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Sustainable development: What role for competition policy? (New Frontiers of Antirust, 3 Nov. 2020)

ENVIRONMENT, ENVIRONMENT PROTECTION, COMPETITION POLICY, CONSUMER WELFARE, GENERAL ANTITRUST

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Does welfare include the green factor? Integration of sustainability into competition law

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1. The ultimate point of interest for competition law is welfare, which can very basically be defined as everything that makes human beings happy and ensures their well-being. Historically, competition law practitioners have been inclined to adopt a narrow interpretation of consumer welfare, postulating a direct correlation between welfare and monetary value. However, the plight of our planet and the environmental crisis urgently mandate us to abandon this approach and focus on a bigger picture-a sustainable picture, that is. Assuming that sustainability goals are not directly related to economic growth and welfare issues would be disregarding the fact that these goals ensure sustainable economic growth patterns in the long term. There is very little doubt that, in the contemporary agenda, sustainability goals possess a social and political nature. Yet, this does not preclude the sustainability goals from being right at the very heart of the economic goals of competition law, a fact which the competition enforcers and practitioners are coming to realize, at long last. It is clear that, the way our industries are built, sustainability has the potential to give rise to cost inefficiencies in the short term. However, it is also beyond any doubt that in the mid- to long-term, sustainable business models will generate vital efficiencies. As such, this article argues that competition law and antitrust enforcement should be used as vehicles to promote sustainability. In accordance with the European Green Deal, the European Union (EU) is taking steps to ensure sustainable development. These new legislative movements towards environmentalism have also influenced the EU competition law policy, as the stakeholders now argue that the most vital instrument towards achieving such a goal would be to incentivize undertakings. This can be achieved by providing clarity through illustrative guidelines on what would be permissible from a competition law perspective, in order to reach the goals of sustainability. As the pioneer in the integration of sustainability into competition law policy, the EU's lead will surely inspire many other competition law policy makers in other jurisdictions to take similar steps to achieve such goals.

2. In particular, at first glance, issues concerning sustainability seem to be irrelevant to competition law matters, due to their non-economic façade. However, when examined in-depth, the two concepts actually intersect at the point where competition law's ideal of consumer protection and welfare intertwines with the macroeconomics and industrial adaptation of sustainability goals.

3. Sustainability, in the broader sense, is defined as "a*capacity to sustain something (e.g. a person, a system, a habit) for an indefinite period of time*." [*1*] The concept embodies three different but equally important pillars, which are: environment, economy and society. [*2*] This is where competition law comes into play, as the policy makers and industry actors are now expected to consider sustainable economic growth in their decision-making processes. This, in turn, brings forth the discussion on whether "consumer welfare" would also encompass sustainability goals, thus requiring the competition authorities to consider the promotion of sustainable development within the scope of antitrust reviews.

4. From a purely individual utility perspective, the social nature of sustainability goals may give the impression that they do not carry material economic implications. That said, practitioners barely refer to individual utility perspective in their competition law analyses and focus more on general welfare of consumers as a whole. Thus, rather than looking at it from an individual utility perspective, instead the question of sustainability would (and should) be evaluated from a social welfare

perspective. Indeed, if sustainability is deemed to be an economic goal embedded within the consumer welfare standard, then those competition law regulations around the world that have an economic underpinning and a purpose of welfare maximization would be able to adopt the sustainability goals with more ease and precision. From the social welfare perspective, the competition in the markets should be viewed as a process and taking place within a time continuum, rather than a single snapshot of one isolated scene. Along the same lines, considering the evident environmental threat which will show its effects in our day-to-day lives inevitably in the midterm, sustainability goals also demand that we keep a close eye on the path as well as the destination that we are headed towards, instead of focusing on the single snapshot that would misrepresent the environmental impact.

4. In terms of the EU, the legislative framework necessary to achieve such a goal is already engraved in the foundation and therefore, the requirement to adopt a broader perspective in terms of consumer welfare is already called upon by the "constitutional" treaty provisions. Therefore, as Holmes puts it, "*there is no basis for the adoption of a narrow 'consumer welfare' test anywhere in the Treaties - and therefore in EU law (or the analogous national competition regimes in Europe).*" [3], [4]

5. The recent activities of national competition authorities and the Commission show that competition authorities in the EU are lenient and determined towards taking action. Indeed, during her speech at the GCLC Conference on Sustainability and Competition Policy, Margrethe Vestager has explained the interlaced relations between competition law policy and sustainability goals, as follows: [5] "*After all, competition helps to make us more sustainable. In a competitive market, where there is transparency, businesses can't afford to use more scarce - and expensive - resources than they absolutely need. And competition also helps to drive innovation, and expand our society's stock of ideas and technologies that help us live more sustainably. But most importantly, perhaps, competition means that businesses have to listen to consumers, when we demand sustainable products.*"

6. Within the EU Member States, the Netherlands Authority for Consumers and Markets (ACM) has very recently published the draft Guidelines Regarding Sustainability claims for public consultation. The draft guidelines provide clarity as well as practical examples on the sustainability claims that would be admissible from a competition law perspective. [6] The Greek Competition Authority (HCC) has also initiated an open dialogue through a public consultation process for adapting the competition law practice to specifically consider sustainable business conduct, via a Staff Discussion Paper and a digital conference launch. [7] Other national competition authorities are also taking further steps to facilitate the integration of sustainability goals, through the inclusion of targets in their agenda that would serve this purpose. The UK's Competition and Markets Authority indicates in its 2020/2021 annual plan: "[W]*e will increasingly devote and prioritise our resources to providing advice and support to government on the impact of policies on competition and consumers in relation to climate change and sustainability.*" [8] Most importantly, the Commission is currently in the process of consulting for the review of its Horizontal Block Exemption Regulations and the Horizontal Co-operation Guidelines, closely scrutinizing to improve the regulations to enable legal certainty for undertakings working to achieve sustainability goals. In scope of the public consultation process, in which 85 stakeholders participated, the need to address sustainability issues within the guidelines was amongst the key trends which the participants consider to be most significant. In particular, the participants considered that the current guidance provided by the Commission was far from sufficient in providing clarity or comfort, in terms of what would be permissible for attaining sustainability goals for certain types of horizontal cooperation. [9]

7. So, what can be done? It is important to note at the outset that the participation of all industry players is vital. Therefore, even an increased awareness of environmental issues and the need for sustainability adopted by the individual consumer would help better achieve such goals. After all, as Vestager said, the businesses will have to listen to the consumer. That said, those policy makers that shape policy preferences on behalf of societies can go beyond what the cumulative total of each individual consumers' behavior is.

