, some definitions are clarified, others are added to make the text more understandable to companies (Commission européenne, 2022; European Commission, 2022a). Given the need for R&D investment to build more sustainable industries, these improvements, facilitating cooperation, are examples of how competition law could help the achievement of Green Deal objectives. However, a more explicit proposal has been made by the Commission regarding sustainability objectives in the revised draft of *Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements* (Horizontal Guidelines). Indeed, a new chapter dedicated to the evaluation of agreements targeting sustainability objectives (namely “*sustainability agreements”*) has been drafted giving more precise indications useful for companies (Crowell, 2022). It is mainly on this new chapter that the analysis of this work will focus.

New chapter on sustainability agreements

In this section, based entirely on the Commission's Draft Horizontal Guidelines (European Commission, 2022b), the objective will be to summarize the main considerations and reasoning of the Commission.

The wording of the new chapter makes explicit reference to the objectives of the Green Deal and to the notion of sustainable development[5]. It establishes that sustainable development is a goal addressed through the protection of competition that guarantees innovation, the emergence of quality products at the best prices and the efficient allocation of resources. However, it also highlights the fact that certain market failures persist in term of environmental impact and that if public policies fail to resolve them, companies will have to cooperate on improving their environmental performance. This obviously cannot be done at the expense of competition, which is why companies are still required to assess whether their cooperation agreements fall within the scope of *Article 101 (1).* If so, they can still legitimize it by proving the presence of environmental performances compensating for the restriction of competition under *Article 101 (3).* Therefore, the purpose of the new guidelines is to establish when sustainable agreements raise competition concerns and how sustainability benefits should be incorporated in the analyses for granting exemptions.

Article 101 (1)

Some agreements that do not affect price, quantity, quality, choice, or innovation (parameters of competition) are unlikely to restrict competition and fall outside the scope of Article 101 (1). The commission gives three non-exhaustive examples outlined in appendix 3.

If the agreement relates to at least one of the competition parameters stated before, it must be analyzed under Article 101 (1) since it is more likely to restrict competition. In the case of a category of agreement that is subject to specific guidance in the HBERs and Horizontal Guidelines (R&D or specialization agreements, production, purchasing, standardization agreements…) these particular rules have to be applied. In general, the presence of a

[5] Defined as *"the ability of society to consume and use the available resources today without compromising the ability of future generations to meet their own needs"* (European Commission, 2022b, p.131)

sustainability objective will help determine whether competition is restricted by object or by effect. Indeed, if companies provide sufficient evidence of the pursuit of a sustainable objective, the effect-based approach will prevail over the restriction by object and a future assessment will determine whether the benefits generated offset the negative effects on competition. Otherwise, it will be considered as restrictive by object.

However, the Commission establishes specific rules for ***sustainability standardization agreements*** since it deems that this is the most frequent type of collaboration when goals in this field are targeted (Crowell, 2022). Such agreements are defined as a set of rules, guidelines or characteristics regarding products or production methods implemented or followed by competitors.

Sustainability standards that affect one of the competition factors and does not have a real sustainability focus are considered to restrict competition by object. Otherwise, a two-step analysis is proposed to determine whether the agreement is prohibited under Article 101 (1). First, companies assess compliance with the seven cumulative conditions presented in appendix 4 composing the *"soft safe harbour".* If they are all met, the agreement will be considered legitimate. If one or more of the conditions are not fulfilled, companies can still prove that their agreement does not have a significant negative effect through a second step of analysis considering the scope of the market concerned. Indeed, if the market share covered allows a sufficient level of competing standards to emerge, the agreement may be free of concern. When a large part of the market is impacted, the effect is not significant if the companies have the possibility to operate outside the standards leaving more choice to consumers. Finally, if after this investigation the agreement is found to have a potentially significant effect on the restriction of competition, it falls within the scope of Article 101 (1) and Article 101 (3) will have to be applied to prove an exemption.

Article 101 (3)

The revised guidelines establish how the traditional exemption conditions apply to all sustainability agreements (not just sustainability standardization agreements). To be eligible for an exempt status, agreements must meet the following 4 conditions in order.

Efficiency gains

Efficiency gains must be perceived and can go beyond cost reductions to include greater product diversity or quality, more (environmentally) efficient production and distribution processes, and the emergence of innovative ideas. However, these gains must be objective, concrete, and verifiable and cannot just be supposed. For example, if companies claim to reduce water pollution, they must demonstrate exactly how and to what extent this occurs.

Indispensability

This condition establishes that all restrictions imposed by an agreement on competition must be necessary to achieve the efficiencies previously detected and that no other less harmful means exist to reach them. The Commission considers that a combination of free market functioning and an effective regulatory framework is a good way to achieve sustainability objectives. However, it will be possible for companies to achieve them in a more cost-effective way if they collaborate with each other. Besides, as already mentioned, market failures exist and can prevent sustainability objectives to be fulfilled. Two of them are highlighted by the Commission. First, a company with strong sustainability targets may suffer from a first mover disadvantage as a large investment is required in terms of implementation and consumer awareness at the beginning. In this sense, its return on investment must be sufficient for it to engage in such practices. This is the reason why it must protect itself from other firms free riding on their investment and preventing them to cover the fixed cost of the initial investment. Secondly, a market failure may emerge when the consumer only perceives the price increase related to an innovation without appreciating its future qualitative gain. A certain level of cooperation between companies is then necessary to solve these market deficiencies, access further efficiency gains and at the end ambitious sustainable objectives.

Pass on to consumers

This condition requires that the sustainability benefits generated must be perceived by the consumers and be at least equal to the damage caused to the same group of consumers resulting from the restriction of competition. In general, efficiencies should serve the consumers of the product covered by the agreement, but the Commission distinguishes 3 different categories of consumer benefits. To justify harm to competition, a company may use one, several or all of these categories of benefits depending on the specific case.

First, the "*individual use value benefits"* result from the simple consumption or use of the agreement product by the consumer. This can be qualitative when, for example, the products are healthier due to the removal of pesticides or quantitative when, for instance, production costs and prices are lower due to smaller packaging or the sharing of infrastructure by several companies. In these cases, the resulting price reductions or qualitative efficiencies compensate for the restriction in price, choice, or quality.

Second, *"individual non-use value benefits"* are those perceived by consumers in the relevant market not because they have a better experience with the product (quality or price), but instead because they assess a better impact of their individual consumption on society in general (including consumer that do not use the agreement product). Here, it is the effect that the product has on society that makes its quality and compensate the restriction. Such a perception can be evaluated via appropriate customers surveys assessing their willingness to pay and preferences.

Third, when consumer preferences do not allow to offset the negative externalities of their consumption, an agreement can still be necessary and justified if it brings collective benefits to a larger number of recipients and if the following conditions are met:

- the benefits are clearly defined, have already **occurred** or are likely to occur[6].
- the beneficiaries are precisely defined, and a demonstration is provided showing that **consumers in the relevant market are part of them**.
- a demonstration that the benefits occurring outside the relevant market (collective benefit) are **sufficiently perceived by the direct consumers** in order to offset the harm suffered, must be provided.

For example, a driver who buys cleaner fuel will also benefit from cleaner air as a citizen. In this case, collective benefits (the ones perceived by all citizens) can be considered in the assessment as drivers are affected. In contrast, if a consumer buys clothes made of environmentally friendly cotton, the sustainable benefit is perceived only in the region where the cotton is grown and not by the direct consumer. In this case, the collective benefits (the ones occurring where the cotton is grown) is not relevant to justify a restriction of competition because the harmed customers are not involved. A difficulty is pointed out by the Commission

[6] The commission notes that for a collective benefit to really materialize, the market share covered must be significant.

concerning the quantification and measurement of these collective benefits in view of the lack of experience in this field.

No elimination of competition

This condition requires that: "*some degree of residual competition will always remain on the market concerned by the agreement, regardless of the extent of the benefits*" (European Commission, 2022b, p. 144). For example, if competition is eliminated on one of the important parameters of price, quantity, variety or quality, and a certain degree of competition is preserved on the other parameters, this condition should be considered fulfilled. Moreover, if the market in question has many differentiated products, persistent competition for certain product variants is sufficient to meet the requirement. Finally, the condition is also met if the elimination of competition is of a temporary nature.

The revised Horizontal Guidelines document also clarifies that companies remain liable for the effects of their conduct on competition even in cases where a public authority is aware of or involved in the implementation of a collaboration. This is not true when the parties to an environmental agreement are compelled to enter into an agreement by a public authority or when the latter reinforces the effects of the agreement. Finally, to illustrate these rules, the Commission ends by giving a series of concrete examples that will allow companies to better identify with different cases (appendix 5).

