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How to protect the environment without infringing the competition

A study on environmental vertical agreements in theory and in practice

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Summary

As humanity is facing its biggest challenge ever – the climate crisis – it is now more important than ever that environmental protection is integrated in all parts of the European Union. Environmental protection is considered a main objective of the EU. In Article 3(3) of the TEU is stated that the internal market of the Union should work for a sustainable development and a high level of protection and improvement of the environment. The internal market should however also work for an effective competition and ensure that it is not distorted. Environmental vertical agreements mean agreements that aim at protecting the environment and may include restraints that infringe competition under Article 101 TFEU. Restraints such as single branding agreements, where a supplier hinders a distributor from buying similar products from other non-sustainable suppliers, or selective distribution systems, where only distributors that fulfill certain criteria such as a sustainable waste disposal can be included, are considered to restrain competition within the meaning of Article 101(1) TFEU. Such restraints may however be exempted if the four cumulative criteria of Article 101(3) TFEU are fulfilled.

The examination of this thesis concludes that an objective of environmental protection does not provide any special advantages for vertical restraints to be exempted, however the area is uncertain as there are no precedents regarding environmental vertical agreements. Furthermore, the research of this paper shows that environmental protection can to a certain extent be included in the concept of consumer welfare. Under the applicable definition of consumer welfare, environmental protection will not have a considerable impact on the assessment. The suggestion is that the European Union would benefit from a more American rule of reason approach which would allow for the Commission and the CJEU to take into consideration all circumstances to the agreement and thereby make a decision based on the individual facts of the case to a greater extent. Additionally, environmental protection should be seen as part of 'technical and economic progress' within the meaning of Article 101(3) TFEU.

The conclusion is that environmental protection is not given enough weight in the assessment of environmental vertical restraints under EU competition law. Hence, this thesis provides suggested measures to be taken by the Commission and the CJEU in order to incorporate environmental protection in the competition law. By suggested measures, the main objective of Article 3(3) TEU to protect and improve the environment can be achieved to a greater extent.

Sammanfattning

Eftersom människan nu står inför sin största utmaning någonsin – klimatkrisen – är det viktigare än någonsin att miljöskyddet integreras i alla delar av den Europeiska unionen. Miljöskydd anses vara ett huvudmål för EU. I Artikel 3.3 i EU-fördraget anges att Unionens inre marknad bör arbeta för en hållbar utveckling och en hög skyddsnivå och förbättring av miljön. Den inre marknaden ska dock också verka för en effektiv konkurrens och se till att den inte snedvrids. Vertikala miljöavtal innebär avtal som syftar till att skydda miljön och kan innehålla begränsningar som kränker konkurrensen enligt Artikel 101 FEUF. Begränsningar som avtal om ett enda varumärke där en leverantör hindrar en distributör från att köpa liknande produkter från andra icke-hållbara leverantörer, eller selektiva distributionssystem där endast distributörer som uppfyller vissa kriterier, såsom en hållbar avfallshantering, kan inkluderas, kan anses hämma konkurrensen inom betydelsen av Artikel 101.1 FEUF. Sådana begränsningar kan dock undantas om de fyra kumulativa kriterierna i Artikel 101.3 FEUF uppfylls.

Slutsatsen i denna uppsats är att ett avtal med syfte att skydda miljön inte ger några speciella fördelar i bedömningen av huruvida de vertikala begränsningarna som avtalet medför ska undantas, men rättsläget är oklart eftersom det saknas prejudikat gällande vertikala miljöavtal. Vidare visar undersökningen i denna uppsats att miljöskydd i viss utsträckning kan inkluderas i begreppet välfärd för konsumenter. Enligt gällande definition av vad som utgör välfärd för konsumenter har miljöskydd i ett vertikalt avtal ingen betydande inverkan på bedömningen av ett sådant avtal. Förslaget är att EU skulle dra nytta av en mer amerikansk *rule of reason*-bedömning, något som skulle göra det möjligt för Kommissionen och EU-domstolen att ta hänsyn till alla omständigheter i avtalet och därmed i större utsträckning fatta beslut baserat på avtalets individuella omständigheter. Dessutom bör miljöskydd ses som en del av "teknisk och ekonomisk utveckling" i den mening som avses i Artikel 101.3 FEUF. Slutsatsen är att miljöskyddet inte ges tillräckligt stor betydelse vid bedömningen av vertikala miljöavtal enligt EU:s konkurrenslagstiftning.

Därmed föreslår denna uppsats åtgärder som Kommissionen och EU-domstolen bör vidta för att integrera miljöskyddet i konkurrenslagstiftningen i större omfattning. Genom föreslagna åtgärder kan huvudmålet med Artikel 3.3 i EU-fördraget för att skydda och förbättra miljön uppnås i större utsträckning.