8. Considering the urgency of the matter at hand, it is safe to say that what we currently need most is foreseeability and leadership. For leadership, we need the policy makers' backing and enactment of the appropriate guidelines. In that sense, as mentioned above, we have the legal foundations to tackle sustainability issues already embedded within the legislation. However, to make sure that the undertakings are aware of which conduct would be permissible to achieve sustainability goals or constitute a competition law violation, illustrative guidelines will be imperative for the interpretation of the law and application of the principles.

9. In the sustainability arena, we want the entities to have innovative approaches, be proactive, and come up with solutions to our problems, and for that kind of unfettered thinking, they need a suitable climate to ease the way. Failing this, i.e., if the entities do not have the necessary guidelines or an open climate which would enable them to foresee what can and cannot be done, unsurprisingly they would be left with the consternation that their conduct would be scrutinized by the competition law rules. Therefore, in the face of such doubt, it would not be reasonable to expect undertakings to engage in pro-environmental practices. The conduct in question could be a unilateral conduct, a conduct that contains duality, a unilateral conduct in the form of higher prices to cover environmental costs, it could be making the purchase of one product from a dominant company conditional on the purchase of another environmentally friendly product, or an essential facility to be denied to an entity that is going to use it for environmentally unfriendly purposes, and so on. The assessment of all of these should and does require the existence of guidelines.

10. In this regard, all of the steps taken by the Commission and the national competition authorities in the EU as exemplified above constitute very positive steps towards addressing sustainability goals through competition law practice, specifically by providing guidance for stakeholders in order to better explain the types of conduct that would be permissible, in line with the principle of legal certainty. The revisit of the Horizontal Block Exemption Regulation would surely be a significant step towards building an EU-wide legal framework that would provide clarity on when the cooperation in question would be deemed permissible due to the environmental benefits within the bigger picture. This, in turn, would also inspire other competition law regimes that are akin to the EU competition law regime to take similar steps towards providing legal certainty for sustainable conduct, which could be deemed to be exempt due to efficiencies it generates, through guidelines and/or block exemption regulations.

11. Indeed, in the case of Turkey, where competition law practice mirrors the EU, the legislative foundation to enable the regulatory intervention when it comes to achieving sustainability goals is similar, even if not so apparent. For instance, Article 56 of the Turkish Constitution sets forth that everyone has the right to live in a healthy and balanced environment. In terms of sector-specific regulations, the Electricity Market Law aims for independent regulation and supervision of this market for the purposes of providing sufficient, good quality, uninterrupted, low-cost and environmentally friendly electricity to consumers. Similar examples can be observed in other sector-specific regulations, such as energy, transportation, agriculture, emission trading and so forth. Along the same lines, very recently on December 24, 2020, a new law [***10***] was introduced to establish the Turkish Environment Agency and to make various amendments to other laws, most of which refer to the environmental legislation, the use of packaging deposits, pollution fines, in an effort to preserve the environment. That said, Turkey yet lacks any primary and secondary legislation that specifically addresses the sustainability agenda under the heading of competition law. Since its EU membership application, Turkey has endeavored to align its legislative framework and the application of such, with the EU. Consequently, the Law No. 4054 on the Protection of Competition has been amended very recently on June 24, 2020, and Turkish Competition Law, which already mirrored the EU competition law regime, was brought even closer to EU regulations. Therefore, the EU's pioneering role in the integration of sustainability into the competition law policy, and the concrete steps that have been taken so far, will hopefully inspire other competition law policy makers to take the required steps towards achieving sustainability goals. In this sense, the EU will naturally play the most important role in integrating sustainability goals into competition law analyses and urge other jurisdictions to take the matter to heart.

12. Against this background, sustainability goals, which are indeed embedded in the very heart of the consumer welfare standard, should become the focus of any competition law analyses, to the utmost extent possible. The urgency of the matter requires all stakehol ders, from the single individual consumer, commercial entities, and associations, to the national and international authorities, to take into account any ramifications in sustainability. Thus, it has now become impossible to turn a blind eye to commercial conduct that would result in the exploitation of environmental conduct, or vice versa, from a competition law perspective.

Competition policy supporting the Green Deal

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I. Introduction

1. Over the last eighteen months I have spoken and written widely about climate change, sustainability and competition law. In particular I have been arguing that competition law need not be an impediment to vital action to fight climate change but can be part of the solution. [*13*] I therefore commend the Commission's new initiative on competition policy supporting the Green Deal and welcome this opportunity to contribute (both now and at the conference on 4th February 2021).

2. My views and proposal have been set out in a number of speeches and detailed papers, most notably that on "Climate Change, Sustainability, and Competition Law" published in the *Journal of Antitrust Enforcement (JAE)* in April. [*14*] I provided a high-level overview of where my thinking has got to for the OECD Roundtable on Sustainability and Competition Policy at which I spoke on 1 December. For your convenience, this can be found in the link below: *https://one.oecd.org/document/DAF/COMP/WD(2020)94/en/pdf*.

II. The Committee's questions

[*15*]

3. My OECD note focusses on cooperation between businesses rather than on mergers, abuse of dominant position, State aid or public procurement. [*16*] All these are important and can play a role in combating climate change but my immediate concern is to show that competition law is inhibiting vital collaborative efforts to fight climate change and support the European Green Deal-and that it need not do so.

4. For the same reason it is the Commission's questions on Antitrust Rules to which I wish to reply (as a complement to the above note and cited papers).

5. Before doing so I would emphasise three points that are frequently misunderstood:

- Like the Commission I see competition policy as a complement to regulation which will often (even usually) be the most appropriate tool (but regulation is all too often too slow coming, too limited geographically, and/or lacking in ambition. Business is often ready and willing to go further);

- Secondly, often businesses can compete on the sustainability of their products (which is an aspect of quality) but they will often suffer from a "first-mover disadvantage" (increased costs that they cannot recover from consumers) and the level of sales of such products (even if commercially viable) may not be sufficient to change things on the scale that the Green Deal requires;

- Thirdly, we are talking about genuine efforts to fight climate change and support the Green Deal and the full force of competition law should apply if this is misused. This must not, however, be used as an excuse for inaction on the part of the competition community. [*17*] The distinction is usually clear cut: agreements to reduce the life of a light bulb, or not to compete on environmental characteristics, are almost certainly going to be illegal; agreements to reduce emissions or increase the life of light bulbs are unlikely to be illegal [*18*]-and the parties to any such genuine arrangements should certainly not be at risk of fines (even if on the particular facts it is found that the arrangements did not get through all the hoops).

6. Subject to the above I would respond briefly to the antitrust questions as follows.

1. Examples

7. Most of the instances of cooperation that I have seen are not cases which I consider infringe Article 101 when that provision is properly interpreted with regard to the "constitutional" provisions of the EU treaties, the jurisprudence of the European courts and, above all, the wording of Article 101 itself. [*19*]

8. What I have seen many times is that the sort of cooperation that is vital if the Green Deal is to succeed is impeded, delayed or done in a less ambitious way for FEAR of competition law (even if that fear is, in my view, unfounded).

