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BACK TO THE TREATIES: TOWARDS A 'SUSTAINABLE' COMPETITION LAW

Abstract

Competition law, especially after the advent of the so-called Chicago School, has often been viewed as a policy interested in the pursuit of economic efficiency only, and sometimes it has also been enforced accordingly. However, the call to improve – if not save – the conditions of the environment in which we live has become urgent for our economic, social and legal systems. Therefore, every policy, competition law included, must play its part, as the protection of the environment represents a core value of our societies' constitutional foundations. In the context of competition law, this means allowing sustainability agreements aimed at pursuing environmentally friendly objectives, such as new products or productive processes. This can be reached through various means, especially by means of the exemption provided by Article 101, paragraph 3, TFEU. This article will analyse the various approaches that can lead to an innovative and environmentally friendly application of competition law, bearing in mind that the inclusion of these concerns in the assessment of competition law cases is rooted in the 'multi-value' approach to competition required by the EU Treaties.

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I The concept of 'sustainability' as a societal goal and the policy role of competition law

Sustainability has been defined by the 1987 World Commission on Environment and Development's Brundtland Report as *development that meets the needs of the present without compromising the ability of future generations to meet their own needs*.¹ The same Report sustained that *sustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well present needs*.² From this statement it results evident how sustainability – not only environmental sustainability, but also social sustainability – can be reached only through a deep rethinking of our economic system, and precisely through an approach more attentive to social values and less focused on the mere economic efficiency. This claim recalls the current debate in competition law, which, being a fundamental policy of our legal and economic systems, has for sure played a role in this context. Anyhow, before turning the focus on the relationship between competition law and environmental sustainability, it is worth recalling the constitutional foundations of the right to a healthy and flourishing environment.

At the United Nations level, on 12 December 2015, 196 States signed the Paris Agreement, a legally binding international treaty entered into force on 4 November 2016 aimed at limiting global warming to 2 or preferably 1.5 degrees Celsius, if compared to pre-industrial levels.³ Having regard to the European Union, on 28 October 2019 the Plenary Session of the European Parliament declared climate emergency and urged the Commission to stick to the

¹ World Commission on Environment and Development (chaired by Gro Harlem Brundtland), *Our Common Future*, 1987, 41 (the concept is expressed also at p. 16), <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>, accessed: 30 May 2023. See also OECD, *Sustainability and Competition*, 2020, 11, <https://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf>, accessed: 30 May 2023; M. C. Iacovides, C. Vrettos, *Falling through the cracks no more? Article 102 TFEU and sustainability: the relation between dominance, environmental degradation, and social injustice*, *Journal of Antitrust Enforcement* 10(2022)1, 37.

² World Commission on Environment and Development, *Our Common Future*, 17.

³ United Nations, *The Paris Agreement. What is the Paris Agreement?*, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>, accessed: 30 May 2023. The text of the Treaty is available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf, accessed: 30 May 2023.

abovementioned 1.5 Celsius degree target, together with cutting emissions in the EU by 55% within 2030, in order to become climate neutral in 2050.⁴ The Commission took action with the so-called *European Green Deal*, which confirms the EU's intention to reach a level of zero net emissions of greenhouse gases by 2050. In light of the European Green Deal, the question about the possible role that competition law should play in the transition towards a more sustainable economy can receive a positive answer. Moreover, it is worth highlighting that competition law should play its part in this context precisely because of the very 'constitutional' basis of the European Union law.⁵

For the sake of better understanding the constitutional roots of the environmental call, it is first worth mentioning that Article 3, paragraph 3, TEU provides that the 'social market economy' which shall lie at the foundation of the European society aims at *full employment and social progress, together with a high level of protection and improvement of the quality of the environment*. Also, the Charter of Fundamental Rights of the European Union's Article 37 establishes that *a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*. In addition, Article 11 TFEU reiterates 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*. These provisions confirm how EU's policies, such as competition law, cannot be untied from the Union's 'constitutional' objectives, but they must implement them, also in accordance with the consistency requirement set forth by Article 7 TFEU.⁶

From another perspective, having regard to the European Charter of Fundamental Rights does not contain any specific provision regarding environmental protection. However, this does not imply that the Charter does

⁴ European Parliament, The European Parliament declares climate emergency, 29 October 2019, <https://www.europarl.europa.eu/news/en/press-room/20191121IPR67110/the-european-parliament-declares-climate-emergency>, accessed: 30 May 2023. The text of the European Parliament's Plenary Session resolution, P9_TA(2019)0079, European Parliament resolution of 28 November on the 2019 UN Climate Change Conference in Madrid, Spain (COP 25) (2019/2712(RSP)), is available at https://www.europarl.europa.eu/doceo/document/TA-9-2019-0079_EN.pdf, accessed: 30 May 2023.

⁵ M. C. Iacovides, C. Vrettos, *op. cit.*, 9-12.

⁶ See also S. Kingston, "Why environmental protection goals should play a role in EU competition policy: a legal systematic argument", in: S. Kingston, *Greening EU Competition Law and Policy*, Cambridge University Press, 2011, 106-107.

not require sustainable behaviours towards the environment. In fact, the European Court of Human Rights has adopted an evolutive interpretation of the Charter and, for instance, applied the right to life or family life to environmental issues.⁷ However, as recently pointed out by the Parliamentary Assembly of the Council of Europe, the extensive interpretation of other fundamental rights promoted by the ECHR in order to include environmental protection concerns is only *indirect and favours an anthropocentric and utilitarian approach to the environment which prevents natural elements from being afforded any protection per se [emphasis added]*.⁸ At this purpose, the same Parliamentary Assembly recognised that *an autonomous right to a healthy environment would have the benefit of allowing a violation to be found irrespective of whether another right had been breached and would therefore raise the profile of this right*.⁹ As a consequence, the Assembly recommended member States of the Council of Europe to *participate in a political process under Council of Europe auspices aimed at preparing legally binding and enforceable instruments – an additional protocol to the Convention, and an additional protocol to the Charter – in order to protect more effectively the right to a safe, clean, healthy and sustainable environment*.¹⁰ Finally, it is worth mentioning that at the same Council of Europe's level the Bern Convention on the Conservation of European Wildlife and Natural Habitats was signed in 1979.¹¹

⁷ Council of Europe, Protecting the Environment using human rights law, <https://www.coe.int/en/web/portal/human-rights-environment>, accessed: 30 May 2023. A summary of the decisions issued by the European Court of Human Rights on environmental issues was made available in July 2021 by the same Court's Press Unit, Environment and the European Convention on Human Rights, https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf, accessed: 30 May 2023.