Informal Guidance Notice

In the same spirit of providing greater certainty to undertakings, the Commission has also proposed the amendment of an instrument that was introduced at the same time as Regulation 1/2003 pursuant to its Recital 38[7]: a Notice on informal guidance. The purpose of this mechanism is to allow companies, under certain conditions, to request a written opinion from DG COMP when there are serious doubts about the compatibility with competition law in view of the unprecedented character of certain situations (Gauer et al., 2003). The

[7] *"Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment. Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission. This Regulation is without prejudice to the ability of the Commission to issue such informal guidance"* (Recital 38, Regulation 1/2003).

conditions established at the time were very restrictive since there was a fear of returning to the notification system that the Regulation was intended to abolish. After years of application, the self-assessment system has been accepted by stakeholders and the Commission considers that it should adopt more flexible requirements. Indeed, in the context of a lack of legal certainty for companies, this instrument has a potential that the Institution want to exploit (European Commission, 2022c). A draft revised text of the Commission Notice on informal guidance (CE, 2022) has been published and a public consultation has been launched (from May 24 to June 21, 2022) to gather industry feedback on these new rules (European Commission, 2022c).

The draft revised text states that: *"where cases, […], give rise to genuine uncertainty because they present novel or unresolved questions for the application of Articles 101 or 102 TFEU, individual undertakings may wish to seek informal guidance from the Commission"* (CE, 2022, p. 1). However, such a request must still be granted by the Commission if it deems such action necessary based on a *prima facie* assessment of the facts. Therefore, no obligation to respond is implied. A guidance letter is likely to be granted if two conditions are met. First, a novel or unresolved questions must be implied which means that no *sufficient clarity* can be found in case law, EU guidelines or previous issued guidance notices. Secondly, the public issuance of a Commission opinion must have added value which is evaluated through:

- the economic importance of the products and services concerned, considering consumer interests.
- *the relevancy of the cooperation objectives for the Commission's priorities or the EU's interests.*
- the magnitude of the investments planned or made by the companies.
- the likelihood that the practice will be adopted by other companies in the future.

On the contrary, informal guidance will not be granted when a similar case has already been assessed by the Court of Justice of the EU or when the agreement is already subject to legal proceedings at European or national level. In addition, hypothetical or outdated agreements are not considered by the Commission. However, the request must be made prior to the implementation of the agreement when an already advanced planning has been established. An opinion issued is not binding on the parties and does not relieve them of their liability to self-evaluate.

Two main changes can be noticed compared to the current document[8]. Firstly, the Commission refers to a sufficient level of clarity leaving more room for companies to justify the novelty of an issue (Droessler, 2022). Second, the added value of an informal opinion can be found when the agreement pursues European interests which is the case of sustainability issues (Droessler, 2022). While the changes do not appear to be radical, it is necessary to wait for the official adoption and implementation of these rules to assess their real contribution in providing more legal certainties.

Member States developments at national level

Having provided an overview of how horizontal agreements are regulated and addressed at the European level, it is now appropriate to briefly explore how some Member States deal with the link between competition law and sustainability in their national competition regulation system. Indeed, as we have stated, national authorities are competent to rule on competition cases within their territory or when several EU countries are involved, even if, in the latter case, they are also required to apply European law. Furthermore, as history shows, Member States are susceptible to influence the Commission in the construction and application of competition rules. Therefore, it is appropriate to describe the progress of national jurisdictions in this area and explore what differs from EU views. The focus will be on the Netherlands, Greece, Austria and Hungary as they are the most active in this matter (Ashurst, 2021a; Malinauskaite, 2022).

The Netherlands

The Dutch competition authority is called *Autoriteit Consument & Markt (ACM)* and is one of the first to have brought a different vision of competition law stating that a decrease in prices does not always translate into a benefit for consumer welfare. Following the ruling of certain cases[9], it has drafted a document (Autoriteit Consument & Markt (ACM), 2021) dedicated to

[8] Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (Text with EEA relevance) - Official Journal C 101 , 27/04/2004 P. 0078 – 0080. https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52004XC0427(05)

[9] "*Energieakkoord vor duurzame groei*" case involving four electricity manufacturers and the *"Kip van Morgen"* case involving chicken producers.

agreements with sustainability objectives (Malinauskaite, 2022). In this document, several differences with the European proposals can be noted.

First, the ACM differentiates between sustainability agreements and environmental-damage agreements. The first are defined as those whose objective is *"the identification, prevention, restriction or mitigation of the negative impact of economic activities on people, animals, the environment, or nature."* On the other hand, environmental-damage agreements are those aiming to reduce the negative externalities of an activity on the environment by generating what is known as efficiency gains. When it comes to this category of agreement, the Dutch national authority claims that the relevant benefits to consider when assessing the agreement under Article 101 (3) are not only those of the direct consumer but also of the society as a whole (Autoriteit Consument & Markt (ACM), 2021). Contrary to European law, benefits outside the relevant market are therefore considered even if they do not directly involve harmed consumers. Moreover, this type of agreement is also exempted when it contributes to national or international public policy objectives (Ashurst, 2021a).

Secondly, as far as sustainability benefits are concerned, if the market shares of the companies jointly represent less than 30% or if it is obvious that efficiencies gains are radically higher than the restriction of competition, there is no need to measure them precisely. Otherwise, quantitative and qualitative (CO_2 emission VS animal welfare) measurement can be valid (Malinauskaite, 2022).

Finally, the Dutch guidelines emphasize that companies may at any time seek advice from the competition authority in case of uncertainty (Autoriteit Consument & Markt (ACM), 2021). In addition, if an agreement is ultimately found to be incompatible with competition law, companies will still have the opportunity to legitimize it by submitting it to the legislature or by contacting the Minister of Economic Affairs and Climate Policy. This approach is intended to encourage the search for solutions rather than impose fines, sending a positive message to companies (Autoriteit Consument & Markt (ACM), 2021).

Greece

The Hellenic Competition Commission (HCC), as the Greek competition authority, also emphasizes the need to reconcile competition law and sustainable development and suggests two additional tools to provide legal certainty. (Malinauskaite, 2022).

The first suggestion is to set up a "*competition law sustainability sandbox"* in which companies can practice working closely together to achieve sustainability goals while being protected from sanctions. This safety space would be monitored by the HCC through a digital platform (Ashurst, 2021a), and would impose time limits on cooperation to avoid excessive anticompetitive effect on the market. The second instrument is a *"Common Advice Unit"* where specialists from regulatory institutions will informally advise companies on the sustainability initiatives they want to undertake.

The HCC also highlights the need to strengthen cooperation between national competition authorities to facilitate a degree of regulatory harmonization in the EU. In doing so, competition law would be more likely to support the long-term objectives of the Green Deal (Malinauskaite, 2022). In this respect, Greece has already cooperated with the Netherlands in the elaboration of a technical report on the quantification of sustainable benefits when it comes to consider the society as a whole and future generations in the assessment methods (Ashurst, 2021a).

Austria and Hungary

Like the Netherlands, Austria proposed to broaden the scope of exemption allocations under the national equivalent of Article 101 (3) by considering that the consumer benefit from the efficiencies when, outside the relevant market, an agreement contributes to an ecologically sustainable or climate-neutral economy. Moreover, as in the Netherlands, precise calculations of the environmental benefits must be provided unless the positive effect largely offsets the restriction of competition. (Malinauskaite, 2022). As far as the Hungarian competition authority is concerned, it has modified its rules on fines by allowing companies to reduce or even be exempted from penalties if they provide pro-active compensation for the restriction of competition (Malinauskaite, 2022).

To conclude this section, two general observations can be made. The first is that awareness is growing at both European and national levels and that Member States are trying to innovate to boost change. On the other hand, and this brings us to the second finding, the proliferation of national initiatives may reinforce the legal uncertainties perceived by companies operating in several EU territories (Malinauskaite, 2022). In this regard, the EU can use its regulatory power to reconcile the paradox and harmonize the rules, while drawing on national contributions.