Preface

Jag var så himla säker på att jag skulle plugga i Uppsala. Alla pluggade ju i Uppsala. Men jag övertygades av två vänner om att vi skulle prova bägge studentstäderna varsin helg innan vi bestämde oss. Så vi läste varsin 15hp-kurs på distans och fick studentkort, köpte tågbiljetter och åkte söderut. Och efter att ha dansat oss genomblöta i skinnjackor på Källaren var valet självklart. Vi åkte aldrig ens till Uppsala, för oss var det otänkbart att det skulle finnas något som kunde vara roligare än vår helg i Lund. Tänk så rätt vi skulle ha!

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Jag kommer sakna dig, Lund!

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Alicia Grethes

Abbreviations

CJEU	Court of Justice of the European Union
Commission	European Commission
EU	European Union
EUMR	EU Merger Regulation No 139/2004
Member States	Current states: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.
OECD	Organisation for Economic Co-operation and Development
RPM	Resale Price Maintenance
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Treaties	Treaty on European Union and Treaty on the Functioning of the European Union.
UN	United Nations

1 Introduction

Environmental law has been incorporated in the European Union[1] law since the 1970s.[2] During the last decades, sustainability and environmental protection have developed into important questions that are now featured frequently on the agenda both at a national and EU level. There is a multitude of directives, regulations and decisions in force within this field in EU today as environmental protection is proclaimed as one of the general principles in the Treaty on European Union.[3] Nevertheless, there are little to no formal guidance on how undertakings can collaborate in order to lower their emissions and enhance the sustainability within the supply chain, from supplier to retailer.

In 2019, the Fairtrade Foundation launched a report detailing how competition law affects business collaboration for sustainability purposes.[4] The report pointed at the failure to use competition law as a protection for actors in the supply chain, mainly in the beginning steps such as producers of various goods. All interviewees of the study claimed that competition law reduced their ability to collaborate with regards to sustainability, as the legal landscape around potential collaboration when it comes to sustainable supply chains is imprecise and unclear.[5] The fear of falling into the scope of regulations such as Article 101 Treaty on the Functioning of the European Union[6] and thereby be considered anti-competitive, prevents market actors to collaborate in order to make the supply chain sustainable.

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[1] Hereafter 'EU'.
[2] Zsuzsanna Laky, *'Environment Policy: general principles and basic framework'* (Factsheet, European Parliament, 2019). <https://www.europarl.europa.eu/factsheets/en/sheet/71/vides-politika-visparigi-principi-un-pamatsistema> accessed 2020-05-05.
[3] Consolidated version of the Treaty on European Union [2008] OJ C115/13 (TEU), art. 3(3); Laky (n 2).
[4] Sophie Long, 'Competition Law and Sustainability: A Study of Industry Attitudes Towards Multi-Stakeholder Collaboration in the UK Grocery Sector' (Fairtrade Foundation, 2019)
[5] Ibid, 14.
[6] Consolidated Version of the Treaty on the Functioning of the European Union OJ [2012] C326/49 (TFEU).

In another report made by Oxfam on sustainability in supermarket supply chains, the application of competition law was held to be *"largely focused on the protection of consumers rather than the abuse of power in other parts of the supply chain"*.[7] The report concluded that collaboration is necessary to deliver consumer benefits. The following question came to light: Is environmental protection not a benefit to consumers? Who else, besides the humans of this planet, will benefit from a prevention of climate changes?

Triggered by this question, along with frequent alarms of an overheated planet and a constant climate debate (much brought into the light by climate activist Greta Thunberg) a deep dive into the competition law and its coexistence with environmental protection became an axiomatic topic.

However, as much had already been written on the horizontal relations of undertakings and what actions could be taken, attention was drawn to vertical agreements. How are they assessed in terms of environmental protection? As the climate threat is more present than ever, should not environmental protection and sustainability be heavier weighted in the assessment of whether a vertical agreement is anti-competitive?

1.1 Background

The purpose of this thesis is to examine to what extent environmental protection can be taken into consideration in the assessment of vertical restraints under EU competition law as well as if environmental protection should be weighted heavier in such assessment. In order to achieve this, it is necessary to have an understanding of EU competition law and what is meant by 'environmental protection'.

[7] Robin Willoughby; Time Gore, 'Ripe for Change – Ending Human Suffering in Supermarket Supply Chains' (Oxfam International, June 2018), 46.