⁸ Parliamentary Assembly of the Council of Europe, Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe, Resolution 2396 (2021), 29 September 2021, point 6, <https://pace.coe.int/pdf/658d3f594762736ba3c0f378798b2c9529cf4be34aa45a8c38616ecd18fa80c0/resolution%202396.pdf>, accessed: 30 May 2023.

⁹ *Ibid.*, point 9.

¹⁰ *Ibid.*, point 14.3. An overview of the Council of Europe Parliamentary Assembly's activities aimed at ensuring that the right to a healthy environment is recognised as a basic human right is available at <https://pace.coe.int/en/pages/environment-right-now>, accessed: 30 May 2023.

¹¹ Council of Europe, Convention on the Conservation of European Wildlife and Natural Habitats, signed in Bern on 19 September 1979, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680078aff>, accessed: 30 May 2023. See also Council of Europe, Presentation of the Bern Convention, <https://www.coe.int/en/web/bern-convention/presentation>, accessed: 30 May 2023.

EU member States also recognise environmental protection as a constitutional level right to be protected and the importance of such a right is increasingly highlighted. The major example is represented by the *Charte de l'environnement de 2004*, added in 2005 to the 1958 French Constitution.¹² It is composed of ten articles. Among them, Article 1 provides that *everyone has the right to live in a balanced environment which shows due respect for health*, whilst Article 2 states that *everyone is under a duty to participate in preserving and enhancing the environment*. Anyhow, for our purposes, the most interesting provision is represented by Article 6, which establishes a link between environmental protection, social progress and economic development, as it requires that *public policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress*.

The issue of environmental protection was addressed also by Germany, which in 1994 added Article 20a to the *Grundgesetz*. With an interesting reference to the *responsibility towards future generations*, this provision affirms that *the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order*.¹³ In compliance with this provision, in 2019 the Federal Climate Change Act was enacted,¹⁴ aimed at implementing obligations stemming from the Paris Treaty with regard to the German Republic. However, on 21 March 2021 the German *Bundesverfassungsgericht* intervened with an order that deemed the Act unconstitutional with regard to the provisions governing climate targets and the annual amount of gas emissions allowed until 2030 since they do not specify how emissions would be reduced beyond 2030.¹⁵ In fact, the Climate

¹² The *Charte de l'environnement de 2004*'s English text is available on the Conseil Constitutionnel's website at <https://www.conseil-constitutionnel.fr/en/charter-for-the-environment>, accessed: 30 May 2023. The *Charte* was added to the French Constitution by means of *Loi constitutionnelle n° 2005-205 du 1er mars 2005 relative à la Charte de l'environnement*, published in the *OJ* 2 March 2005.

¹³ The German *Grundgesetz*'s English text is available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0116, accessed: 30 May 2023.

¹⁴ Federal Climate Change Act, 12 December 2019, published in *OJ* I S. 2513. The Act's English translation is available at https://www.gesetze-im-internet.de/englisch_ksg/englisch_ksg.html, accessed: 30 May 2023.

¹⁵ Bundesverfassungsgericht, Order of the First Senate of 24 March 2021, 1 *BvR* 2656/18, paras. 1-270, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html, accessed: 30 May 2023. The relevant press release, No. 31/2021, 29 April 2021, Constitutional complaints against the Federal Climate Change Act partially successful, is available in English at

Change Act provided for precise emissions reduction targets until 2030 and then referred to an adjustment of the emissions reduction pathway after 2030. Very interestingly, the *Bundesverfassungsgericht* deemed this adjustment mechanism not enough to ensure that the transition to climate neutrality is achieved in time. According to the Court, the emissions reduction obligation stems from the above-analysed Article 20a of the *Grundgesetz* and more detailed gas reduction targets after 2030 are required to protect the freedom guaranteed by fundamental rights, as almost every activity characterising human life implies gas emissions. Therefore, all these freedoms might be threatened by gas reduction obligations in case the climate situation would have reached a tipping point due to excessive emissions allowed in the current phase, thus offloading the burden of fundamental freedoms' limitation to future generations, after 2030. In conclusion, the Court ordered the German legislator to amend the Act with more precise provisions regarding the after-2030 period. The Act was amended in June 2021.¹⁶ In a similar vein, in October 2021 the *Tribunal Administratif de Paris* issued a decision where it stated that the French State must compensate the non-compliance with the carbon emission targets fixed for the 2015-2018 term.¹⁷ In particular, the *Tribunal* found that these objectives were exceeded by 15 Mt of carbon dioxide. Therefore, the Court fixed a short term, set on 31 December 2022, within which the French State must compensate for carbon dioxide excess. Anyhow, this order was not supported by means of *astreinte* measures.¹⁸

<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>, accessed: 30 May 2023.

¹⁶ White & Case LLP, Reshaping Climate Change Law, 14 July 2021, <https://www.whitecase.com/publications/alert/reshaping-climate-change-law>, accessed: 10 August 2021; Dentons, Parliament passes first law amending the German Federal Climate Protection Act, 18 June 2021, <https://www.dentons.com/en/insights/articles/2021/june/18/first-draft-law-amending-the-german-federal-climate-protection-act>, accessed: 30 May 2023.

¹⁷ Tribunal Administratif de Paris, decision 14 October 2021, no. 1904967-1904968-1904972-1904976, <http://paris.tribunal-administratif.fr/content/download/184990/1788790/version/1/file/1904967BIS.pdf>, accessed: 30 May 2023. See the relevant press release by the same *Tribunal Administratif de Paris*, L'Affaire du Siècle: l'Etat devra réparer le préjudice écologique dont il est responsable, 14 October 2021, <http://paris.tribunal-administratif.fr/Actualites-du-Tribunal/Communique-de-presse/L-Affaire-du-Siecle-l-Etat-devra-reparer-le-prejudice-ecologique-dont-il-est-responsable>, accessed: 30 May 2023.