Chapter 2: Critical case analyses under the new Commission proposal

Consumer Detergents case

Facts and Commission decision

The Consumer Detergents case (European Commission, 2011) concerns an agreement between three companies, Henkel, P&G and Unilever, regarding a product called HDD low suds powder (Heavy Duty laundry Detergent), which is subject of significant trade between Member States. It is a machine washing powder sold to consumers in Belgium, France, Germany, Greece, Italy, Portugal, Spain and the Netherlands. The parties involved in the agreement, which are the three largest manufacturers and suppliers of the product in the EU, are represented to the European Institutions by the International Association for Soaps, Detergents and Maintenance Products. In 1997, this organization launched an initiative to promote a more sustainable consumption of textile detergents: the AISE initiative. As part of this program, an industry-wide agreement led to a reduction in the dosage, the weight and consequently the packaging of this powder detergent. Indeed, the companies exchanged information on "compacting" and "downsizing" the product during 4 different implementation phases to achieve the expected result. In addition to the pollution benefits resulting from these reductions, costs have also been reduced in terms of transportation, raw materials, and packaging.

In this case, the Commission's concerns in terms of competition lie in the fact that the three companies involved took advantage of the regular contacts and meetings occurring in the framework of this project to exchange and agree on prices. This price control was intended to ensure the status quo of the companies' market share at the European level (market position stabilization) and took three main forms. First, despite the reduction in production and transportation costs, they decided to keep the prices perceived by consumers unchanged during the implementation period, which is equivalent to an indirect price increase. Second, again during the four phases of implementation, they mutually restricted their promotional activity with respect to the sustainable initiative that was being implemented, which amounts to a price collusion for the Commission. Both practices had the main objective of preventing the parties from using the scheme as a competitive advantage in the European market. Finally, the parties agreed on direct price increases for specific markets and exchanged sensitive information on prices and trading conditions. Besides, some information exchanged about the product presentation (pack dimensions and fill levels) was considered by the Commission as an instrument allowing the parties to collude on prices.

The Commission found the practices described above to be an agreement between undertakings within the meaning of Article 101 of the TFEU having, by object, a restrictive effect on competition since its purpose was to reduce the competitors' uncertainty in terms of price on the market for the product concerned. Moreover, in view of the size of the parties on the European market and the large volume of cross-border trade of detergent powders, the Commission considered that the agreement was likely to restrict trade between Member States. Finally, given that the only objectives of the agreement were the market share stabilization and price coordination, there was no evidence of potential benefits capable of meeting the conditions of Article 101 (3). The agreement was therefore considered restrictive by object and no further analysis of its effect on the market was conducted. As a result, the Commission imposed fines on the parties involved according to the guidelines governing their calculation. However, Henkel, which was the first company to inform the Commission about these practices, was granted full immunity. Consequently, the amounts charged to Henkel, P&G and Unilever were respectively € 0, € 211,200,000, and € 104,000,000.

Assessment of the agreement under Article 101 (1)

It seems now interesting to analyze this specific case in the light of the chapter on sustainability agreements of the new Guidelines proposed by the Commission (European Commission, 2022b) in order to discuss what could have been the possible outcomes of this decision under the new rules.

First, it is evident from paragraphs 551 and 555 of the Guidelines that the agreement is likely to raise competition concerns since it affects the crucial parameter of price. In that sense, the agreement falls within the scope of Article 101 (1)(a) because it *directly and indirectly discusses and fixes selling prices and trading conditions.*

The next step in the reasoning is to identify the presence of a sustainability objective that may provide evidence that some efficiencies may arise from the practices. If this is the case, paragraph 560 indicates the need for a by effect analysis of the agreement under Art. 101 (3). Otherwise, the agreement will be considered by object restrictive of competition and the outcome of the decision will be the same as before. In this context, it is interesting to point out two different interpretations which, both plausible, would lead to different decisions.

The first would be a narrow reading of the agreement whereby the Commission would consider the price cartel as independent from the sustainability initiative, even though a link between the two exists. This reasoning would be equivalent to that followed by the Commission in 2011, which ruled that *"the AISE environmental initiative neither foresaw nor necessitated price discussions"* (European Commission, 2011, para. 22). In this view, the environmental efficiency behind the initiative cannot be taken into account to legitimize the price agreement since the latter is not indispensable to the implementation of the project. Therefore, the parties are not able to justify the presence of a sustainability objective within the meaning of paragraph 560 of the Guidelines and the price settlements as presented above remain by object restrictive of competition. In this scenario, it is noticeable that the Commission would prioritize its objectives of protecting the consumer and the free trade between Member States, ignoring the presence of this sustainability initiative under the assumption that the link with price restriction is not sufficiently justified. It is precisely this element of the reasoning that, if considered differently, can allow competition law to reach different conclusions.

This leads to the second possible interpretation which, by being broader, would exploit the existing connection between the sustainability initiative and the price agreement. This relation is particularly present if we focus on the first two pricing practices, which are designed to prevent the parties from using the initiative as a competitive advantage on the market. Indeed, it is observed that the companies decided to keep prices unchanged and not advertise the initiative *"during the implementation of the different phases of the environmental* *initiative"* (European Commission, 2011, para. 25). This implies that once the initiative implemented, the agreement would come to an end and the prices would be freely and individually fixed on the market again. In this sense, it can be argued that there is a dependency between the sustainability initiative and the price cartel. In other words, what the Commission fails to do if it interprets the agreement narrowly as explained above, is to contemplate what the company's behavior would have been if this price agreement had not taken place. In this light, it is conceivable that the parties would not have participated in this initiative without ensuring a status quo during the implementation phase. These anti-competitive practices could then be seen as a kind of incentive for the implementation of the sustainability project by the parties. Consequently, in its broad interpretation, the Commission could judge this consideration as sufficient to justify the involvement of a sustainability objective in the price cartel, pursuant paragraph 560 of the Guidelines. Therefore, a more thorough analysis under Article 101(3) will have to be conducted in order to measure the real effect of these price controls on the market. In contrast, this reasoning is less obvious with regard to direct price fixing by the firms, which does not seem to be temporary or linked to the initiative, thus removing the possibility of any leniency from the Commission concerning this practice.

Furthermore, beyond these two different perspectives, another instrument of European competition law can be explored: the *ancillary doctrine.* This concept is explained in paragraph 39 of the new Guidelines and implies that a restriction of competition can be justified *"if it is objectively necessary to implement the horizontal cooperation agreement"* compliant with Article 101 (1) *"and proportionate to the objectives thereof"*. A reference to this principle is also present in the chapter on sustainability agreements which states that: *"restrictions that are ancillary to a sustainability agreement which is compliant with Article 101(1), will also fall outside the scope of that provision"* (European Commission, 2022b, para. 548). However, the Commission specifies that making the initiative easier or more profitable to implement is not sufficient to legitimize a restriction of competition (European Commission, 2022b, para. 39). Here, one could consider that companies are not seeking for more profitability or convenience but simply a manner of ensuring that they will benefit from their investment in the future, as otherwise, they would not engage in the initiative. Therefore, in view of this principle, if the Commission considers that the incentive offered by the price cartel is objectively indispensable and proportionate to the green initiative as it provides a strong impetus for parties to engage in it, the collusion may be granted negative clearance[10]. On the contrary, if it follows a restrictive interpretation of paragraph 39, the price agreement will not be accepted as an ancillary restraint since the practical operation of the AISE initiative would be considered as technically feasible without an arrangement on prices. In this case, the collusion could still be exempted, if the Commission accepts the presence of a sustainability objective and if the agreement meets the requirements of Article 101 (3).

Assessment of the agreement under Article 101 (3)

It is now relevant to explore what the conclusions of the Article 101 (3) analysis might have been in the Consumer Detergent case under the new Guidelines if the sustainability purpose was recognized by the Commission. According to paragraph 576, the parties must prove compliance with the four conditions of this provision to benefit from the exemption.

Regarding the first condition, as soon as the agreement on prices is the condition for the program to take place, it is the efficiency gains of the sustainable initiative that are to be considered. In this sense, according to paragraph 578, it is likely that the condition would have been fulfilled since pollution reduction objectives are achieved as explained in the case facts.

Secondly, the indispensability of price fixing might be justified under paragraph 585 which states that *"restrictions may also be indispensable in order to align the incentives of the parties and ensure that they concentrate their efforts on the implementation of the agreement"*. Indeed, the Commission may view that in this case, the reduction of price uncertainties during the implementation period, allows companies to focus on the pollution reduction objective pursued under the sustainability initiative and the second condition would then be respected.