9. From early 2000 and onwards I did work helping the UK to improve its rate of recycling, reduce the amount of plastic packaging used, and reduce food wastage. This often required cooperation between retailers and suppliers. It is not enough for one retailer to work with several suppliers on systems to reduce packaging and increase recycling as the systems put in place may not work in other retailers. It is not enough for one supplier to work with several retailers on this for similar reasons (retails may find the systems they would put in place would not work for other suppliers). What is often needed is cooperation (with all the usual safeguards) between retailers and suppliers to put industry systems in place. Much progress was made in this area [*20*] but progress was certainly slower and less ambitious than it could have been because of concerns over the possible application of competition law.

10. Another example is efforts to ensure that fish stocks are not depleted. In one instance, I was involved with an initiative involving all major suppliers of a type of fish and most major retailers by which they agreed only to source that fish in a sustainable manner. One major retailer declined to sign up fearing that a competition authority might characterise the arrangement as a collective boycott of suppliers sourcing fish in an unsustainable manner. Looking at the detailed safeguards in the system it was clear that that would not be an appropriate characterisation of the arrangement-and I was satisfied that the risk of enforcement action was minimal. Again, it was a misplaced FEAR of competition law that was impeding the sort of cooperation that is vital if the Green Deal is to succeed and Europe is to develop in a sustainable manner.

11. Talking to European businesses (for example as a member of the International Chamber of Commerce (ICC)'s Global Competition Commission) I am aware that across many industries there are many examples of situations where cooperation between businesses is vital (but where there is a risk that they may be caught-or perceived to be caught-by competition law) but which should be allowed to proceed (either because they should not be caught at all or because they should be exempt). Many such examples have been brought to the Commission's attention in the course of its consultation on the Horizontal Guidelines. For convenience I would draw to your attention some example drawn from the submission by Unilever. These are *attached as Annex B to this Article*.

2. Clarification

12. Yes, there is an urgent need for clarification and comfort to be given as to:

- The fate of agreements that the competition authorities are not likely to challenge (as a matter of enforcement priorities);
- The fate of agreements/provisions that are likely to escape the Article 101(1) prohibition completely;
- The sort of agreements that, if caught by Article 101(1), are likely to meet the conditions of Article 101(3); and
- The circumstances in which the authorities will not impose fines (even if an agreement is, on examination, caught by Article 101(1) and is not exempt under Article 101(3)).

13. The best way of doing this is by guidance on enforcement priorities, and the approach to Article 101(1) and 101(3) in the context of cooperation agreements to fight climate change or otherwise support the Green Deal. In this respect the competition authorities could draw on the commendable approach which they took to Covid-19. If we can do this to fight one (hopefully short term) crisis, why cannot we show the same resolve in the face of an existential threat like climate change? [*21*]

14. This should be supplemented by regular statements from the Commission on the basis of real-life experience of cases brought to it (whether this takes the form of a press release, speech, or exceptionally an Article 10 decision [*22*] is a secondary consideration). [*23*] At present there is a serious asymmetry: business hears (quite rightly) what cannot be done but rarely hears what can be done. This needs to be rectified as quickly as possible.

15. I am wary of doing this by means of a block exemption for cooperation agreements to support the Green Deal. In theory that would be the best approach. However, I fear that any such block exemption would be very narrowly drawn (particularly as the Commission does not yet have extensive experience of such cooperation). There is therefore a risk that any such block exemption does more harm than good in that business will tend to assume (often wrongly) that anything outside the block exemption risks infringing Article 101 and being subject to enforcement action. There may be some scope for a block exemption for a particular category of cooperation agreement such as standardisation agreements. However, if a block exemption attempted to cover cooperation agreements supporting the Green Deal more widely, it should be made very clear that many other agreements are likely to escape Article 101(1) or be exempt under Article 101(3) on a case-by-case basis (and this should be accompanied with guidance-similar to that which accompanies the VBER at present). [*24*]

3. Beyond current enforcement practice

16. Taking the last question first, there are compelling legal, economic, political and moral reasons to differentiate between cooperation to fight climate change and support the Green Deal from other policy objectives (however laudable they may be):

- First, climate change is an existential threat and of a different order of concern to all the other issues (important as they may be [25]). There is a moral and economic imperative to mobilise all policy tools to combat this.

- Secondly, that is precisely why the EU has (quite rightly) launched the Green Deal and both the Commission and the European Parliament have made that their number 1 priority. That means there is a political reason to single out cooperation to achieve Green Deal objectives.

- Thirdly, there is a good legal basis for this:

(i) Article 11 TFEU makes it clear that "environmental protection" must be taken into account when applying all EU policies to promote sustainable development. There is no exception for competition policy; [26]

(ii) Article 191(2) TFEU mandates that EU policy on environmental sustainability should be based on the "precautionary principle" and requires that the EU takes all appropriate measures to prevent risks to the environment "*by giving precedence to the requirements related to the protection of those interests over economic interests*"; [27]

(iii) In the light of the EU's commitments under the Paris Agreement, Articles 2 and 8 of the EU Charter of Fundamental Rights (as rightly interpreted by the Dutch Supreme Court in the *Urgenda* case), the EU could be in breach of its international obligations if it did not integrate climate change and environmental protection into competition policy. [28]

17. I turn now to the Commission's first two questions.

18. Yes, there are circumstances in which the pursuit of Green Deal objectives would justify "restrictive agreements" [29] beyond current enforcement practice.

19. This does not imply that we need a change in the law. In most cases it is simply a question of applying the law as set out in the treaties as interpreted by the CJEU. In particular, if we need to heed the actual wording of Article 101(3) and apply it as it is written noting, for example, that the first condition of Article 101(3) does not just refer to promoting "economic" progress but also to "improving production," "improving distribution" and promoting "technical progress"-all elements that can easily accommodate many cooperation agreements in support of the Green Deal. We should focus on this and not lapse into lazy shorthands like "pro-competitive" factors or get lost in vague and arcane imported concepts like "consumer welfare" that are to be found nowhere in the treaty [30].

20. Similarly, in the second condition of Article 101(3) we should focus on the "benefits" to consumers and not conflate this broad term with the narrower and more limiting idea of "efficiencies"-again a word that does not appear anywhere in Article 101(3) (important as it may be).

21. That said, there is one area in particular where I see important reasons to go beyond current enforcement practice and that is in the approach to the concept of the "consumers" who must get a "fair share" of the "benefits" referred to in the first condition of Article 101(3) referred to above.