¹⁸ *Ibid.*

Having regard to the Italian context, before a constitutional reform intervened in 2022, in the absence of specific provisions contained in the Italian Constitution, the *Corte Costituzionale* recognised environmental protection as a right to be safeguarded.¹⁹ The Court defined the environment as a constitutionally protected value. In particular, the Italian Constitutional Court stated that the environment shall be protected as an element that determines the quality of life. Its protection, according to the Court, does not pursue naturalistic goals, but it aims at preserving the environment where humans live, which is necessary for the society. This value should have been protected according to Articles 9 (safeguard of natural landscape) and 32 (right to health) of the Italian Constitution – thanks to an extensive interpretation – and it amounts to an absolute value of primary importance.²⁰ However, a proposal of constitution-amending law directed at introducing environmental protection into the Italian Constitution's Articles 9 and 41 (the latter referred to the right to private economic enterprise) was approved in February 2022 – according to the procedure provided for by Article 138 of the Italian Constitution.²¹ This initiative aligns the Italian Constitution with the above-analysed French and German Fundamental Laws, as the amendments explicitly introduce the right to environmental protection. In particular, the reform adds to Article 9 of the Italian Constitution a paragraph which explicitly recognises the protection of the environment, biodiversity and ecosystems, also in the interest of future generations, as a fundamental principle of the Republic. The same Article makes also reference to the protection of animals, although the concrete application of this last provision is delegated to ordinary law.²²

¹⁹ See the report drafted by the *Corte Costituzionale's Servizio Studi*, *La tutela dell'ambiente, dell'ecosistema e dei beni culturali nei giudizi di legittimità costituzionale in via principale (2002-2015)*, April 2015, https://www.cortecostituzionale.it/documenti/convegni_seminari/stu_279.pdf, accessed: 30 May 2023.

²⁰ *Corte Costituzionale*, decision 17 December 1987, no. 641, para 2.2. See also, *inter alia*, *Corte Costituzionale*, decision 4 July 1989, no. 391; decision 7 March 1990, no. 127; decision 24 September 1990, no. 430.

²¹ Constitutional Law 11 February 2022, no. 1, published in *OJ* 22 February 2022, no. 44. See Camera dei Deputati, *Tutela ambientale, approvata la proposta di legge costituzionale*, 8 February 2022, https://www.camera.it/leg18/1132?shadow_primapagina=13595, accessed: 30 May 2023.

²² Camera dei Deputati, *Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente*, 8 February 2022, <https://temi.camera.it/leg18/temi/modifiche-agli-articoli-9-e-41-della-costituzione-in-materia-di-tutela-dell-ambiente.html>, accessed: 30 May 2023; Presidenza del Consiglio dei Ministri, Dipartimento per le Riforme Istituzionali, *La riforma*

Likewise, the amended Article 41 of the Italian Constitution clearly states that economic activities must not be performed with prejudice to health and the environment.²³

From the analysis conducted in this paragraph results evident how the protection of the environment lies at the foundations of our societies. Therefore, all the policies, competition law included, have to pursue this goal, which cannot be sacrificed in light of more material goals, such as economic efficiency. With regard to competition law, this means a broadening of its goals through what we have already defined – more broadly – as a 'multi-value' approach.²⁴

The following paragraphs will analyse how competition law provisions shall be interpreted in order to give a contribution to the shift towards a more environmentally sustainable economy, especially in the context of Article 101 TFEU.

II Sustainability and sustainability-enhancing agreements between firms: The role of Article 101 TFEU

Article 101 TFEU represents the most important tool for pursuing environmentally friendly goals in competition law. That is why companies willing to introduce more sustainable products or processes may encounter the so-called 'first mover disadvantage', as researching for innovations is often more expensive than continuing with the conventional technologies.²⁵ As a result, a firm that decides to embrace a more sustainable regime may be backfired by this choice, as it will be required to invest more and it will also bear the risk of not recovering these investments, provided that the products offered would probably be – at least initially – more expensive. Given this premise, companies might be unwilling to risk sustainability-oriented investments, especially if they are operating in a highly competitive market. Of course, more sustainable products might also come out to be market-breaking ones, but this outcome may not be predicted. In fact, these items, from the average consumer's point of view, represent a sort of 'dilemma', as they require a difficult trade-off between their –

costituzionale in materia di tutela dell'ambiente, <https://www.riformeistituzionali.gov.it/it/la-riforma-costituzionale-in-materia-di-tutela-dell-ambiente/>, accessed: 30 May 2023.

²³ *Ibid.*

²⁴ A. Piletta Massaro, Il diritto della concorrenza tra obiettivi di policy e proposte di riforma: verso un approccio multi-valoriale, *La Cittadinanza Europea Online* 2021, 65.

²⁵ S. Holmes, Climate change, sustainability, and competition law, *Journal of Antitrust Enforcement* 8(2020)2, 367.

usually high – price and quality parameters. In this realm, competition may establish the right market conditions for developing greener products which, thanks to synergies among regulators and industries, might be also affordable, thus leading to an *inclusive green transition*, bearing in mind that this is the only way possible to reach a change of path in the society's relationship with the environment.

However, the point is that companies need to cooperate for the purpose of developing more sustainable products, but in doing so they do not have to risk or fear the application of competition provisions.²⁶ Of course, on the contrary, competition rules cannot be totally relaxed, as this would incentivise 'green washing' behaviour that would negatively affect both competition and the environment.

The existing Treaty provisions and the praxis developed by competition Authorities and Courts already allow the inclusion of sustainability-related profiles into the competition law assessment of a case. Four routes appear practicable in this sense,²⁷ which can be categorized into three sub-groups: The first and most important way is built on the exemption provided for by Article 101, paragraph 3, TFEU; The second relies on the newly introduced sustainability agreements category. Finally, as the final two approaches represent 'alternative' means, they could be analysed together, and they are elaborated upon the 'ancillary restraint' category and the ECJ's *Albany* decision's approach.²⁸

1. The Article 101, paragraph 3, TFEU exemption

Article 101 TFEU, paragraph 1, establishes which agreements are contrary to competition rules. Anyhow, the same Article's paragraph 3 set forth a generally available exemption from the application of Article 101, paragraph 1, TFEU in case the agreements at stake meet certain conditions. These requirements shall be categorised into positive and negative ones. The latter requires that agreements aimed at promoting certain positive improvements do not amount to agreements

²⁶ *Ibid.* See also European Commission, Competition Policy in Support of Europe's Green Ambition, Competition policy brief 2021-01, September 2021, 1-2, <https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF>, accessed: 30 May 2023.