Then, according to paragraph 588 of the Guidelines, the third condition requires that the overall effect of the agreement on the consumer of the product concerned is at least neutral,

[10] *"Procedure in the competition policy of the EU whereby the Commission of the European Union issues a decision at the request of an undertaking indicating that it does not consider that a given proposal is prohibited by its competition law."* (Collins Dictionary of Law, 2006).

in the sense that the benefits generated must offset the harm caused in the relevant market. If *individual use value benefits* are considered first, it is the reduction in prices induced by lower costs that would enhance the consumer's experience with the product within the meaning of paragraphs 590 and 593. However, it is precisely this element that is restricted by the first practice on prices, since the parties decide to leave the prices perceived by consumers unchanged during the implementation. In this perspective and considering that the initiative would not have occurred without the price agreement, the Commission could have two different approaches. The first is a short-term perspective according to which it would assume that the benefits generated by the agreement are not passed on to consumers because the companies alone will perceive the cost reduction. This would imply the absence of potential individual use value benefits capable of offsetting the harmed suffered while the initiative is being implemented. In the second, it could decide to take into account the temporary nature of this restriction by considering that these benefits will be, even if deferred in time, finally perceived by consumers once the initiative is implemented. In this situation, the perceived damage due to the temporary price restriction can be compensated by the fact that, in the end, consumers will be able to enjoy cheaper products on the market. Moreover, focusing on *individual non-use value benefits*, companies may prove under paragraph 595 that consumers in the relevant market are willing to pay higher prices to consume more sustainable products because they perceive them as being of better quality due to their lower environmental impact. The fact that, in this case, prices would only be temporarily higher, could be an element facilitating the parties' argument. Besides, companies can also point to the fact that prices will not, in effect, be higher in the market, but simply unchanged until the initiative is operational.

Furthermore, if companies are unable to prove the existence of non-use value benefits, they can still refer to the last category of collective benefits. In fact, paragraph 603 of the Guidelines states that: *"the collective benefits to the consumers in the relevant market occurring outside that market, can be taken into account if they are significant enough to compensate consumers in the relevant market for the harm suffered"*. In this perspective, the pollution reduction induced by the environmental initiative would be beneficial for consumers both as direct purchasers and as citizens benefiting from a cleaner air outside the relevant market. Moreover, according to paragraph 605, collective benefits are likely to materialize only if the market shares affected by the agreement are significant. In this case, the three companies

involved are the largest manufacturers and suppliers of the product concerned, thus reinforcing the potential presence of collective benefits capable of compensating the harmed suffered (European Commission, 2011, para. 50).
In conclusion, if the parties can prove the sufficient presence of one, two or three of these benefits pursuant to paragraph 609, it could lead the Commission to consider that the temporary price restriction that allows the implementation of the initiative is compensated by its benefits in terms of cost reduction and pollution.

Finally, the temporary nature of the restriction can also be used by the parties to prove compliance with the last condition requiring that some form of competition persist in the market despite the benefits generated. Indeed, paragraph 614 of the Guidelines establishes that if competition is restricted for a limited period of time and is not impacted after that period, this fourth requirement is likely to be met.

Critical views

In view of the arguments set out above, it can be concluded that the wording of the new Guidelines could allow certain part of the Consumer Detergent agreement to be exempted by the Commission when it has been considered a cartel in the past. However, this would depend on how the Commission decides to interpret the rules outlined and on its choice of prioritization regarding the objectives pursued. The purpose of this section is therefore to critically analyze the Commission's potential approaches and reflections with regard to its sustainability objectives, and to discuss the relevance of certain instruments that could complement the proposed Guidelines.

First, to expect some form of leniency from the Commission in such cases, it must agree to consider the different forms of the case price collusion separately, since it is the first two practices that are most likely to have a real link with the sustainability initiative. However, it is important to note that in the 2011 decision, the Commission considered *"the conduct in question constituting a single and continuous infringement of Article 101 of the TFEU"* (European Commission, 2011, para. 38). This means that it seems inappropriate in the Institution opinion to separate the agreement into different parts since all the practices were interconnected and pursued the same goal. Since the new chapter on sustainability agreements does not give more precision on this subject, it is difficult to know to what extend the splitting of an agreement that involves sustainable objectives into several practices will be possible in the future. In this sense, a first gap can be highlighted considering that the Commission should address this point in the new guidelines. If it turns out that a certain flexibility is granted by the Commission on this subject, this could comfort the companies willing to cooperate as they would risk potentially less heavy sanctions if their agreement is considered only partially contrary to competition law. In this sense, this could increase the legal certainty of companies, which is the main goal of the guidelines reform.

Second, it is interesting to ask whether the Commission would be willing to opt for the second and broader interpretation with respect to the recognition of a sustainability objective allowing a by effect assessment as described above. An attempt to answer this question can be made by exploring Article 11 of the TFEU (European Union, 2016), which states that *"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"*. In fact, insofar as it is conceivable that the measure would not have taken place without the price cartel, the Commission cannot ignore the incentive that it represents for the initiative to occur since this would be equivalent to going against the promotion of sustainable development. The mere consideration that a legitimate objective is involved may allow the Commission to meet the requirements of Article 11 without legitimizing the agreement, which must still pass under the analysis of paragraph 3.
With regard to companies, it is interesting to note that efficiency maximization is one of the main motivations when it comes to engaging in sustainability practices (Brockhaus et al., 2017; Pozo et al., 2015). In the Consumer Detergent case, the reduction of production and transportation costs can be considered as the driving force for companies to participate in the sustainability initiative. However, according to Brockhaus et al. (2017), this type of company struggles to promote the sustainable characteristics of their product to consumers, which makes them less likely to benefit from the competitive advantage that it represents. This could be a reason why companies wanted to ensure that none of them would use the initiative as a competitive advantage during the implementation of the initiative since it would allow them to be on a more equal footing after this period to start seeking for the valuation of

sustainability characteristics on the market. This would explain why the price agreement could be seen as an important incentive for companies to engage in this sustainability practice. Indeed, the temporary control of their competitive advantage in the market regarding the initiative would have been a way for companies to focus on implementing it without worrying about promoting it to consumers which may increase their willingness to participate and invest in it. In that perspective, once the efficiency targets met, firms would again decide individually how to reflect the cost reductions on consumers and resume their promotional activities. This would amount to a return to normal competition while more sustainable products would be brought to market thanks to this temporary period of restricted competition. These considerations may therefore explain why it is conceivable that the parties would not have participated in this initiative without ensuring a status quo during the implementation phase. Therefore, if the Commission decides to recognize the legitimacy of this condition, it would be a way for the Institution to enforce competition law while pursuing sustainability objectives in accordance with Article 11 TFEU.

However, although this interpretation would help motivate companies to invest in the implementation of such initiatives, the agreement affects the price which is a sensitive parameter of competition law. Therefore, the Commission cannot lose sight of its objective of protecting consumers and must continue to protect them from potential corporate cartels. To reconcile the two seemingly conflicting objectives, it is interesting to look to the approach of Greece, which has proposed an instrument called the *sustainability sandbox*. The aim is to create a supervised environment where companies can cooperate safely while the competition authority ensure the control of the negative effect they may have on competition (Hellenic Competition Commission, 2022). In this perspective, a European tool could be conceived creating a space where price agreements such as those described in the Consumer detergent case could take place, since they would be controlled by the Commission, which would limit their negative effects on competition. It could ensure that the temporary nature of the agreement is respected and that the exchange of information on prices is sufficiently constrained as to produce no significant negative consequences on the market. For example, if firms decide to leave prices unchanged, they do not necessarily need to know the actual prices of their competitor and can agree to stick to the current prices set individually. This kind of managed system can be effective in promoting sustainability goals by motivating companies to commit to green practices while continuing to protect the market from hidden and illegitimate agreements.

Finally, it is appropriate to revisit the ancillary doctrine and the likelihood of the Commission considering the price cartel as an ancillary restraint to the sustainability initiative. To this end, it is important to emphasize that this legal instrument has only been used very rarely by the Commission and in areas other than sustainability (Gerard, 2022). Therefore, this reasoning would be very far from what the Commission has decided in the past, which reduces its chances of being adopted in the future. This could be due to the fact that it has a great power to legitimize agreements, which leads the Commission to interpret it in a quite restrictive way. In this perspective, it seems interesting to revisit it by creating an alternative ancillary doctrine that would have a decreased power of legitimization. This new version of the concept could allow the Commission, not to enable a restriction to fall outside the scope of Article 101 (1), but to give it access to Article 101 (3) pursuing a by effect analysis. In the Consumer Detergent case, where the pursuit of a sustainability objective is ambiguous, this would allow the Commission to ensure its alignment with the goals of the Green Deal because it could justify its decision through a more objective and thorough analysis of the effect on the market. Moreover, given the lack of experience in the calculation of the new category of collective benefits explicitly mentioned in the guidelines in paragraph 608, encouraging a by-effect analysis would give the Commission the opportunity to be confronted with more practical cases enabling it to develop a computation methodology. This would facilitate the task of companies that would benefit from more detailed guidelines regarding these benefits, making them more likely to successfully justify the positive effects of their actions on the market under Article 101 (3).