22. At times it is suggested that this means just the immediate purchases of a particular widget. However, this cannot be right for a number of reasons (set out on pages 21 and 22 of my *JAE* paper). In particular a much wider group of citizens benefit from environmental improvements flowing from an agreement than just the particular purchasers of an individual product (and environmental benefits have been recognised as "benefits" in the sense of condition 1 in a number of cases-most notably the European Commission's excellent decision in the "washing machine" or *CECED* case [31]). It is essential

that we give proper weight to what really matters. If we do not, we will ask the right questions but get the wrong answers. What weight should we put on a product (which perhaps we do not need at all) costing one euro cent less? And what weight do we put on having clean air to breathe or leaving our grandchildren a planet worth living on? [32]

23. In this context I would strongly commend the draft guidelines on sustainability agreements published by the Dutch competition authority (ACM) in July 2020. [33] In particular it makes three excellent observations/innovations:

- It makes a brave attempt to single out "environmental damage agreements" [34] for a more flexible treatment when it comes to the question of a "fair share for consumers" (paras. 38 to 39);

- It recognises that consumers are responsible for the environmental damage which their products cause-and that it is therefore 'fair' if they are not fully compensated for any price increase that might result from an agreement designed to mitigate that environmental damage (para. 41); and

- It recognises that we do not need to quantify everything in life (paras. 45 to 48). In my view economics is a very valuable tool and it can often be helpful to use all available data. However, ultimately most questions in competition law (and law more generally) are a matter of weighing up all the quantitative and qualitative evidence and coming to a judgement based upon that evidence.

24. If I were to make one criticism of the ACM paper, it is that one of the conditions for its more flexible approach to "environmental damage" agreements is that they help comply with "*an international or national standard to prevent environmental damage to which the government is bound.*"As, in many instances, neither the EU nor national governments are legally "bound" to meet a particular environmental standard (or there is some dispute as to this), it should be sufficient if the cooperation agreement contributes in an efficient manner to supporting the Green Deal.

III. Conclusion

25. I have long argued that competition policy need not be a barrier to vital cooperation to fight climate change. I therefore welcome wholeheartedly this initiative to explore how competition policy can best support the European Green Deal and hope my work can contribute to the Commission's thinking.

Competition law and sustainable development: Opportunities with constant law

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Introduction

1. Sustainable development, i.e. development that meets the needs of the present without compromising the ability of future generations to meet their own needs [35], is one of the major challenges facing our societies. The European Commission says no more when it bases the European industrial strategy on a digital and ecological transition [36].

2. In recent months, the competition law community has taken up the debate on what competition law can do in the fight against global warming and, more broadly, in the promotion of sustainable development. This topic has been brought to the forefront by the Dutch authorities [37] and the Greek authorities [38].

3. It is now a given that each player must "do its part", including, as the Executive President of the European Commission, Margrethe Vestager, pointed out, the competition authorities. [39] . In this perspective, a competition authority, a gardener and not a landscaper [40], must first and foremost consider what it can do under existing law.

4. Competition and sustainable development are not incompatible in principle, far from it. Competition is a source of efficiency, which contributes to sustainable development [41]: productive efficiency, which optimises the use of resources; allocative efficiency, which allows consumers to benefit under the best conditions from products that respect sustainable development; dynamic efficiency, which stimulates innovation and can create opportunities to face the challenge of the climate crisis.

5. Of course, the competitive game can lead to giving priority to short-term competitiveness considerations to the detriment of sustainable development considerations. Faced with such a market failure, forcing companies to comply with regulations could be an appropriate response, but it also has limits in practice (time required to implement the standard, asymmetry of information, resources required, *etc.*). Competition law can then also play a role.

6. To do so, the place of sustainable development, which is an objective of the Union [42], in competition law must however be clarified beforehand. Some authors consider that sustainable development should be made an objective of competition law, alongside consumer welfare (or even replacing it with the welfare of the citizen). [43] . Others consider that only consumer welfare, strictly understood, should prevail and any consideration of the impacts of an undertaking's behaviour outside the relevant market (externalities) should be excluded, unless the authorities are given the task of arbitrating between different objectives, which would be either impossible or too difficult to undertake without depriving competition law of its useful effect [44].

7. An intermediate position is, however, possible. The objective of competition law is the welfare of consumers and, when questions of interpretation arise, it must take into account the objectives of the Union, including the objective of sustainable development [45]. Where the implementation of competition law will not be sufficient to meet the objective of sustainable development, it will have reached the limit of its contribution under constant law.

8. This interpretation is fully consistent with Articles 7 and 11 TFEU and Article 27 of the Charter, which require the Union to ensure coherence between its various policies and actions, taking into account in particular the objectives of sustainable development. It is also consistent with the idea of a "*reboot* rather than a *reset*" of the law presented by Margrethe Vestager in a recent speech, referring in particular to digital and sustainable development [46].

9. However, this approach can be a source of significant questioning. In particular, sustainable development tends rather to affect quality on the one hand, and to have a role in a long-term competitive or even dynamic analysis on the other. Therefore, integrating it into the reasoning leads to a greater focus on the role of non-tariff elements and to moving more frequently beyond a static and short-term view in competitive analysis. None of this, however, calls into question the place of consumer welfare.

10. Within this framework, a competition authority can, first of all, integrate sustainable development into its traditional analyses (I.), secondly, further develop certain reflections on the application of competition law (II.) and, finally, question its strategy (III.).

I. Sustainable development as a classic competition parameter

11. Sustainable development undoubtedly enters into the competitive analysis as soon as it constitutes a classic parameter of competition. With an ever-increasing demand for "greener" or "responsible" products, companies are led to make sustainable development an element of quality in their products. In these circumstances, sustainable development becomes a parameter of competition: on this or that aspect, it is taken into consideration by consumers and by companies active on the market.

12. Corporate strategies in the face of sustainable development issues can then take two main directions that structure the type of response that competition law can offer: negative strategies in terms of sustainable development (1.) and positive strategies in terms of sustainable development (2.).

1. Negative behaviours

13. As they may do with other characteristics of their products, undertakings are likely to limit competition by addressing a sustainable development aspect when it constitutes a parameter of competition.

14. It does not address situations where sustainable development is an excuse for traditional anti-competitive behaviour, such as a price cartel, as was the case in the so-called "detergents" case [*47*]. The unsustainable behaviour referred to here relates in particular to innovation, diversity and product quality.

15. Among these behaviours is the fact that companies may seek to limit innovation (the incentive and capacity to innovate but also the objective of innovation) even though it would be conducive to sustainable development. One can think of the risk of predatory acquisitions pointed out in particular by the Spanish authority [*48*]. As regards the prohibition of cartels, the case of Volkswagen, Daimler and BMW - which would have limited the use of emissions-reducing technologies and thus deprived consumers of the opportunity to buy less polluting vehicles - for which the Commission sent a statement of objections in April 2019, is a good example [*49*]. Finally, as regards abuses, in its Decision No 17-D-16 of 7 September 2017, the Authority accepted, for example, Engie's commitment to remove the operator's obligation for new co-ownerships to use gas as their sole energy source, thereby preventing co-ownerships from benefiting from the development of efficient energy solutions combining renewable energy and gas [*50*].