1.1.1 Competition Law

The aspiration and objective of competition law is well documented. However, all concepts of competition assume that competition is the opposite of a monopoly and requires an amount of rivalry between market participants. Some schools, like the Chicago School, argue that the only goal of competition law is economic efficiency and that other goals should not be taken into account, even if they have an economic dimension. Others, like ordoliberal concepts, argue that the objective of competition law should be to protect the independence of activities of the company and that economic efficiency is a derivative of this goal. Hence, there is no clear answer to whether the concept of competition includes non-economic goals or not.[8]

Article 3(3) TEU states that the EU shall establish an internal market[9]. Protocol 27 on the internal market and competition annexed to the Treaties describes this as creating a system which ensures that competition is not distorted. Hence, competition law plays a huge role in the creation of an internal market. Former Commissioner Margrethe Vestager has stated that:

> *The founding fathers of Europe understood that there would be no genuine integration without a Single Market — and no functioning Single Market without a strong competition policy enforced by a central competition authority.*[10]

The internal market is considered to be one of the EU's biggest assets which should be protected. EU competition law is mainly regulated by Article 101 and 102 TFEU[11], but also the EU Merger Regulation[12] which applies to

[8] Aleksander Maziarz, 'Do Non-Economic Goals Count in Interpreting Article 101(3) TFEU?' [2014] 10/2 European Competition Journal <https://doi.org/10.5235/17441056.10.2.341> accessed 2020-04-06, 343-345.
[9] Also known as 'the single market'.
[10] Margrethe Vestager *'The Values of Competition Policy'* (European Commission, 13 October 2015) available at <https://ec.europa.eu/competition/speeches/index_2015.html> accessed 2020-04-07.
[11] Also, Article 106-109 TFEU are relevant for competition law in the EU, however they will not be examined in this thesis.
[12] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR).

concentrations between undertakings with an EU dimension. It is necessary to read the competition rules in TFEU in conjunction with the objectives and principles laid down in the Treaties.[13] Article 3(1)(b) TFEU gives the EU the exclusive right to establish competition rules to ensure that the internal market functions as intended.

1.1.1.1 Article 101 TFEU

Article 101 TFEU applies to vertical agreements that may affect trade between Member States and prevent, restrict or distort competition ('vertical restraints').[14] The CJEU has confirmed that Article 101 TFEU applies to both horizontal and vertical agreements.[15] Article 101(1) prohibits agreements that exist in order to, by object or effect, prevent, restrict or distort competition in the internal market. Article 101(3) provides an exception for agreements with sufficient benefits that compensate the anti-competitive effects.[16] In order for an agreement to be covered by the exception, a fair share of the resulting benefit must accrue the consumers.[17]

The purpose of Article 101 is to protect competition in the internal market and ensure that vertical agreements between undertakings do not affect consumers negatively.[18] This intention is rooted in the aim to create an internal market which promotes an efficient allocation of resources in the Union for the benefit of the consumers.[19] Regarding vertical agreements, the main challenge for a well-functioning competition market is if there are insufficient competing parties at one or more levels of trade. Vertical restraints are in general less harmful than horizontal restraints.[20]

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[13] Richard Whish; David Bailey, *Competition Law* (9th edn, Oxford University Press 2018), 52.
[14] Commission, 'Guidelines on Vertical Restraints' OJ [2010] C 130/01, para 5.
[15] Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECLI:EU:C:1966:41, 339.
[16] Guidelines on Vertical Restraints (n 14), para 5.
[17] Article 101(3) TFEU.
[18] Guidelines on Vertical Restraints (n 14), para 7.
[19] Commission Notice, 'Guidelines on the application of Article 81(3) of the Treaty' OJ [2004] C 101/08, para 13.
[20] Guidelines on Vertical Restrains (n 14), para 6.

The assessment based on Article 101 TFEU must be conducted in two parts. Firstly, whether an agreement between undertakings which significantly affects the trade between Member States has an anti-competitive effect. Secondly, if an agreement is considered anti-competitive, an assessment of the competitive benefits of the agreement and whether these compensate for the anti-competitive effects is conducted.[21]

Article 101(1) TFEU distinguishes between restrictions *by object* and restrictions *by effect*. If an agreement includes restrictions by object, it is not necessary to examine the effects of that agreement. This presumption is based on experience that shows that if the purpose is anti-competitive, it is likely to have negative effects on the market and jeopardizes the objectives of the Union. Restrictions of competition by object may by extension lead to reduction in consumer welfare as they must pay a higher price for the goods and services in question. Factors to be examined in order to assess whether an agreement contains restrictions of competition by object include the content of the agreement, the context in which it is to be applied and the behavior of the parties on the market. However, even where the formal agreement does not contain an expressed provision of anti-competitiveness, the implementation of the agreement may reveal such restrictions.[22]