In conclusion, the analysis of this case shows that the new Guidelines would potentially be able to legitimize an agreement found to be restrictive by object in the past. In the case that it would not reach the exemption, access to an analysis under Article 101 (3) would already be a plausible change. However, this often implies that the Commission opts for less restrictive interpretations of its Guidelines. For that, it may be necessary, as this case illustrates, to prioritize sustainability targets over consumer protection objectives, at least for a limited period. If so, however, it is important to emphasize that to continue to meet its consumer protection obligations, the Commission must supervise companies with which it is more lenient, for instance, by means of a tool inspired by the Greek sustainability sandbox. Finally, further clarification of the possible separation of a sustainability agreement into different practices and the use of a revisited version of the ancillary doctrine, could help to deepen the Commission's Guidelines providing more legal certainty to companies.

Car Emissions case

Facts and Commission decision

This case (European Commission, 2021a) involves five major car manufacturers, Daimler, BMW, Volkswagen, Audi, and Porsche (the last three being part of the Volkswagen Group) and concerns a technology used to reduce harmful nitrogen oxide (NOx) emissions from diesel cars sold in the EU called the *Selective Catalytic Reduction system (SCR system).* This innovation was developed by these companies in the context of the implementation by the European Union in 2007 of stricter minimum standards with regard to car pollution. Indeed, between 2009 and 2014, these firms held technical meetings where they discussed the development of this technology in order to be able to meet the new EU regulatory framework (Ashurst, 2021b). This technology consists in injecting a substance, the "liquid SCR system" also called *AdBlue*, so that a chemical reaction can take place transforming the nitrogen oxide into water and nitrogen. This is made possible by the incorporation in the car's engine infrastructure of a tank designed to accommodate this solution (see figure 1).

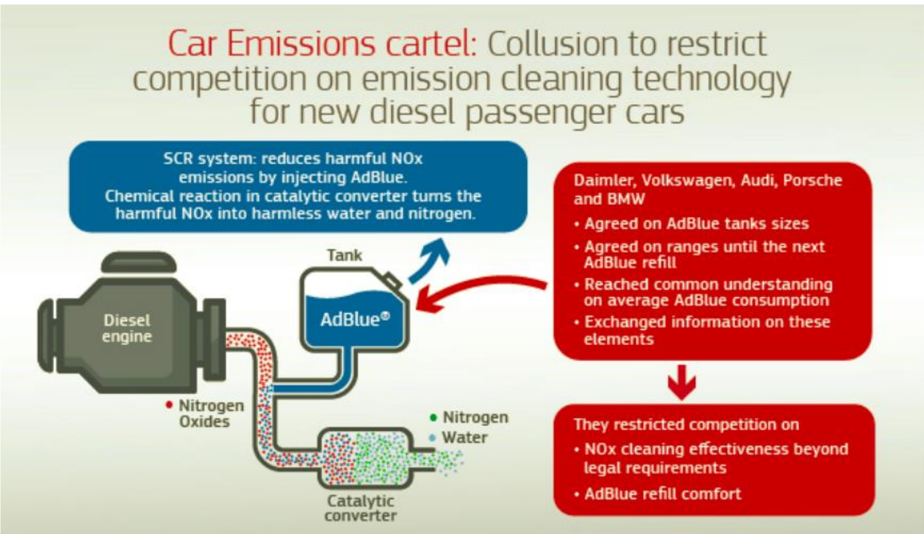

Figure 1: SCR system (Europa.eu, 2021)

While many technical aspects were discussed during these so-called *"circles of 5"* meetings, the Commission was only concerned with specific aspects of these exchanges which are the following. On the one hand, the companies agreed on a smaller standard of AdBlue tank size and consequently fixed smaller tank filling intervals. They argued that smaller tanks made the car lighter, more fuel efficient and therefore less CO2 intensive while some advantages in terms of space were also mentioned. Moreover, they justified this decision by stating their willingness to influence the mineral oil industry and boost the development of filling infrastructures in order to make them more consumer friendly. On the other hand, they jointly determined the estimated average AdBlue consumption (based on the ratio between tank size and refill ranges) sufficient to meet legal requirements. Besides, the exchange of commercially sensitive information on these elements (size, range, and average consumption) was seen by the Commission as a way to enhance the transparency that already existed between them in relation to the development of the new technology. Through this deal and knowing that AdBlue consumption would increase with the new regulation, the parties agreed not to attempt to over fulfill the legal requirements while it was possible to do so with bigger tanks. Eventually, in 2014, Daimler, VW and BMW, stuck on disagreements, realized that it was impossible to establish a tank size standard thereby marking the end of the collusion.

In its 2021 decision, the Commission ruled that the practices described above constitute an agreement restricting competition within the meaning of Article 101 (1)(b) since it has the object of limiting technological development and consumer choice in the field of NOx cleaning for diesel cars. Therefore, it prevents companies from providing an innovation capable of surpassing the legal requirements in term of environmental efficiency. For the first time, the Commission renders a judgment based solely on technical aspects coordination without involving price, costs, or quantity collusion, which makes this case a novelty in the history of European competition law. As far as the application of Article 101 (3) is concerned, the argument put forward by the companies that the agreement would have benefited consumers by allowing the development of a more user-friendly filling infrastructure is not legitimate in the eyes of the Commission. Moreover, no reference is made to the weight and space argument. Therefore, the agreement is considered as a restriction by object and the analysis of the real effect on the market is not relevant according to the Institution. Yet, it recognizes that the parties have never actually applied the size standards on the market since the tank volumes were often above what the agreement required. In addition, it points to the fact that cleaning strategies differed from one company to another[11]. Despite these considerations, the presence of a by object restriction has not been doubted. As a result, the parties were fined except for Daimler who was granted immunity. Besides, because the case was a novelty for the Commission, it granted a 20% fine reduction for the Volkswagen Group and BMW which were respectively charged an amount of € 466,172,000 and € 372,827,000 with an additional € 36 190 000 for Volkswagen and Audi.

Assessment of the agreement under Article 101 (1)

As with the Consumer Detergent case, this sub-section will analyze this practical case according to the new Guidelines proposed by the Commission in 2022 (European Commission, 2022b) with the aim to explore what might have been the potential considerations of the Commission.

To begin with, it is interesting to ask whether this understanding could fall within the scope of the *sustainability standardization agreements* on which the Commission focuses in greater detail in its new proposal. In this perspective, paragraph 562 establishes that: *"sustainability standardization agreements usually provide rules, guidelines or characteristics for products and production methods on […] sustainability metrics".* Insofar as this collusion concerns the characteristics in terms of tank sizes and assumed AdBlue average consumption of the technology in question, which can be considered here as the "sustainable product", the Commission would be in a position to consider that it is indeed a sustainable standardization agreement. This consideration leads to the possibility of analyzing this case according to the specificity of this type of agreement, which receives greater emphasis from the Commission.

[11] *"So BMW introduced a combination of NSC and SCR and used a twin-tank system for AdBlue to counter restrictions of construction space in the cars and still ensure a sufficient range of the SCR- system. DAIMLER mainly used AdBlue tank systems with a volume well above the 8 litres discussed originally, usually over 20 litres. VW used single-tank solutions and twin-tank solutions with large volumes well over 8 litres."* (European Commission, 2021a, para 80).

To do so, according to the Guidelines, it is necessary to first determine whether a restriction by object should be envisaged. According to paragraph 570, sustainability standards that do not pursue a genuine sustainable objective and that affect the competition fundamental parameter of innovation, are considered restrictive by object. In the Car Emissions case, the sustainability objectives put forward by the companies concern the lighter weight of the car allowing for less CO2 emissions as well as the development of infrastructure making the sustainable innovation easier to use. There are therefore elements on which the Commission can rely to consider that a sustainability objective is being pursued, which makes this decision plausible. In this perspective, a restrictive interpretation would lead to a decision similar to the one taken in 2021 considering these arguments inadmissible (European Commission, 2021a, para. 175) and the agreement restrictive by object. On the contrary, a broader approach would lead the Commission to take into account these claims and therefore consider that the agreement is not by object restrictive.