²⁷ These possibilities are finely addressed and proposed by S. Holmes, *op. cit.*, 15-30; S. Holmes, Climate change, sustainability and competition law in the UK, *European Competition Law Review* 2020, 41(8), 385.

²⁸ European Court of Justice, decision 21 September 1999, Case C-67/96, *Albany International BV v. Stichting Bedrijfspensionenfonds Textielindustrie*.

which detrimentally distort competition. These requirements ought to be read as cumulative.

Turning to the positive conditions, the Treaty provision grants the analysed exemption if the concerned agreements are directed at improving goods' production or distribution or if they deliver some sort of economic or technical progress. However, these agreements also need to deliver a 'fair share' of these improvements to consumers. In particular, as stated by the ECJ in *Consten and Grundig*, the benefits brought by the concerned agreement shall *compensate for the disadvantages which they cause in the field of competition*.²⁹

It is worth noticing that the first set of positive requirements is contained in a sentence put together by means of disjunctive conjunctions. Consequently, the exemption is granted also in case the agreement *only* improves the production or the distribution of goods or whether it delivers *only* technical or economic progress. At this point, the first question arises, *i.e.*, if environmental concerns may fit into the first two positive requirements. The answer ought to be positive, as practices directed at reducing the production and sale of goods' environmental impact of course improve the production and distribution of goods and they would also introduce more efficient processes which could drastically reduce the waste of natural resources. Therefore, these kinds of agreements match all the positive requirements requested by Article 101, paragraph 3, TFEU in order to receive the exemption contemplated therein.³⁰ Moreover, it is highly unlikely that in the current political and policy realm the Commission and Courts will not recognise the positive value brought by practices intended at promoting environmental protection. In this sense, the ECJ recognised that the Commission can rely on public policy arguments while evaluating cases under Article 101, paragraph 3, TFEU,³¹ and a revised version of the Commission's exemption guidelines, including specific reference to sustainability-oriented agreements, has

²⁹ European Court of Justice, decision 30 July 1966, joined cases 56 and 58/64, *Consten and Grundig*, p. 348.

³⁰ Hellenic Competition Commission, *Competition Law and Sustainability*, 2020, 27, https://www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/1896_9b05dc293adbae88a7bb6cce37d1ea60.html, accessed: 30 May 2023.

³¹ European Court of Justice, decision 25 October 1977, case C-26/76, *Metro v. Commission*, para 21; EU General Court, decision 11 July 1996, joined cases T-528/93, T-542/93, T-543/93 and T-546/93, *Metropole television SA et al. v. Commission*, para 118, where the Court stressed that *in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty*. See also Hellenic Competition Commission, *Competition Law and Sustainability*, 26.

been recently approved, and it is going to be published just after a light linguistic revision.³² In addition, the Commission has already considered environmental-related justifications to exempt agreements according to the general exemption clause under scrutiny in cases such as *Philips-Osram*,³³ *CECED*³⁴ and *DSD*.³⁵

More challenging, while assessing the merit of a single case, is the second and overarching positive condition, *i.e.*, the delivery of these benefit's fair share to consumers. For this purpose, it is essential to better delineate what the required *fair share* is and to what *consumers* it shall be delivered.

According to the newly approved Commission Exemption Guidelines, Consumers receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the agreement, so that the overall effect on the consumers in the relevant market is at least neutral.³⁶ This does not amount to a full compensation, but to appreciable objective advantages, as it can be read through the lines of the ECJ *Asnef-Equifax*³⁷ and *Mastercard*³⁸ decisions

³² Communication from the Commission, Approval of the content of a draft for a Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2023, https://competition-policy.ec.europa.eu/system/files/2023-06/2023_revised_horizontal_guidelines_en_0.pdf, accessed: 27 June 2023. Also, recently adopted Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (published in the *Official Journal of the EU* 2 June 2023, L 143/9), at its Recital 2 explicitly states that cooperation among undertakings in R&D can fit into the purposes of the European Green Deal.

³³ EU Commission, decision 21 December 1994, 94/986/EC, case IV/34.252 – *Philips-Osram*, in particular para. 27.

³⁴ EU Commission, decision 24 January 1999, 2000/475/EC, case IV.F.1/36.718. *CECED*, in particular paras. 55-57.

³⁵ EU Commission, decision 17 September 2001, 2001/837/EC, case COMP D3/34493 – *DSD and others*, in particular para. 148.

³⁶ Communication from the Commission, Approval of the content of a draft for a Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, point 569.

³⁷ European Court of Justice, decision 23 November 2006, case C-238/05, *Asnef-Equifax*, para. 72, where the Court stresses that *the overall effect on consumers in the relevant markets must be favourable*.

³⁸ European Court of Justice, decision 11 September 2014, case C-382/12 P, *MasterCard Inc. at al. v. Commission*, para. 234.

and sustained also by a paper issued by the Dutch ACM.³⁹ Moreover, if the agreement leads to an increase in prices, consumers can be compensated through increased quality or other benefits.⁴⁰ In fact, in relation to environmental sustainability issues, it is possible that higher prices paid by actual consumers may be reflected in higher long-term benefits to society.⁴¹ For this purpose, the new Commission Guidelines introduce three categories of possible benefits for consumers: The 'individual use value benefit', the 'individual non-use value benefits' and the 'collective benefits'. The first kind refers to improved product quality or product variety resulting from qualitative efficiencies or takes the form of a price decrease as a result of cost efficiencies.⁴² The second encompasses the appreciation of the consumers whilst consuming a sustainable product in comparison to a non-sustainable one, as it causes a less negative impact on others (and, in this case, consumers could also be willing to pay more for the product).⁴³ The last category of benefits, instead, occurs irrespective of the consumers' individual appreciation of the product and these benefits accrue to a wider section of society than just consumers in the relevant market.⁴⁴

However, a difficult task appears to be the evaluation of sustainability gains, as these are not easily measurable through price parameters. In this sense, as pointed out by the Dutch ACM, *environmental benefits can often be quantified, for example, by indicating the extent to which certain harmful emissions will be reduced, and*

³⁹ Dutch Authority for Consumers & Markets, What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?, ACM Legal Memo, 27 September 2021, 1, 3-4, <https://www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf>, accessed: 30 May 2023. See also M. Dolmans, "Sustainable Competition Policy and the "Polluter Pays" Principle", and M. P. Schinkel, L. Treuren, "Green Antitrust: Friendly Fire in the Fight Against Climate Change", both in: *Competition Law, Climate Change & Environmental Sustainability* (eds. S. Holmes, D. Middelschulte, M. Snoep), Concurrences, 2021, respectively 34 and 72.