16. Firms may also seek to limit competition on the sustainability qualities of their products. These may relate to environmental performance, for example, or, conversely, to the hazardousness of products. In particular, by limiting transparency on these qualities, companies are likely to inhibit a more or less decisive factor of competition, depending on the economic and legal context. For example, in its Decision No 17-D-20 of 18 October 2017 on floor coverings, the Authority found the agreement by which undertakings refrain from disclosing on the basis of the individual environmental performance of their respective products [*51*] to be anti-competitive by reason of its object.

17. Undertakings may still engage in behaviour aimed at limiting the development of competing products or the enactment of binding standards, including, in certain circumstances, behaviour towards public authorities [52].

2. Positive behaviours

18. Conversely, players can adopt positive behaviours in terms of sustainable development that do not pose a problem in the competitive field. If work is needed to further clarify these situations, a non-exhaustive portrait can be drawn up here [53].

19. These are first of all cases in which competition law is not intended to apply, for example where the perpetrators of the conduct are not undertakings within the meaning of competition law, where the activity does not have the characteristics of an economic activity because it is strictly limited to environmental protection, where the conduct is carried out by undertakings deprived of their autonomy of conduct, *etc.*

20. It then covers all situations in which an analysis can easily establish that the conduct is not likely to constitute a restriction of competition even though sustainable development is a relevant competition parameter.

21. In this respect, the European Commission has already provided some very relevant analytical frameworks for assessing such conduct where it is likely to fall within the scope of Article 101 :

- First of all, agreements falling within the scope of the *de minimis* notice are lawful. [54] ;
- agreements which fulfil the conditions for falling into the category of standardisation agreements as developed by the Commission in its guidelines on horizontal cooperation agreements are also lawful [55] or, as the Commission wrote in its 2001 Guidelines, *'agreements defining the environmental performance of products or processes that do not appreciably affect the diversity of products and production in the relevant market, or that have only a minor impact on purchasing decisions'*. [56] . A good example of this is the agreement on the conditions for rearing pigmeat validated by the Dutch authority. Despite a temporary and possible increase in the upstream price, supermarkets remained free to set downstream prices and meat meeting other farming conditions could be sold *via* other networks [57];
- are still lawful agreements that do not impose "*any specific individual obligations* (...) on the *parties or* [that commit] in *a non-binding manner to an environmental objective set for an entire sector*" [58]. This is the reasoning that the Commission followed in 1998, for example, when it considered that the European Automobile Manufacturers' Association could set an average CO2 reduction target for all its members, with each being free to choose its own level of reduction and its own method of achieving it [59];
- Finally, "*agreements that lead to genuine market creation, such as recycling agreements*, (...) *provided and as long as the parties are not able to carry out the activities concerned in isolation, where there is no alternative or no other competitor*" [60]. The Commission applied this reasoning, for example, in a case concerning the conditions for the collection of packaging in Germany [61].

II. Sustainable development as an opportunity to deepen competitive analysis

22. In many situations, sustainable development is present in the legal and economic context but is not a competitive parameter easily captured by conventional analytical tools, which can however be improved.

23. At this stage, and without claiming to be exhaustive, we can cite the following three examples, which are not specific to sustainable development but are frequently encountered in it: the problems of valuing long-term and dynamic considerations (1.), the limits linked to behaviour not envisaged by the economic tools traditionally mobilised by competition authorities (2.) and the presence of externalities (3.). Numerous theoretical reflections are underway on these subjects and will undoubtedly make it possible to outline a methodology for a better understanding of these phenomena without altering positive law [62].

1. Valuation of long-term or dynamic bills of exchange

24. Competition law does not focus solely on the static and short-term effects of behaviour. It is also concerned with the long-term and dynamic effects of behaviour, for example in relation to pricing practices (long-term examination of the effects of price reductions, which are favourable to consumers in the short term) or where it preserves the incentive to innovate (e.g. in relation to refusal to supply or merger control).

25. However, the competitive analysis could be further developed in some cases. Examples include the need to take better account of diversity in innovation or the fact that certain objectives of innovation, such as more environmentally friendly innovation, need to be considered with more attention, as the Commission's decisions in the recent *Dow/DuPont* [63] and *Aurubis/Metallo* [64]. It might also be worthwhile to clarify or re-examine the motivations for undermining the value of a future gain on the grounds that it is remote in time [65]. Finally, when the question of long-term effects or a dynamic perspective arises, a reflection on the likely evolution of what the consumer of tomorrow is likely to be could also be relevant. On these topics, the objectives set by the political authorities will be of great help.

26. Furthermore, a difficulty of analysis concerns the limit of the expression of current demand, as consumers tend to value a current profit gain or reduction, such as a price reduction for example, more than a longer term profit gain or reduction, such as a healthier product for example ("*hyperbolic discounting*"). This fact is particularly sensitive in the case of sustainable development considerations, which often require long-term analyses or the assessment of dynamic effects (e.g. air or water pollution issues). Taking this limitation into account is possible: there is nothing in competition law to prevent this effect from being corrected [66]. But it is a difficult exercise. At the very least, it will be necessary to explore the possibility of other discounting methods than systematically reducing the nominal value of the future gain. [67] .

2. The limits linked to the actors' behaviour

27. As can happen with the use of private data, for example, consumers are concerned about the environment and sustainable development, but do not necessarily reflect this commitment in their purchasing behaviour. While it may include "*hyperbolic discounting*", this "eco-paradox" goes far beyond it, particularly because it also targets short-term situations. This can be explained by various factors. Rationally, consumption compatible with sustainable development can be perceived as inefficient if it remains individualistic. More irrationally, different biases exist, such as habit or fear of change [68].

28. The authorities' competitive analyses are based on the premise of an economically rational undertaking which, therefore, necessarily acts optimally to maximise its profits. Although companies are nowadays widely called upon to act in the area of sustainable development, some are fully committed to doing so, even departing from the classic behaviour of the economically rational company. Some of them are even pursuing a non-economic objective [69], forming cooperative societies of collective interest, mission-based enterprises, social and solidarity-based enterprises, etc. Others have profitability ceilings, redistribution objectives, etc .

29. The tools traditionally used by competition authorities do not always make it possible to identify these phenomena and therefore, *a fortiori*, to assess them. Current discussions may lead to the use of new tools. One of the avenues to be explored is how competition law should deal with behaviour that is part of the strategies of companies that are not purely economic, and how they should be distinguished from disguised forms that are aimed solely at "greening" otherwise anti-competitive behaviour.