In the latter case and according to paragraph 572 it is necessary to establish if the agreement has an appreciable negative effect on competition to assess if it violates Article 101 (1). To this end, the first step is to review if it complies with the seven cumulative conditions capable of making it benefit from the *soft safe harbour* status thanks to which it will fall outside of the scope of Article 101 (1). In this regard, the seventh condition states that: "*there should be a mechanism or a monitoring system in place to ensure that undertakings that adopt the sustainability standard indeed comply with the requirements of the standard"* (European Commission, 2022b, para. 572). Since this type of mechanism does not exist in the case of this agreement and since the conditions to be met are cumulative, it is likely that the agreement would not be eligible for the *soft safe harbor*. The next step is then to analyze the agreement under paragraph 575 according to which sustainability standards covering a significant market share can still be considered as not having a significant anti-competitive effect if the parties involved are free not to follow the standards. In the Car Emissions case, where companies with a strong European market share are involved (European Commission, 2021a), it has been noted in paragraph 80 and 108 that the standards are not respected on the market by the companies, each of them opting for different strategies. As a result, the consumer is not limited in his choice of products and *"hence competition is unlikely to be restricted"* (European Commission, 2022b, para. 575). Therefore, according to this reasoning, the Commission's decision could be that the agreement falls within the scope of Article 101 (1) but that, in view of the assessment of its effect on the market, it is unlikely to be restrictive of competition without having to do an investigation under Article 101 (3).

Critical views

In the previous section, we provided some reflections on how the Commission could have considered, under the new Guidelines, that the agreement was susceptible of producing a limited anti-competitive effect on the market. This reasoning highlights the fact that the methodology proposed by the Commission might not explore what would have been the outcome if the standards of the agreement had been followed to a greater extent by the parties involved. This is what this section seeks to discuss.

In fact, if an interpretation like the one developed above had been followed, it would have been difficult to conclude the occurrence of a significant negative effect on competition since the agreement did not really take effect on the market. However, if the companies had respected the standards according to the terms of the deal, the conclusion could possibly have been different. Indeed, in this case, the limitations in terms of technological development and innovation might have been more important, which could have required an analysis under Article 101 (3) according to paragraph 575 of the Guidelines. This could have led to two different conclusions. In the first, the weight, space, and infrastructure usability efficiencies would have been sufficient to compensate for the innovation restriction. On the contrary, the second could have highlighted the inability of the agreement to produce efficiencies capable of compensating for the damage caused. In this perspective, it is relevant to point out that "*the manufacturers were aware that, with even higher quantities of AdBlue, more effective NOx-cleaning beyond regulatory requirements would have been possible […] ("over-fulfilment")"* (European Commission, 2021a, para. 82). This statement may support the fact that the second conclusion would probably have been preferred since more effective pollution reductions would have been achieved overall without the agreement.
Furthermore, it is interesting to highlight the fact that given that the regulatory framework was already setting sustainability benchmarks through new requirements, companies may be considered illegitimate in the task of establishing that those characteristics of the technology would allow more environmental performance. Indeed, as evidenced by the introductory

paragraph 546 of the new chapter on sustainability agreement: *"where market failures are addressed by appropriate regulation, for example, mandatory Union pollution standards, […], additional measures by undertakings, for example through cooperation agreements, may be unnecessary"*. Based on this wording, such practices undertaken by the parties could therefore be considered as illegitimate discrepancies in the context of a legitimate collaboration helping at meeting legal rules. This was well illustrated by Commissioner Margrethe Vestager who publicly stated: *"today's decision is about how legitimate technical cooperation went wrong"* (Europa.eu, 2021, para. 2).
In view of these observations, the collusion could have been considered illegitimate in the case of a rigorous implementation by the companies. In other words, it is not the nature of the agreement that could make it unlikely to produce significant anti-competitive effects, but rather the fact that it did not fully happen since otherwise it could have been considered restrictive under Article 101 (3).

Now, if one considers the agreement illegitimate, it is relevant to question the appropriateness of penalizing companies that have entered into an agreement which, although desired and established by the parties, was lightly reflected on the market (European Commission, 2021a, para. 140), and ended spontaneously when the companies realized, in 2014, that it was impossible to reach an understanding. If a teleological interpretation[12] of European competition law is favored, companies might not receive a penalty since the EU's goal is to build a more sustainable Europe in the sense of the Green Deal. Indeed, as the agreement is more theoretical than concrete, the Commission could find an interest in being reluctant to impose a fine on a company investing in the development of a sustainable technology since this would contribute to deprive it of financial resources useful for the emergence of this innovation. However, it is conceivable that the Institution may still want to influence companies not to enter into this type of agreement, even theoretically, by punishing the conduct rather than the effective restriction of competition. In this perspective, a proactive compensation system like the one adopted by the Hungarian competition authority can be imagined. This is a mechanism aimed at reducing or eliminating a fine if the company

[12] A teleological interpretation consists in granting *"particular attention to the aim and purpose of EU law […] rather than focusing exclusively on the wording of the provisions (linguistic interpretation)"* (European Parliament, 2017, p.6).

voluntarily commits to remedy the negative effect of its conduct in a partial or complete manner (Hungarian Competition Authority, 2021). For example, if its engagement consists in promoting sustainable development or environmental protection, the penalty would be directly linked to a sustainability objective instead of being simply a withdrawal of money. This would contribute to penalize businesses while redirecting financial resources to other sustainable interests and would therefore be in accordance with a teleological interpretation.

The above-mentioned instrument is interesting when it is necessary to crack down on companies with intentionally dubious practices. However, it is also conceivable that these companies have simply made a mistake in the self-assessment of the agreement in question. In this respect, Haid (2021, para. 9) states that *"reading between the lines, one cannot shake the feeling that the EC does not really blame the car manufacturers for the installation of smaller AdBlue tanks […] the cooperation was "kindly intentioned, but not considerate""*. It is therefore interesting to ask how the Commission could strengthen its assistance to companies in evaluating their agreements under Article 101, especially when it comes to joining forces to be able to respond to new regulations. This could avoid having to impose penalties on companies committed to the sustainable transition.

In this perspective, two approaches can be explored. The first concerns the use of the Informal Guidance Notice described in the previous chapter, which has already been amended by the Commission to provide more legal certainty to companies. In view of the novelty of this case, the economic importance of diesel cars[13] and the clear link of the cooperation agreement objectives with the European interests of sustainability, a guidance letter could have been provided by the Commission according to the new proposal. Indeed, when entering the collaboration to develop the SCR system, the company could have asked the Commission for an opinion on this aspect of its cooperation through this system. While the new proposal of the Commission seems to allow it to be more easily applicable, it appears necessary that the Institution promotes this instrument among the firms to maximize its effectiveness. In this perspective, the Dutch competition authority goes one step further by giving companies the possibility to reach it at any time in order to discuss their questions when uncertainties are

[13] *"In the EEA, around half of all passenger cars were fitted with diesel engines and the other half with petrol engines in the relevant period"* (European Commission, 2021a, para. 36).

raised (Autoriteit Consument & Markt (ACM), 2021). In view of the complexity and evolving nature of agreements such as to one in the Car Emissions case, it seems that such a system would be even more effective in providing legal certainty to companies.
The second would be an instrument close to the one proposed by Greece: "*a common "Advice Unit" may be formed by experts from a variety of regulatory authorities, in order to provide informal consultation on proposed sustainability-related innovations."* (Hellenic Competition Commission, n.d.). In the same idea, we could imagine a European entity where competition experts, companies, consumer associations or groups promoting sustainable development could gather and discuss in order to help businesses make the right choices in terms of sustainability cooperation. In this respect, an instrument that already exists in internal market law could be exploited. Indeed, the "Solvit" service, an informal network, allows European citizens and companies to find quick solutions when their European rights seem not to be respected, without official legal proceedings. Provided by the national administration of each Member State, it strengthens the communication between them to solve problems (Commission Européenne, n.d.; Sibony, 2022). By imagining that companies could use this service regarding their compliance with competition law, where different kinds of experts could be solicited, they could benefit from more legal certainty. Furthermore, it could contribute to the harmonization of competition law enforcement in Europe since cross-border interaction between EU countries would be enhanced. As stated above, this necessity has been highlighted by the Hellenic Competition Commission (HCC) if European competition law wants to effectively support the long-term objectives of the Green Deal. Finally, unlike the Informal Guidance Notice system, this informal instrument could relieve the Commission and allow companies to benefit from quick advice and assistance.