⁴⁰ *Ibid.* See also point 102, where it is stated that consumer pass-on can also take the form of qualitative efficiencies such as new and improved products, creating sufficient value for consumers to compensate for the anticompetitive effects of the agreement, including a price increase.

⁴¹ G. Monti, J. Mulder, Escaping the clutches of EU competition law. Pathways to Assess Private Sustainability Initiatives, *European Law Review* 2017, 42(5), 649; M. Dolmans, *op. cit.*, 31-32.

⁴² Communication from the Commission, Approval of the content of a draft for a Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, point 571.

⁴³ *Ibid.*, 575, 578.

⁴⁴ *Ibid.*, 582.

over what period.⁴⁵ This solution is particularly viable as a means for quantifying an agreement's sustainability gains and comparing them with the related restriction to competition. Moreover, anchoring this process to measurable parameters brings the necessary safeguards for preserving legal certainty in a field – *i.e.*, sustainability – which is guided by broad policy considerations.

With regard to the aspect concerning the category of consumers who shall receive the fair share required by Article 101, paragraph 3, TFEU, the newly approved Commission Guidelines specify that *the concept of 'consumers' encompasses all direct or indirect customers of the products covered by the agreement.*⁴⁶ In this sense, it is important to follow the reasoning of the Commission's new Guidelines with reference to the so-called collective benefits. Here it is stated that *although the weighing of the positive and negative effects of the restrictive agreements is normally done within the relevant market to which the agreement relates, where two markets are related, efficiencies generated on separate markets can be taken into account, provided that the group of consumers that affected by the restriction and that benefits from the efficiencies is substantially the same.*⁴⁷ Moreover, *where consumers in the relevant market substantially overlap with, or form part of the group of beneficiaries outside the relevant market, the collective benefits to the consumers in the relevant market that occur outside the market can be taken into account if they are significant enough to compensate the consumers in the relevant market for the harm they suffer.*⁴⁸

The abovementioned Guidelines' approach appears to be consistent with the praxis developed by the European judiciary. Indeed, in *Compagnie Générale Maritime*,⁴⁹ the General Court stated that for the purposes of Article 101, paragraph 3, TFEU, *regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market [...], but also, in appropriate*

⁴⁵ Dutch Authority for Consumers & Markets, Draft Guidelines on Sustainability Agreements, 2020, point 32, <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>, accessed: 30 May 2023. See also Communication from the Commission, Approval of the content of a draft for a Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, point 587.

⁴⁶ Communication from the Commission, Approval of the content of a draft for a Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, point 569.

⁴⁷ *Ibid.*, point 583.

⁴⁸ *Ibid.*, point 584.

⁴⁹ EU General Court, decision 28 February 2002, case T-86/95, *Compagnie Générale Maritime v. Commission*.

cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement.⁵⁰ Additionally, in the *Mastercard* judgement (dealing with a credit card system two-sided market), although the Court of Justice first held that *where [...] restrictive effects have been found on only one market of a two-sided system, the advantages flowing from the restrictive measure on a separate but connected market also associated with that system cannot, in themselves, be of such character as to compensate for the disadvantages resulting from that measure in the absence of any proof of the existence of appreciable objective advantages attributable to that measure in the relevant market, in particular [...] where the consumers on those markets are not substantially the same,*⁵¹ some paragraphs below the Court specified that what is required is that both the sides of the concerned market had to receive an advantage, but that has not to be of the same extent.⁵² Furthermore, as specified by the Dutch ACM, the ECJ's *dictum* in *Mastercard* means that *if the two groups were substantially the same, out of market benefits could possibly suffice. This is because fair compensation for consumers can result from out of market benefits for a larger group of beneficiaries that includes the consumers who are also present in the relevant market, for instance because the relevant benefits accrue to society as a whole.*⁵³ In particular, according to the ACM, *Mastercard* clarified that *out of market benefits are counted towards compensation of the consumers negatively affected, in particular if they affect substantially the same group and that out of market efficiencies benefiting other consumers can also be counted toward a fair share for consumers overall.*⁵⁴ Consequently, it appears that the case-law is already in line with the approach adopted by the Commission (and by some National Competition Authorities, such as the Dutch ACM).⁵⁵

⁵⁰ *Ibid.*, para 343.

⁵¹ EU General Court, decision 11 September 2014, case C-382/12 P, *MasterCard Inc. et al. v. Commission*, para 242.

⁵² *Ibid.*, para 248.

⁵³ Dutch Authority for Consumers & Markets, What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?, 3.

⁵⁴ *Ibid.*, 4. In light of this, it is worth recalling the Commission decision in the *CECED* case, which stated that an agreement aimed at producing more energy-efficient washing machines would create environmental results for society that *would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines.* European Commission, *CECED*, point 56.

⁵⁵ Hellenic Competition Commission, Competition Law and Sustainability, 29; Dutch Authority for Consumers & Markets, What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?, 3.

Of particular importance is also the timeframe of the materialisation of the benefits that a sustainability-oriented agreement may bring. For this purpose, the newly adopted Guidelines suggest that *the fact that pass-on to consumers occurs with a certain time lag does not in itself exclude the application of Article 101(3). However, the greater the time lag, the greater must be the efficiencies to compensate for the loss to consumers during the period preceding the pass-on. In making this assessment, the value of future benefits must be appropriately discounted.*⁵⁶

In the end, the approach introduced by the new Commission Guidelines has to be welcomed, as a too narrow interpretation of the *fair share* requirement would undermine the possibility of exempting agreements that would have a positive effect on the fight against climate change.⁵⁷ Anyhow, as already anticipated, an excessive enlargement of the requirements could well challenge the legal certainty necessary in the market and the green transition itself, as well.⁵⁸ Consequently, a link between the market affected and the market in which the benefits are passed-on ought to be required.⁵⁹ What is important is also that now, after the new Guidelines' adoption, these considerations are not anymore based on academic interpretation of judicial praxis or Competition Authorities decisions, but it is plainly outlined by the Commission. This will for sure provide a safe and stable guidance to firms and it will for sure stimulate the cooperation aimed at pursuing sustainable goals in production.