Restrictions of competition by effect is assessed based on both actual and potential effects. The agreement must affect the actual or potential competition to such extent that negative effects on price, production, innovation or the variety or quality of goods and services can be expected *"with a reasonable degree of probability"*.[23] Negative effects are likely to occur when parties, jointly or individually, have obtained some degree of market power that is maintained or even increased by the agreement. In regard to vertical agreements, restrictions of competition by effect includes in

[21] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 11.
[22] Ibid, para 20-22.
[23] Ibid, para 24.

particular fixed and minimum resale price maintenance and absolute territorial protection.[24]

Article 101(3) TFEU provides exceptions to the prohibition in Article 101(1). Hence, it is only applicable if an agreement between undertakings is found to be anti-competitive within the meaning of Article 101(1). The third paragraph consists of four cumulative requisitions. Any agreement, decision or concerted practice which

> *(1) contributes to improving the production or distribution of goods or to promoting technical or economic progress, while*
>
> *(2) allowing consumers a fair share of the resulting benefit and which does not:*
>
> *(3) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
>
> *(4) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question*[25]

may be exempted from the application of Article 101(1).[26]

Unlike Article 101(1), Article 101(3) does not distinguish between restrictions by object and restrictions by effect. Article 101(3) includes all agreements that fulfil the four cumulative conditions aforementioned.[27] The burden of proof lies with the party that claims a right to exception.[28]

The assessment of benefits given from a restraining agreement must be made in the scope of the relevant market to which the agreement applies. Negative effects for consumers in one particular market cannot be outweighed by a positive effect on another market geographically or product wise. However,

[24] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 23.
[25] Author's edit.
[26] Article 101(3) TFEU.
[27] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 20.
[28] Article 3 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003).

some agreements only affect consumers in a downstream market. In such cases the assessment must be made based on the impact on those consumers.[29]

1.1.1.2 Block Exemption Regulation

The Block Exemption Regulation[30] provides a presumption of legality for vertical agreements based on the market share of the supplier and the buyer. In order for the Block Exemption Regulation to apply, the respective party's market shares must be 30% or less.[31] The Regulation defines a 'vertical agreement' as

> *[…] an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.*[32]

The Block Exemption Regulation applies only to agreements that fall within the scope of Article 101(1) TFEU. Agreements entered by non-competing undertakings that each have an individual market share below 15 % are normally considered to fall outside the scope of Article 101(1).[33] The Regulation creates a presumption of legality for vertical agreements, provided that the market shares of the concerted parties are below the thresholds set up in Article 3.[34] The supplier's market share cannot exceed 30 % of the relevant market where the goods or services are sold, and the buyer's market share cannot exceed 30 % in the market where one buys the goods or services.[35] If the threshold is exceeded, there is no presumption that vertical agreements are covered by Article 101(1), neither that it will not fulfil the conditions of

[29] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 43.
[30] Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Block Exemption Regulation).
[31] Guidelines on Vertical Restraints (n 14), para 23.
[32] Article 1(1)(a) Block Exemption Regulation.
[33] Guidelines on Vertical Restraints (n 14), para 9.
[34] Article 2(1) Block Exemption Regulation.
[35] Article 3 Block Exemption Regulation.

Article 101(3).[36] Agreements in the scope of the safe harbor do not have to be examined under Article 101 TFEU.[37]

1.1.1.3 Consumer welfare

Among the main objectives of competition law is consumer welfare. It is thus of central importance that consumer welfare is considered when interpreting and applying competition law.[38] The enforcement of EU competition law was majorly reformed in 2004 when Regulation 1/2003[39] came into force, along with a number of other measures taken in the previous decade. This is often known as the 'modernization' of EU competition law. During the modernization, the Commission adopted the consumer welfare standard, which means that the Commission should apply competition law to deliver lower prices, greater output, greater options, higher quality and better innovation in products and services in order to benefit the consumers.[40]

The term 'consumer welfare' stems from economic theory and is, according to OECD, defined as *"the individual benefits derived from the consumption of goods and services"*[41]. The concept is thus very broad, relying in many ways on the preferences of the individual. According to the OECD glossary, 'consumer welfare' is measured by the concept of 'consumer surplus' which means the benefit that accrues to consumers of a product when the price they pay is lower than what they would at most be willing to pay for the product.[42] However, such definition does not explain how to balance gains in consumer surplus with possible gains in consumer welfare from expected improvements in products or choice which will show in the future.[43]

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[36] Guidelines on Vertical Restraints (n 14), para 23.
[37] Case C-260/07 *Pedro IV Servicios SL v Total España SA* [2009] EU:C:2009:215, para 36.
[38] Whish, Bailey (n 13), 18.
[39] Regulation 1/2003 (n 28).
[40] Alison Jones; Brenda Sufrin, *EU Competition Law: text, cases, and materials* (6th edn, Oxford University Press 2016), 39.
[41] OECD 'Glossary of Industrial Organisation Economics and Competition Law' <http://www.oecd.org/regreform/sectors/2376087.pdf> accessed 2020-03-27, para 43.
[42] Ibid, para 42.
[43] Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11/1 The Competition Law Review p. 131-160 <https://ssrn.com/abstract=2605777> accessed 2020-03-23, 136.