In conclusion, the analysis of this case revealed a deficiency in the new Guidelines. Indeed, in view of the reasoning used, it has been shown that an agreement such as the Car Emissions case could have been considered as having a limited restrictive effect, becoming free of concern for competition law. However, such an interpretation would not enable companies to be penalized for having created restrictive arrangements without having fully implemented them. In this sense, it would be appropriate for the Commission to develop the rules to be followed in such cases to complete the Guidelines. As explained, one solution could be to create a more lenient sanctioning regime directly oriented towards sustainability objectives.

On the other hand, it also seems appropriate to prevent companies from entering into such agreements by providing them with more assistance in their choice and by encouraging them to ask for such support. The fact that they have taken the step of requesting an opinion could also be used by the Commission to interpret a sort of goodwill from the firms. It would thus be used as a form of mitigating circumstances giving access to a less restrictive sanction regime as imagined above. Finally, the creation of an informal network providing guidance to businesses can also benefit the cooperation and harmonization of rules across the Member States thereby reducing the legal uncertainty emerging from isolated national initiatives.

Conclusion

Through the analysis of the Consumer Detergents and Car Emissions case, it was possible to elaborate on how the Commission could be more lenient with companies pursuing sustainability interests, whether proven or alleged. In this sense, it seems that, in its wording, the chapter on sustainability agreements of the new Guidelines addresses the need to adapt competition law to the sustainability objectives set by the Green Deal. However, it is also important to emphasize that the interpretative choices to be made by the Institution can have a great influence on the outcome of a decision, which can be different depending on the objectives pursued. In this perspective, some shortcomings have been highlighted hampering the improvement of competition law enforcement when it comes to finding a balance between its various and contradictory goals and when dealing with the need to provide more legal certainty to businesses.

First, this balance might be easier to achieve if the Commission allows practices that pursue sustainable objectives to be considered separately from those that do not, even if they are part of a single agreement. Indeed, this could help reassure companies concerned about the legal risks associated with potential agreements, since they will be able to justify the various components separately.

Second, a less powerful version of the ancillary doctrine could allow more agreements to be analyzed according to their real effect on the market. This would help the Commission to better balance the achievement of its objectives since it would rely on a more thorough analysis to make decisions. In addition, the experience gained in terms of calculating sustainable benefits will be beneficial for future judgments.

Third, to the extent that a temporary restriction of competition may be necessary for some firms to invest in sustainability initiatives, the concept of the *sustainability sandbox* can be exploited. Indeed, it would permit the Commission to provide incentives to companies while controlling negative market effects.

Finally, the new rules on sustainable standardization agreements seem to allow established but weakly implemented agreements to escape Article 101. In this perspective, it appears appropriate for the Commission to elaborate further on this kind of situation to determine what sanctions would be applicable to such companies. If the traditional regime seems inappropriate, a voluntary compensation system would be a relevant alternative to find a balance between the protection from cartels and the pursuit of sustainability objectives. Beyond that, a reinforced assistance to companies through a European Common Advice Unit, the Informal Guidance Notice, or the possibility to discuss at any time with the competition authorities would allow well-intentioned companies to establish considered sustainability agreements that would escape legal proceedings. These instruments would make it possible to find trade-offs in terms of objectives when drawing up the agreement, avoiding penalties for companies afterwards.

In view of the importance of competition law in the proper functioning of the European Union, and its capacity to shape the structure of the economy, as stressed in the first chapter of this work, the Commission should reconsider different approaches of its enforcement in order to deepen its greening process while still protecting its traditional interests. Indeed, substantive reconsiderations are first to be contemplated and would consist in preferring in-depth assessment of the agreements' market impact, leaving less room for interpretations by object and facilitating a possible degree of control over these effects. Then, it is about revisiting the attitude taken by the Commission towards companies to send them a positive message while continuing to apply competition law firmly. In light of these observations, one might wonder whether the Commission has the willingness and resources to conduct more field investigations and whether it is inclined to reconsider its traditionally fine-based sanctioning regime. If this is not the case, it would be in its interest to strengthen to a greater extent the possibility for companies to access prior opinions through external mechanisms capable of providing them with increased legal certainty. In any case, this work has demonstrated the relevance of some national initiatives whose effectiveness can be strengthened if they are implemented at the European level.

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Appendixes

Appendix 1: Competition law approaches

(Sibony, 2022)

ARTICLES OF THE TFEU	**PURPOSES**
101	Prohibits anti-competitive agreements including cartels, exchanges of information between competitors, as well as vertical and horizontal agreements
102	Outlaws abuses of dominant positions by companies operating on the European market
106	Regulates the behavior of public undertakings or undertakings providing a service of general economic interest
107	Regulates state aid granted to private undertakings
REGULATION	**PURPOSES**
Merger Regulation	Control and approval of fusion between companies

Appendix 2: Article 101 (1) of the TFEU

(European Union, 2016)

The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Appendix 3: Agreements falling outside the scope of Article 101 (1)

(European Commission, 2022b)

- agreements on internal corporate conduct such as plastic or paper consumption in the offices and environmental impact of buildings.
- joint creation of a database of suppliers and distributors meeting certain sustainable criteria, provided that no contractual obligations are imposed with them.
- joint implementation of an awareness campaign on the carbon footprint of an industry or consumers, provided that no joint advertising for certain products is done.

Appendix 4: Soft safe harbour conditions

(European Commission, 2022b)

- the creation of the standards is a **transparent process** allowing the participation of every competitor.
- **no compliance obligations** are imposed on any of the competitors.
- the established **standards are minimum rules** and each competitor involved can adopt a higher level of requirements.
- companies can only **exchange information that is relevant** to the development, adoption, and modification of standards.
- all competitors can **access and comply** to these rules, even those who have not participated in the creation process.
- a significant **increase in price** or a significant **decrease in product choices** should not occur.

- a **supervision system** needs to be put in place to monitor compliance with the standards.

Appendix 5: Commission concrete examples of sustainability agreements

(European Commission, 2022b, p.145-149)

a. *Example 1: agreement that benefits from the soft safe harbour*

Situation: Breakfast cereal is sold in attractive colourful cardboard boxes. Over the years, these boxes have become bigger, not because the content has increased, but merely to make them look more attractive and promising to consumers. This is a profitable marketing strategy, because consumers often purchase breakfast cereals spontaneously, and the bigger size gives the impression of being the better buy. Because all producers have followed this strategy, it has not had a significant effect on their market shares. However, it has led to an excess of around 15% in the packaging material used for their products.

Prevent Waste, a non-governmental organisation, has criticised the ‘empty box’ strategy of the breakfast cereal producers as wasteful and harmful for the environment, using more natural resources than it is necessary for the efficient production and distribution of these products. In response, the breakfast cereal producers, organised in their trade organisation have agreed to limit the excess packaging of their products. They have collectively agreed to limit the excess to no more than 3% to ensure that cereal boxes are still easy to use and have made their decision public. The producers have implemented the agreement since the beginning of the year and it covers 100% of the market. As a result, packaging costs, which make up 6% of the wholesale price, have decreased by around 10%. This has led to a decrease of around 0.5% in the wholesale price of breakfast cereals and a 0-0.5% decrease in the retail price.

Analysis: Competitors agree on an element that impacts the price of the product, but they do so in a transparent manner, allowing everyone to adopt the approach withouth imposing an obligation to do so. There is no exchange of sensitive information and compliance with the decision is easy to monitor. In addition, cereal producers remain free to further reduce their own packaging if they so wish. Moreover, the agreement to limit excess packaging has a very small and even downward effect on the price of breakfast cereals, does not affect competition between the cereal producers on the main parameters of price, quality and innovation, and only affects competition on marketing to a very limited extent (in view of the apparently limited impact of the box 'oversizing' strategy). The agreement therefore meets the conditions of the safe harbour and is thus not caught by Article 101(1). The agreement actually improves the outcome for consumers, by eliminating costly excess packaging strategies which have little impact on competition.

b. *Example 2: agreement having no appreciable effect on competition*

Situation: Fair Tropical Fruits, a non-governmental organisation, together with a number of fruit traders, have set up a label for fair-traded tropical fruits (the “FTF” label). In order to use the label, firms trading in tropical fruits must guarantee that the fruits in question comes from farms where certain minimum conditions as regards safe use of pesticides, are respected. These firms remain free to also trade fruits under other labels. Fair Tropical Fruits has set up a monitoring system to certify that the products sold under the

FTF label comply with the minimum conditions. The conditions for participation and the methodology and results of the monitoring system are available on the website of Fair Tropical Fruits. The fruits sold under the FTF label are more expensive than other tropical fruits traded.