2. Sustainability agreements

A second route through which firms can pursue environmentally sustainable goals without risking the breach of competition rules relies on the so-called sustainability agreements category.⁶⁰

⁵⁶ Communication from the Commission, Approval of the content of a draft for a Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, point 591.

⁵⁷ (With reference to the regime preceding the newly adopted Guidelines) T. van Dijk, "A New Approach to Assess Certain Sustainability Agreements under Competition Law", in: *Competition Law, Climate Change & Environmental Sustainability* (eds. S. Holmes, D. Middelschulte, M. Snoep), 58.

⁵⁸ The risks of an excessive broadening of Article 101, paragraph 3, TFEU's exemption are recognised also by the European Commission, Competition Policy in Support of Europe's Green Ambition, 2.

⁵⁹ The 'broader view' suggested by S. Holmes (2020a), 24.

⁶⁰ However, as pointed out by the OECD, these agreements might also lead to a reduction of competition as a result of the harmonisation of product characteristics. Consequently, a careful

The 2001 Commission Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements⁶¹ contained an entire section dealing with the so-called environmental agreements. They were defined as agreements *by which the parties undertake to achieve pollution abatement [...] or environmental objectives*.⁶² The Commission also specified that *environmental agreements may set out standards on the environmental performance of products (inputs or outputs) or production processes*.⁶³

Anyhow, the subsequent 2011 Guidelines expressly turned not to directly address sustainability agreements, stating that *standard-setting in the environment sector [...] is more appropriately dealt with in the standardisation chapter of the same Guidelines*.⁶⁴ Furthermore, it was specified that *in general, depending on the competition issues 'environmental agreements' give rise to, they are to be assessed under the relevant chapter of these guidelines, be it the chapter on R&D, production, commercialisation or standardisation agreements*.⁶⁵

Anyhow, the current importance of sustainability issues led to the introduction of a specific section about 'sustainability agreements' in the Guidelines approved in 2023. In particular, the mentioned section gives guidance on the assessment of such agreements under Article 101, paragraph 1 TFEU. The Guidelines also specify that if these agreements are found as anti-competitive under this provision, they can still benefit from the above-analysed exemption granted by Article 101, paragraph 3, TFEU.⁶⁶

competition law assessment, along the lines suggested in paragraph 3. of the present chapter, is necessary. See OECD, Horizontal Agreements in the Environmental Context 2010, 24 November 2011, 12, <https://www.oecd.org/competition/cartels/49139867.pdf>, accessed: 30 May 2023.

⁶¹ European Commission, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, published in *OJ* 6 January 2001, C 3/2.

⁶² *Ibid.*, point 179.

⁶³ *Ibid.*, point 180.

⁶⁴ Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, published in *Official journal of the EU* 14 January 2011, C 11/1, footnote no. 14.

⁶⁵ *Ibid.*

⁶⁶ Communication from the Commission, Approval of the content of a draft for a Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, point 536.

In particular, these kinds of agreements may lead, according to the Guidelines, to the adoption of sustainability standards, which can also concretise in specific sustainability labels.⁶⁷ According to the Commission, sustainability standardisation agreements may lead to the development of new products or markets, to an increase in quality of the concerned products, or improve the distribution of products. Moreover, sustainability standards can increase the awareness of consumers on the sustainability of the products they purchase.⁶⁸

Anyhow, there is also a dark side to these agreements as, under a competition law lens, might lead to price coordination, foreclosure of alternative standards, and exclusion or discrimination of competitors.⁶⁹

Therefore, the Guidelines establish six cumulative conditions that render such agreements 'unlikely' to restrict competition. This constitutes very important guidance to companies on this 'soft safe harbour', as it is called by the same Guidelines. In particular, these conditions are:

Transparency, which means that all interested competitors must be able to participate in the process leading to the selection of the standard;⁷⁰

No obligation to comply with the standard on undertakings that are not willing to participate in it;⁷¹

Freedom to apply higher sustainability standards for companies participating in the standard setting, although binding requirements can be imposed on them in order to ensure compliance with such a standard;⁷²

No exchange among the undertakings participating the standard setting of sensitive information which is not necessary or proportionate for the purpose of the standard;⁷³

Effective and non-discriminatory access to the outcome of the standard-setting process must be ensured;⁷⁴

⁶⁷ *Ibid.*, points 538, 541.

⁶⁸ *Ibid.*, point 545.

⁶⁹ *Ibid.*, point 546.

⁷⁰ *Ibid.*, point 549.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

As a final requirement, firms must comply with at least one of the following two conditions: 1. The standard must not lead to a significant increase in the price or a significant reduction in the quality of the products concerned; 2. The combined market share of the participating undertakings must not exceed 20% on any relevant market affected by the standard.⁷⁵ This last point is of particular importance, as it, by setting an alternative for firms, allows also firms having a significant market share on the market to pursue sustainability goals, but without harming consumers. The relevance of this lies in the fact that big firms often are the ones that have the necessary resources to establish a standard or develop, by means of research, new sustainable products.

What is important, is that the Guidelines specify that the non-compliance with one of these conditions does not lead to a presumption of anti-competitiveness of the concerned agreements, but by not applying the 'safe-harbour', this makes necessary a normal assessment of the agreement under Article 101, paragraph 1, TFEU.⁷⁶

3. Alternative routes: Public policy considerations and the 'ancillary restraint' route

The two final routes that we would like to illustrate are a sort of praetorial interpretation of competition provisions along more environmental or sustainability-sensitive lines.

The first approach envisages a policy that confers competition Authorities and Courts with the possibility of adopting – to a certain extent – a sort of 'multi-value' approach while interpreting competition provisions. The case that acts as a cornerstone for such possibility is the ECJ's *Albany* decision. In this ruling, the ECJ had to decide whether collective bargaining agreements in the labour field fell under the scope of Article 101 TFEU. Of course, from a pure 'classical' economic point of view, there are no reasons why these agreements shall escape the application of competition provisions. The Court of Justice, after reminding that the EU Treaties indicate social protection as an objective to be pursued by the Union, stressed that *certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreement would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking to*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, point 522.