3. Taking externalities into account

30. Sustainable development issues often lead to a focus on situations in which non-market gains are linked to behaviour that is otherwise problematic in competitive terms. In such situations, there are positive externalities (reduction of air pollution, preservation of biodiversity, etc.) that do not constitute a parameter of competition on the relevant market, either directly through their internalisation (*via* taxation for example or by taking into account the polluter-pays principle in the analysis), or indirectly through their valuation by consumers in terms of product quality (so-called "responsible" products for example).

31. A first question relates to the possibility, as a matter of constant law, of taking these externalities into account. Different tools are then possible [70]: ancillary restrictions, objective justifications and, finally, efficiency gains, on which the following developments focus. Several approaches exist in this respect.

32. In a first approach, the core of the problem would be to determine what definition should be given to the notion, contained in Article 101 § 3 TFEU, of "fair share" of the gains which must accrue to users. Several answers seem possible: (i) a broad view in which all gains can be captured, including non-market gains - then burdens the burden of establishing that a "fair" share accrues to consumers harmed by the restriction [71]; (ii) a narrow view in which only those gains that benefit consumers suffering the restriction of competition can be considered in assessing whether they compensate for the restriction, so that full compensation of consumers in the market is required [72]; (iii) a median view in which all gains can be taken into account and the 'fair' share of the benefits to consumers suffering from the restriction of competition must be established, which is the case either only in certain limited situations [73] or, more openly, if expert evidence of 'fairness' is sufficiently robust [74].

33. In a second approach, the core of the problem of externalities is shifted to focus on the definition of the term "user". Indeed, some consider that one of the avenues to be explored is to check whether the user referred to in Article 101(3) should not be given a broader definition, or even a different one from the notion of consumer in the relevant market [75].

34. In practice, the question will be understood differently depending on whether or not a text specifies the obligations of companies in terms of sustainable development. When a text exists and sets an objective, it is possible to consider that the question of the trade-off between protecting welfare in the market and pursuing sustainable development objectives will have been settled. The Authority, in its role as "gardener", can then intervene without ambiguity as to the legitimacy of its intervention and proof can be facilitated. The same applies when the text has already been adopted but has not yet entered into force. Conversely, where no text provides for obligations on undertakings or where the behaviour goes well beyond the prescribed obligations, the fact that undertakings take on externalities will lead the Authority to balance distinct legitimate interests, namely injured consumers and non-market gains.

III. Sustainable development as a strategic priority

35. Beyond the questions relating to the substance of the analysis, the question of a competition authority's operational strategy in the face of sustainable development issues may arise.

36. The Competition Authority has decided to make sustainable development one of its priorities for action in 2021, as was already the case for 2020. It is taking part in the collective reflections on taking climate issues into account within the group of French regulatory authorities [*76*] and is taking part in discussions at the European and international level.

37. Concretely, an authority can discuss, reflect and act. It is for these purposes that a network dedicated to sustainable development has been set up within the Competition Authority since November 2019, bringing together agents who examine cases from different sectoral units. The purpose of this network is to (i) discuss sustainable development issues and the difficulties encountered with the Authority with the various contacts who can shed light on them; (ii) reflect internally by exploring legal and economic issues that may arise, in order to strengthen the expertise and harmonise the practices of the investigation departments; (iii) act by seeking, in different sectors, litigation subjects that are relevant to sustainable development issues.

38. This last point relates to the core business of an authority and is of major interest here. Highlighting examples, whether virtuous or not, is indeed the clearest way to support the self-assessment of companies and to pass on the following relevant messages to them

39. The first message is that companies implementing anti-competitive practices that have a negative impact on sustainable development or using sustainable development as a pretext to harm consumers will be severely punished. In this respect, in its decision in the flooring sector, cited above, the Authority indicated that a practice which has prevented competition based on environmental performance and which may have deterred companies from improving the performance of their products and investing in innovative processes is, by its very nature, particularly serious [*77*].

40. The second message is that the Authority is prepared to assist virtuous enterprises, in the same way as it has shown itself prepared to assist virtuous projects in the context of the Covid-19 health crisis. In its priorities for the year 2021, the Authority has indicated that it will continue to provide support to undertakings which wish to benefit from guidance on this subject, for example when they are considering positive action for the environment.

41. It has been heard for several months that competition law would be a hindrance for some projects related to sustainable development [*78*]. In this respect, an exemption decision would certainly help to change the perception of companies and show that they can implement projects if they are balanced. Until a relevant case arises, the main course of action is paradoxically not to open cases on subjects that the appraisal services think are virtuous. However, in France at least, informal requests from companies on the compatibility of their projects with the competition rules are virtually non-existent and initiatives that have become public and which one might have thought were good candidates for discussion are made without consulting the Authority.

42. It is therefore essential to identify the reasons for the fears expressed, in particular those which genuinely fall within the competence of a competition authority, and all the more so as there seems to be confusion between the need to clarify existing rules and the need to relax them. It will then be possible to respond to the legitimate need for clarification of the rules by specifying what can be clarified without difficulty, to then focus on the most difficult questions and, *in fine*, to provide useful tools for companies in terms of legal predictability.

43. While part of the exercise can be carried out and, as indicated above, has been under way for several months, in particular at the Authority, the fact remains that only by being confronted with the reality of individual cases will the competition authorities be able to gain the expertise needed to establish the relevant rules. Without solid prior experience, there is a risk of having guidelines that are either too general or too cautious. The same uncertainties exist for other tools currently under consideration, such as the guarantee of immunity from fines for environmental agreements that would

ultimately have anti-competitive effects [79] or the possibility of monitoring behaviour during a certain period of immunity [80]. In the meantime, contacts with the authorities are therefore the best option when the planned behaviour is serious but not easy to analyse.

Conclusion

44. To meet the challenges of sustainable development, all competition law must be mobilised. But only competition law can be mobilized by the competition authorities. In the current legal framework, however, the competition authorities can already do a great deal: increasingly, sustainable development is indeed a classic competition parameter and can be integrated into competition analysis for this reason. However, while there is a need to consider the integration of less familiar reasoning that would allow sustainable development considerations to be better taken into account in the current legal framework, competition authorities also need to identify the sources of companies' fears that competition law would prevent them from adopting behaviour in favour of sustainable development. The competition authorities also need to gain expertise on these issues through actual cases, before they can possibly issue general guidelines.

[1] OECD, Sustainability & Competition Law and Policy - Background Note, J. Nowag (Dec. 1, 2020), para. 16.

[2] Ibid, para. 21.

[3] *See* S. Holmes, Climate Change, Sustainability and Competition Law, February 2020, *https://events.concurrences.com/IMG/pdf/simon_holmes_article.pdf*.