The FTF label has been introduced EU-wide and a number of large traders use the label and have signed the agreement to respect the label's minimum conditions. The label has quickly become popular with certain consumers. Depending on the type of tropical fruit and the geographic market concerned, market shares for fruits sold in the EU under the label now range from 2.6% for pineapples to 14.7% for mangoes. The remainder of the market is supplied by the same traders operating outside the label and by other traders not party to the agreement.

Analysis: The higher price of the fruits sold under the FTF label, may require assessing the effects of the agreement. However, in view of the modest market shares of the products covered by the agreement in the various markets in the EU, the significant market shares held by, and competition from, other labels and conventional products, the fact that participation in the FTF label is on a voluntary and non-exclusive basis and that the licence to use the label is dependent only on respecting certain minimum conditions, the agreements to establish and license the label are unlikely to lead to appreciable negative effects. The agreements are thus not caught by Article 101(1). The agreements may actually widen the choice available to consumers, by enabling them to identify products which have 'fair trade' characteristics.

c. Example 3: agreement unlikely to restrict competition under Article 101(1) and/or likely to satisfy the condition under Article 101(3)

Situation: In response to the findings of research into the recommended levels of fat in certain processed food conducted by a government-funded think tank in a Member State, several major manufacturers of processed foods in that same Member State agree, through formal discussions at an industry trade association, to set recommended fat levels for the products. Together, the parties represent 70% of sales of the products within the Member State. The parties' initiative will be supported by a national advertising campaign funded by the think tank highlighting the dangers of a high fat content in processed foods.

Analysis: Although the fat levels are recommendations and therefore voluntary, as a result of the wide publicity resulting from the national advertising campaign, the recommended fat levels are likely to be implemented by all manufacturers of the processed foods in the Member State. It is therefore likely to become a de facto maximum fat level in the processed foods. Consumer choice across the product markets could therefore be reduced. However, the parties will be able to continue to compete with regard to a number of other characteristics of the products, such as price, product size, quality, taste, other nutritional and salt content, balance of ingredients, and branding. Moreover, competition regarding the fat levels in the product offering may increase where parties seek to offer products with the lowest levels. The agreement is therefore unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1). However, even if the agreement is found to have an appreciable negative effect on competition under Article 101(1) – because consumers are deprived of the choice of having high level fat food - the benefits for consumers in terms of value of information received and beneficial health effects are likely to outweigh the harm and the agreement is likely to satisfy the conditions of Article 101(3).

d. Example 4: agreement restricting competition under Article 101(1) and failing to satisfy the conditions of Article 101(3).

Situation: All of the major furniture producers in a particular market agree to introduce a “green tree” label for furniture made of sustainably grown wood. Currently, the law does not impose any sustainability standards for wood. The parties have agreed to apply the new standard, which requires that at least 30% of the wood used in furniture should be grown sustainably, within 3 years. After that period, all furniture produced by the parties to the agreement will have to comply with the agreed standard and will be labelled with the ‘green tree’ label. The parties remain free to produce furniture that respects (even) higher standards under other labels. Some of the producers already do this. The agreed sustainability standard slows down but does not stop the reduction of forested areas and the degradation of their biodiversity. For this reason, non-governmental organisations have criticised the label for ‘being too little, too late’.

The furniture producers that are party to the agreement have a combined market share of 85%. Currently, around 80% of the parties' total sales consist of furniture made from wood that is not grown and harvested sustainably. The remaining 15% of the market is held by smaller manufacturers selling under other sustainability labels. Studies commissioned by the furniture producers from third party consultants estimate that compliance with the ‘green tree’ label standard will increase the cost of wood by on average 40% and that this will increase the cost of producing the furniture, for which wood is the main component, by on average 20%. Production costs make up on average 60% of the final price, the remaining 40% being distribution costs. It can be expected that the increase in the final price of the furniture will be on average 12%.

A separately published study, indicates that, on average, consumers are willing to pay 5% more for furniture produced to the ‘green tree’ standard, as compared to non-sustainable wooden furniture. This research is based on surveying consumers about their willingness to pay for furniture made from wood which meets the ‘green tree’ standard and on a choice experiment involving different purchase options for furniture of varying standards and prices.

Analysis: In view of the market coverage of the agreement and the significant price increase, the agreement is likely to infringe Article 101(1). The possible efficiencies, in the form of improved sustainability in the growing and harvesting of wood, are unlikely to lead to benefits for consumers that outweigh the expected price increase: the study of consumers’ willingness to pay shows that, on average, consumers value the improved sustainability conditions considerably less (at 5% of the final price) than the expected price increase of 12%. In addition, it seems unlikely that the agreement is indispensable to raise sustainability standards for the cultivation of wood. This is shown by the fact that some of the parties to the agreement and other furniture producers already use higher standards and labels. In other words, it is not clear why the agreement is necessary in order to raise sustainability standards and why individual action by each furniture producer would not enable them to raise standards in a similar way or - as a result of competitive pressure - in an even better way. The agreement therefore does not fulfil at least two of the conditions of Article 101(3) and thus cannot benefit from the exception to the prohibition under Article 101(1).

e. Example 5: agreement restricting competition under Article 101(1) and satisfying the conditions of Article 101(3).

Producers of washing machines currently produce a range of machines, from the latest models, which are technically more advanced, to older models that are technically less advanced. While the older, less advanced models use more electricity and water, they are cheaper to produce and are sold at lower prices than the more recent and technically advanced models. In accordance with an EU regulation, all models are classified into eight energy efficiency categories, from A to H, and labelled accordingly.

Innovation in the industry is focussed on further improving the energy efficiency of new models. However, the washing machine producers also feel that they have a responsibility to try to reduce the energy consumption of their machines in other ways. They have therefore agreed to phase out the production and sale of washing machines in categories F to H, the older and least energy-efficient models. These older models are also the least water-efficient.

The agreement includes all the producers and therefore covers almost 100% of the market. It provides that the production and sale of washing machines in categories F to H will be phased out within two years. These models currently make up around 35% of all sales in the market. While all the participating producers already produce some models in categories A to E, and therefore none of them will lose all of their current sales, each producer will be affected differently, depending on its current range of models. It is thus likely that competition between the producers will be affected. In addition, the phasing out of categories F to H will reduce the choice of machines available to consumers and increase the average purchase cost. For the average purchaser of a washing machine in categories F to H, the price of the machine will increase by between €40 and €70.

Before implementing the agreement to phase out categories F to H, the industry has tried to shift demand away from these categories using advertising campaigns. Studies have shown that the lack of success of these campaigns is due to the fact that many consumers find it difficult to balance the positive impact of future reductions in their electricity and water bills against the negative impact of the immediate increase in the purchase price of the machine.

These studies also show that the buyers of washing machines in fact benefit considerably from the phasing out of categories F to H. The average buyer of a washing machine will recoup the increase in the purchase price within one to two years, in the form of lower electricity and water costs. The overwhelming majority of consumers, including those that use their machine less frequently, will recoup the increase in the purchase price within four years. Given that the average life expectancy for machines in categories A to E is at least five years, the consumers, as a group, benefit from the agreement. This net benefit is further increased, for all users of washing machines, by the environmental benefits resulting from the collective reduction in the use of electricity and water. The reduction in electricity consumption leads to less pollution from electricity production and this benefits consumers, to the extent that the pollution-related market failure is not already addressed by other regulatory instruments (e.g. the European Emissions Trading System, which caps carbon emissions). The reduction in water consumption leads to less water pollution. As users of washing machines make up the overwhelming majority of the overall population, a share of these environmental benefits accrues to the consumers in the relevant market that are affected by the agreement.

Analysis: Although the agreement is likely to have appreciable negative effects and be caught by Article 101(1), it is also likely to fulfil the conditions of Article 101(3). In particular: (i) as a result of the agreement, the average washing machine becomes more energy- and water-efficient, (ii) this could not have been achieved with a less restrictive agreement, for instance with a collective advertising campaign or label, (iii) consumers in the relevant market benefit as a result of the individual economic benefits and the collective environmental benefits, and (iv) competition is not eliminated, as the agreement only affects the scope of the range of models, being one parameter of competition, and not other parameters, on which competition can and does take place.

Résumé

LOUVAIN-LA-NEUVE | BRUXELLES | MONS | TOURNAI | CHARLEROI | NAMUR
Place des Doyens, 1 bte L2.01.01, 1348 Louvain-la-Neuve, Belgique | **www.uclouvain.be/lsm**