*jointly adopt measures to improve conditions of work and employment.*⁷⁷ Having regard to its scope, the agreement concerned represented the outcome of negotiations between employers and workers and established a supplementary pension scheme managed by a pension fund to which affiliation might have been compulsory. However, as the Court pointed out, this agreement was aimed to *guarantee a certain level of pension for all workers in that sector*, thus improving their working condition.⁷⁸ As a condition, according to the Court, such an agreement falls outside the scope of Article 101 TFEU.⁷⁹

This approach, which, more recently, was confirmed by the ECJ also in the *FNV Kunsten* ruling,⁸⁰ clearly introduced a policy element into the ECJ's reasoning and this was plainly supported by the EU Treaties. Therefore, given the above-analysed Treaties provisions aimed at reaching a high level of environmental protection, together with the consistent policy lines endorsed by the Commission with the Green Deal and the signing of the Paris Agreement, there are no obstacles to exempting agreements directed at pursuing environmental-friendly goals.⁸¹

An alternative way for assessing sustainability clauses in the competition law realm is that of evaluating them as 'ancillary restraints'. These are defined by the Commission itself as *restrictions [...] which do not constitute the primary object of the agreement, but are directly related to and necessary for the proper functioning of the objectives envisaged by agreement.*⁸² Although this possibility has not been tested in Court yet, it is highly unlikely that, under the current policy scenario, a Court would not accept a grounded environmental justification contained in an ancillary agreement.⁸³

⁷⁷ *Ibid.*, para. 59.

⁷⁸ *Ibid.*, para. 63.

⁷⁹ *Ibid.*, para. 64.

⁸⁰ European Court of Justice, decision 4 December 2014, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*. See S. Holmes (2020a), 17, footnote no. 36.

⁸¹ M. Dolmans, *op. cit.*, 29.

⁸² European Commission, Glossary of terms used in EU competition policy, 2002, <https://op.europa.eu/it/publication-detail/-/publication/100e1bc8-cee3-4f65-9b30-e232ec3064d6>, accessed: 30 May 2023. Please note that although this publication has been archived, it proves still helpful for defining key competition law terms.

⁸³ S. Holmes (2020a), 18.

However, these last two parallel routes rely on a case-by-case assessment of every single agreement's merits, and they may well function with reference to single cases, also in a large number of them. Anyhow, they do not establish a sort of 'level playing field', a complete and objective guide, on which firms may firmly rely while running their business. Therefore, these two routes may reinforce the arguments in favour of an agreement needed for sustainability purposes, or they might be used in particular cases, but a complete shift would not occur if firms may however incur the risk of having Article 101 TFEU applied to 'green' agreements. Consequently, to achieve the necessary degree of legal certainty to establish a proper market where firms can compete in order to deliver 'greener' products, other paths have to be followed, such as the analysed Article 101, paragraph 3, TFEU exemption and the standardisation agreements option.

III Practical examples of sustainability-oriented practices in competition law

In order to put into practice the possibility to reach environmentally friendly results also through competition law, competition Authorities must take initiatives oriented at promoting sustainability-oriented business initiatives.

A first step in this direction is providing firms with precise guidelines on the activities they can perform in order to 'green' their processes and production. In this sense, in March 2023 the European Commission opened a consultation regarding a draft revised version of the Horizontal Block Exemption Regulations and the related Guidelines.⁸⁴ The definitive version of these legislative instruments and guidelines should follow soon.

Also, the Dutch Authority for Consumers & Markets 2014 issued a 'vision document' on competition and sustainability.⁸⁵ In 2020 it published draft guidelines on sustainability agreements,⁸⁶ whilst in 2021 a clarification about the notion of 'fair share' for consumers was released.⁸⁷ These documents are of

⁸⁴ European Commission, Antitrust: Commission invites comments on draft revised rules on horizontal cooperation agreements between companies, 1 March 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1371, accessed: 30 May 2023.

⁸⁵ Dutch Authority for Consumers & Markets, Vision Document on Competition & Sustainability, 9 May 2014, https://www.acm.nl/sites/default/files/old_publication/publicaties/13077_vision-document-competition-and-sustainability-2014-05-09.pdf, accessed: 30 May 2023.

⁸⁶ Dutch Authority for Consumers & Markets, Draft Guidelines on Sustainability Agreements.

⁸⁷ Dutch Authority for Consumers & Markets, What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?.

particular importance, as they will provide firms with an inside information of how competition Authorities will interpret certain concepts and issues related to sustainability-enhancing agreements.

The Hellenic Competition Commission, as well, issued a comprehensive staff discussion paper on this matter.⁸⁸ Moreover, the same Greek Authority and the Dutch ACM commissioned a technical report on sustainability and competition law published in January 2021.⁸⁹

The German *Bundeskartellamt* drafted a working paper on *Sustainability and Competition* for the 2020 OECD Competition Committee meeting,⁹⁰ and the UK Competition & Markets Authority, after having affirmed that a focus for the 2021/2022 term will be placed on *supporting the transition to a low carbon economy*,⁹¹ issued guidance where the CMA's approach to sustainability agreements is delineated and useful guidelines for businesses are provided.⁹²

Another option, also suggested by the European Commission, is the adoption of a so-called 'regulatory sandbox',⁹³ which consists of a structured context where innovative technologies, solutions or approaches can be tested for a limited time under the supervision of a regulatory authority that ensures that the necessary safeguards are in place.⁹⁴ In this sense, the Hellenic Competition Commission

⁸⁸ Hellenic Competition Commission, Competition Law and Sustainability.

⁸⁹ R. Inderst, E. Sartzetakis, A. Xepapadeas, Technical Report on Sustainability and Competition, report commissioned by the Dutch ACM and the Greek HCC, January 2021, https://www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/2165_f998b905c20c0426f068e512186c6ec4.html, accessed: 30 May 2023.

⁹⁰ Bundeskartellamt, Sustainability and Competition – Note by Germany, 27 November 2020, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2020/OECD_2020_Sustainability_and_Competition.pdf?__blob=publicationFile&v=2, accessed: 30 May 2023.

⁹¹ CMA consults on Annual Plan 2021/2022, 3 December 2020, <https://www.gov.uk/government/news/cma-consults-on-annual-plan-2021-22>, accessed: 30 May 2023.