[4] *Also see* for instance: (i) Article 3 of the Treaty on European Union sets our EU's objectives as: "*The Union* (. . . .) *shall work for the sustainable development of Europe* (. . .) *and a high level of protection and improvement of the quality of the environment*" and adds that "*it shall contribute to* (. . .) *the sustainable development of the earth*" and to "*free and fair trade*. "(ii) Further to that, Article 11 of the TFEU mandates 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. As such this requirement also applies to competition law as one of the EU's policies. (iii) Lastly, Article 37 of the EU Charter of Fundamental Rights sets forth 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.*".

[5] *See* M. Vestager, Speech, Competition and sustainability, October 2019, *https://wayback.archive-it.org/12090/20191129200524/https:/ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en*.

[6] *See* The Netherlands Authority for Consumers and Markets, Draft Guidelines Sustainability claims, September 2020, *https://www.acm.nl/sites/default/files/documents/2020-09/acm-publishes-for-consultation-its-draft-guidelines-regarding-sustainability-claims.pdf*.

[7] *See* Hellenic Competition Commission, Competition Law & Sustainability, September 2020, *https://www.epant.gr/en/enimerosi/competition-law-sustainability.html*.

[8] *See* Competition & Markets Authority, CMA Annual Plan consultation 2020/21, January 2020, *https://www.gov.uk/government/consultations/competition-and-markets-authority-annual-plan-2020-to-2021/cma-annual-plan-consultation-202021*.

[9] *See* European Commission, Factual summary of the contributions received during the public consultation on the evaluation of the two block exemption regulations and the guidelines on horizontal cooperation agreements, *https://ec.europa.eu/competition/consultations/2019_hbers/HBERs_consultation_summary.pdf*.

[10] Law No. 7261 regarding the Establishment of Turkish Environmental Agency and Amendment of Certain Laws, published in the Turkish Official Gazette dated December 24, 2020, and numbered 31350.

[11] {{*This article is the response made by the author to the European Commission's call on 13 October, 2020 for contributions on a "Competition Policy Supporting the Green Deal".*

[12] He is also an adviser to the NGO ClientEarth; a strategic adviser to Sustainable Public Affairs; a member of the Competition Commission of the International Chamber of Commerce (ICC); a member of the international advisory board of the IDC (Instituto de Derecho de la Competencia); an associate member of the UCL Centre for Law, Economics and Society (CLES); and a founding member of the Inclusive Competition Forum (ICF).

[13] This was kicked off at a conference in April 2019 hosted by the European Economic and Social Committee and we followed this up with a major conference in October 2019 on "Sustainability and Competition Policy: Bridging two Worlds to Enable a Fairer Economy" at which Commissioner Vestager was our keynote speaker.

[14] Climate Change, Sustainability, and Competition Law (*https://lnkd.in/gNVZcVN*). If you would like to read something shorter, *see also* my paper on this topic in the *CPI Antitrust Chronicle* of July 2020 (which contains a collection of papers on "Antitrust and Sustainability") or my short piece on "Consumer welfare, sustainability and competition law goals," *Competition* No. 2-2020, art. No. 93496, *www.concurrences.com*. *See also* Climate Change, Sustainability and Competition Law in the UK, published by the *European Competition Law Review (ECLR)*, *https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_working_paper_cclpl51.pdf*. I would also highly recommend excellent papers by J. Ellison, A Fair Share: Time for the Carbon Defence? (21 February 2020), available at SSRN: *https://ssrn.com/abstract=3542186*, and M. Dolmans, Sustainable Competition Policy, *Competition Law and Policy Debate*, Vol. 5, Issue 4 & Vol. 6 Issue 1 (March 2020).

[15] In its "Call for contributions" (referred to in footnote 1) the Commission asked a number of specific questions on state aid, antitrust, and merger control. Those on antitrust (which are addressed in this article) are set out in *Annex A* to this Article.

[16] The more detailed papers cited in the OECD note also cover abuse of dominance and mergers. My UK paper also looks at how the UK Market Investigation Regime could be relevant (with an obvious read over to any new EU Competition Tool).

[17] We do not ban trade associations or visits to a restaurant by competitors because they might discuss inappropriate matters!

[18] Subject to the scrutiny in the usual way.

[19] *See* the detailed analysis of this in my *JAE* paper of April 2020 and as summarised in my OECD paper cited above.

[20] *See*, for example, the Courtauld initiative in the UK.

[21] See further the discussion of this under "Lessons from Covid 19" on page 396 of my UK paper cited in footnote 3.

[22] Article 10 of Regulation 1/2003 gives the Commission power to take decisions finding that an agreement does not infringe Article 101 TFEU.

[23] I appreciate that is, to a great extent, dependent on business bringing cases to it-and I am certainly encouraging it to do so. In the absence of "real life" examples, it would be good if the Commission were to set out some hypothetical examples.

[24] *See also* Section IX "Some Conclusions and Proposals for Action" in my paper in the *JAE* referred to above. There is a fuller (and more recent) discussion of this in my *ECLR* paper on "Climate Change, Sustainability and Competition Law in the UK" (which includes a section on "Lessons from Covid-19"). Both are cited in footnote 2.

[25] These other issues should be assessed on their own merit on a case-by-case basis applying the law in an open-minded way to see if the relevant legal test is met (e.g., to see if there is an "improvement," "progress" or customer "benefit" in the sense of Article 101(3)). The key point is that, whatever the difficulties may (or may not) be in taking into account other issues and concerns (such as job creation or social objectives), these must not be seen as a reason (or used as a pretext) for not taking into account climate change concerns (where the treaties permit or require this).

[26] Article 11 says: "*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.*" *See also* Article 3(1), 3(3) and 3(5) of the Treaty on European Union; Articles 7 and 9 TFEU; and Article 37 of the EU Charter of Fundamental Rights.

[27] Judgement of the Court of First Instance, 26 November 2002, *Artegodan and Others v. Commission*, Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00, EU:T:2002:283, at para. 184.

[28] Supreme Court of the Netherlands, No. 19/00135 of 20 December 2019. For a fuller discussion of this, *see* the sections on the *Urgenda* decision and Human Rights in my *ECLR* paper on "Climate Change, Sustainability and Competition Law in the UK" referred to in the Introduction to this reply.

[29] The Commission correctly uses the term "restrictive agreements" and not the term "cartel" which some commentators have wrongly used (which will almost invariably be unlawful).

[30] Useful as a concept like "consumer welfare" might be (if properly applied), the key point is that that is not the proper place to start the analysis: that is with what the law actually says. This issue is discussed in my JAE paper (in Section IV on pages 6 to 12 and in Section V at pages 19 to 21) and in my short Competition article on consumer welfare cited in footnote 3.

[31] Commission Decision 2000/475/EC of 24 [illegible] 1999 – Case IV/36.718 – CECED

[31] Commission Decision 2000/475/EC of 24 January 1999, Case IV.F.1/36.718 - *CECED*, C(1999) 5064, OJ L 187, 26.7.2000, pp. 47-54.

[32] For a fuller discussion of this, *see* my paper in the *JAE* referred to in the Introduction to this reply at pp. 21 to 28 and A Fair Share: Time for the Carbon Defence? by J. Ellison (both cited in footnote 3).

[33] ACM, Draft guidelines Sustainability Agreements, 9 July 2020, available at *https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf*. [. NB After this reply was prepared the ACM published on 26 January, 2021, a second draft of its guidelines].

[34] In the current context this could be replaced by the words "agreements supporting the Green Deal" or "agreements supporting Green Deal objectives."

[35] Definition adopted by INSEE.

[36] V. Communication from the Commission, A new industrial strategy for Europe, COM(2020) 102 final, 10 March 2020.

[37] Netherlands Authority for Consumers and Markets (ACM), Draft Guidelines on Sustainability agreements, 2020.

[38] Hellenic Competition Commission (HCC), Draft discussion paper on sustainability issues and competition law, 2020.

[39] M. Vestager, The Green Deal and competition policy, speech, 22 September 2020.

[40] This expression is borrowed from Bruno Lasserre. See e.g. Colloquium, Les PME face au droit de la concurrence, Introductory remarks of B. Lasserre, 22 June 2011.

[41] See e.g. M. Vestager, Competition policy: Time for a reset, OECD Global Forum on Competition, 7 December 2020.

[42] See Articles 3 TEU, 7 and 11 TFEU and 37 EU Charter of Fundamental Rights.

[43] On this point, v. not. S. Holmes, Consumer welfare, sustainability and competition law goals, *Concurrences* No. 2-2020, Foreword, *www.concurrences.com*. V. equals. M. Ristaniemi and M. Wasastjerna, Sustainability and competition: Unlocking the potential, *Concurrences* No. 4-2020, On-Topic Sustainability and competition law, p. 59.

[44] V., in particular, L. Peeperkorn, Competition and sustainability: What can competition policy do? *Concurrences* No. 4-2020, On-Topic Sustainability and competition law, pp. 40 et seq.

[45] This is one of the avenues envisaged by S. Holmes, *op. cit.* See also, e.g., C. Volpin, Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves), *CPI Antitrust Chronicle*, July 2020. See also, e.g., M. E. Stucke, Reconsidering Antitrust's Goals, *Boston College Law Review*, vol. 53, no. 2, 2012, pp. 551-629.

[46] M. Vestager, *op. cit.* note 7.

[47] Comm. eur. of 13 April 2011, *Consumer Detergents*, Case COMP/39579.

[48] CNMC, Contribution to the European Commission Green Deal Consultation, December 2020.

[49] *https://ec.europa.eu/commission/presscorner/detail/fr/IP_19_2008* ↗.

[50] Concordance No. 17-D-16 of September 7, 2017 on practices implemented by Engie in the energy sector.

[51] Aut. conc. dec. no. 17-D-20 of 18 October 2017 on practices implemented in the resilient flooring sector, §§ 438 to 440.

[52] See the precedents cited in Dec. No. 20-D-11 of 9 September 2020 on practices in the treatment of age-related macular degeneration (AMD), § 916 et seq.

[53] See also: Unilever, Sustainability cooperations between competitors & Art. 101 TFEU, 2020 ;

[54] Commission Notice, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union, *OJEU* No C 291 of 30 August 2014, p. 1.

[55] Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, *OJEU* No C 11 of 14 January 2011, p. 1, not. § 280.

[56] Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, *OJ* C 3, 6 January 2001, p. 2, § 186.

[57] *https://www.acm.nl/en/publications/publication/6223/NMa-noobjections-against-agreements-on-the-castration-of-boars-with-the-use-of-anesthesia* ↗.

[58] Commission, supra, note 23, § 185.

[59] *https://ec.europa.eu/commission/presscorner/detail/en/IP_98_865* ↗.

[60] Commission, supra, note 23, § 187.

[61] EC Commission, decision of 20 April 2001, *DSD*, Case COMP D3/34493.

[62] See, in particular, HCC/ACM, Technical report on sustainability and competition, January 2021.

[63] Eur. comm., dec. of 27 March 2017, *Dow/DuPont*, aff. M.7932, § 1977 et seq.

[64] Eur. comm., Dec. 14, 2019, *Aurubis/Metallo*, aff. M.9409.

[65] See, e.g., Aut. conc., Guidelines for the Control of Concentrations, 2020, §774.

[66] See e.g. HCC, *op. cit.* pp. 31-32.

[67] V. Commission Notice, Guidelines on the application of Article 81(3) of the Treaty, *OJEU* No C 101 of 27 April 2004, p. 97, § 88.

[68] See e.g. M. Ristaniemi and M. Wasastjerna, *op. cit*; C. Volpin, op. *cit.*

[69] *Contra*, M. P. Schinkel, Sustainability and competition, OECD Discussion, December 2020.

[70] On these different vehicles, see not. S. Holmes, Climate change, sustainability, and competition law, *Journal of Antitrust Enforcement*, vol. 8, no. 2, 2020 pp. 354-405.

[71] CFI, 28 February 2002, *Compagnie Générale Maritime and Others v Commission*, Case T-86/95, § 343; CFI, 1 September 2006, *GlaxoSmithKline v Commission*, Case T-168/01, § 248; Trib. UE, 24 May 2012, *MasterCard, Inc. and Others v Commission*, Case T-111/08, § 228. V. égal. Minister of the Economy, letter C2007-14 of 13 November 2007, *CCIP/Unibail*, p. 23.

[72] Com, Guidelines on the application of Article 81(3) of the Treaty, cited above footnote 34, §§ 43 and 85.

[73] Comm. eur. dec. 23 May 2013, *Continental/United/Lufthansa/Air Canada*, aff. COMP/AT.39595, § 55 et seq.; ACM, *op. cit.*

[74] V. not. Aut. Conc, Response to the European Commission's Green Pact Consultation, 2020.

[75] HCC, *op. cit.* pp. 28 et seq.

[76] Aut. conc., AMF, Arcep, ART, CNIL, CRE, CSA and HADOPI, Accord de Paris et urgence climatique : enjeux de régulation, May 2020.

[77] Dec. 17-D-20, § 456.

[78] V. not. Commission, Factual summary of the contributions received during the public consultation on the evaluation of the two block exemption regulations and the guidelines on horizontal cooperation agreements, 2019; G. de Stefano, EU Competition Law & the Green Deal: The Consistency Road, *CPI Antitrust Chronicle*, July 2020; Linklaters, LinkingCompetition: Competition and Sustainability Series, Survey, 2020.

[79] ACM, *op. cit.* § 60 et seq. V. equals. L. Peeperkorn, *op.* cit., p. 50.

[80] HCC, *op. cit.* pp. 47 et seq.