⁹² Competition & Markets Authority, Guidance on Environmental sustainability agreements and competition law, 27 January 2021, <https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law>, accessed: 30 May 2023.

⁹³ European Commission, Competition Policy in Support of Europe's Green Ambition, 3.

⁹⁴ See the definition provided by the Council of the EU, Regulatory sandboxes and experimentation clauses as tools for better regulation: Council adopts conclusions, 16 November 2020,

created a Sustainable Development Sandbox.⁹⁵ The sandbox solution shall be regarded as a particularly ambitious and functioning one, as it allows competition Authorities to explore new approaches in a safeguarded environment.

IV Conclusion

This article affirms the necessity that competition law plays a role in the green transition, being required by the 'constitutional' provisions contained in the EU Treaties. However, while analysing the various possibilities for implementing sustainability-related concerns through the current competition provisions, and especially Article 101 TFEU, a tension between the 'social' and the 'economic' soul of competition law emerged. This does not happen by chance, as this clash, back in 2015, led to the contradictory assessment issued by the Dutch ACM – one of the most progressive competition Authorities about sustainability issues – in the *Chicken of Tomorrow* case.⁹⁶ The issue involved an initiative put forward by supermarkets and firms active in the poultry market to set a minimum standard related to the chickens' 'animal welfare'. This agreement would have led to the replacement of the 'ordinary' chickens with the so-called 'Chicken of Tomorrow'. Anyhow, after having carried out a willingness to pay analysis, the ACM established that the consumers' willingness to pay was not enough to justify the increase in chickens' prices that the arrangement at stake would have caused. Consequently, the ACM held that the positive aspects of the 'Chicken of Tomorrow' initiative did not outweigh the reduction in consumer choice (as consumers would not have the possibility to buy 'ordinary' chickens anymore)

<https://www.consilium.europa.eu/en/press/press-releases/2020/11/16/regulatory-sandboxes-and-experimentation-clauses-as-tools-for-better-regulation-council-adopts-conclusions/>, accessed: 30 May 2023. See also the definition provided by the European Commission, Competition Policy in Support of Europe's Green Ambition, 3, footnote no. 7.

⁹⁵ Hellenic Competition Commission, Public consultation: Proposal for the creation of a sandbox for sustainability and competition in the Greek market, <https://www.epant.gr/en/enimerosi/sandbox.html#diavoulefsi>, accessed: 30 May 2023; see also the relevant press release, 13 July 2021, <https://www.epant.gr/en/enimerosi/press-releases/item/1471-press-release-public-consultation-proposal-for-the-creation-of-a-sandbox-for-sustainability-and-competition.html>, accessed: 30 May 2023. The website of the Sustainable Development Sandbox is available at <https://sandbox.epant.gr/en/>, accessed: 30 May 2023.

⁹⁶ Dutch Authority for Consumers & Markets, ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow', 26 January 2015, case ACM/DM/2014/206028, https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf, accessed: 30 May 2023. See also I. Lianos, *op. cit.*, 26-28; G. Monti, J. Mulder, *op. cit.*, 639-641.

and the related increase in prices.⁹⁷ In addition, the ACM stressed that instead of setting a minimum standard, consumers should have been informed more properly about the chickens' welfare by means of appropriate labelling, a measure which is regarded as less restrictive of competition.⁹⁸ This case clearly shows the tension between the price-centric dimension of competition law and its 'multi-value' one. What is clear is that in order to make a fruitful step towards a more sustainable approach to competition law, aspects not related to the price shall be attributed much more importance in the competitive assessment of the single cases. In this sense, guidance for firms is necessary, and the issuance of progressively more detailed guidelines – as done by the UK CMA, the Dutch ACM, the Greek HCC, and, finally, the European Commission – represents the best solutions. In addition, solutions like the analysed regulatory sandboxes appear necessary, as well.

However, at the basis of all this shall lie the paramount belief that competition law is included in a broader policy environment and that, as pointed out by the European Commission itself, the consumer welfare standard (European version) *pertains not only to price reduction, but also to quality and innovation*.⁹⁹ In light of this and taking into account the whole analysis conducted in this Article, it appears clear how the inclusion of environmentally oriented goals in competition law, in accordance with a 'multi-value' approach to this subject, is not an abstract academic call, but a needed policy shift to safeguard – and urgently – our planet, and a legal requirement included into the EU's foundational Treaties.

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Povratak Ugovorima: ka "održivom" pravu konkurencije

Rezime

Pravo konkurencije je, naročito nakon Čikaške škole, često posmatrano kao politika koja je zainteresovana samo za ostvarivanje ekonomske efikasnosti, pa je u skladu sa tim ponekad i primenjivana. Međutim, poziv da se pobojša, ako ne i

⁹⁷ Dutch Authority for Consumers & Markets, ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow', 6.

⁹⁸ *Ibid.*, 7.

⁹⁹ European Commission, Competition Policy in Support of Europe's Green Ambition, 5-6.

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spase, životna sredina postao je hitan za naše ekonomske, društvene i pravne sisteme. Stoga svaka politika, uključujući i pravo konkurencije mora odigrati svoju ulogu, jer zaštita životne sredine predstavlja ključnu vrednost ustavnih osnova naših društava. U kontekstu prava konkurencije ovo znači dozvoljavanje sporazuma o održivosti koji imaju za cilj postizanje ekološki prihvatljivih ciljeva, kao što su novi ekološki proizvodi ili proizvodni procesi. To se može postići na različite načine, a naročito putem izuzeća predviđenog u članu 101(3) Ugovora o funkcionisanju Evropske unije. U radu su analizirani različiti pristupi koji mogu dovesti do inovativne i ekološki prihvatljive primene prava konkurencije, imajući u vidu da je uključivanje ovih pitanja u ocenu prava konkurencije ukorenjeno u "više vrednosni" pristup konkurenciji koji je zahtevan Osnivačkim ugovorima EU. Ovaj član potvrđuje neophodnost da pravo konkurencije igra ulogu u zelenoj tranziciji, budući da to zahtevaju "ustavne" odredbe sadržane u Ugovorima EU. Tako se pojavila tenzija između društvene i ekonomske duše prava konkurencije.

Ključne reči: konkurencija, pravo, UFEU, čl. 101, održivost.

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