The definition of what constitutes consumer welfare remains imprecise. It has not been decided in any legally binding instrument and has been shown in several cases to be an issue for national courts.[44] Two different approaches can be adopted in regard to 'consumer welfare': a narrow and a broader approach. A narrow consumer welfare concept would entail a fairly short-term assessment where the long-term consequences are not taken into account. The broader approach also includes the longer perspective, looking at a general social welfare function.[45] This approach was taken in the *CECED*[46] case, where the agreement resulted in both short- and long-term benefits for consumers, lowering their energy costs but also environmental benefits such as lowered CO_2 emissions. The Commission looked at both types of benefits and stated that (regarding the lowered CO_2 emissions)

> *such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines.*[47]

It has been stated that the welfare standard for EU competition law is the consumer welfare, not social welfare. The distinction is however not important in most cases as maximizing consumer welfare and social welfare require the same outcomes.[48] The Commission has defined 'consumers' in terms of the second condition in Article 101(3) TFEU as all direct and indirect users of the product, meaning that it includes also intermediate purchasers.[49] The same interpretation is made in both the *2010 Horizontal Guidelines*[50], the

[44] Daskalova (n 43), 131-132.
[45] Anna Gerbrandy, 'Addressing the Legitimacy Problem for Competition Authorities Taking into Account Non-Economic Values: The Position of the Dutch Competition Authority' [2019] Forthcoming, European Law Review <https://ssrn.com/abstract=3364131> accessed 2020-03-04, 2.
[46] *CECED* (Case IV.F.1/36.718) Commission Decision 2000/475/EC, OJ [1999] L 187/47.
[47] Ibid, para 56.
[48] Jones, Sufrin (n 40), 39, referring to S. Bishop and M. Walker, *The Economics of EC Competition Law* (3rd edn, Sweet & Maxwell 2010), 31-32.
[49] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 84.
[50] Commission Communication, 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements' (2010 Horizontal Guidelines) OJ [2011] C 11/9, para 49.

EUMR[51] and the *Horizontal Merger Guidelines*[52]. Thus, it can be safely assumed that the term 'consumers' refers to all direct and indirect consumers that may deal with the product at some point in the supply chain.[53]

In 2006, the General Court gave two judgements on Article 101, identifying the 'welfare' of the final consumer as an objective for competition law. In *Österreichische Postsparkasse*[54] the Court held that the ultimate purpose of competition rules is *"[...] to increase the well-being of consumers"*.[55] This was once more emphasized in *GlaxoSmithKline*[56] where the Court held that

> *[...] the objective of the [Union] competition rules is to prevent undertakings [...] from reducing the welfare of the final consumer of the products in question"*.[57]

The CJEU later declared in the appeal in *GlaxoSmithKline*[58] that Article 101 TFEU also aims at protecting the structure of the market and hence competition as such.[59]

1.1.2 Environmental Protection

The main objectives of the EU are presented in Article 3 TEU, an Article considered to be a core provision of the Treaty.[60] The objectives are binding for all EU institutions and the Union law should be interpreted in accordance with the principles of the provision.[61] Article 3(3) TEU states that the Union

[51] Article 2(1)(b) EUMR.
[52] Commission Communication, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (Horizontal Merger Guidelines) OJ [2004] C 31/5, endnote 105.
[53] Daskalova (n 43), 145.
[54] Case T-213 and 214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* [2006] ECLI:EU:T:2006:151.
[55] Ibid, para 115.
[56] Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2006] ECLI:EU:T:2006:265.
[57] Ibid, para 118. Author's edit.
[58] Case C-501/06 *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECLI:EU:C:2009:610.
[59] Ibid, para 63.
[60] Hermann-Josef Blanke; Stelio Mangiameli, *The Treaty on European Union (TEU): A Commentary* (2013 edn, Springer-Verlag Berlin and Heidelberg GmbH & Co. K, 2013) , 158.
[61] Ibid, 161.

shall establish an internal market which should work for *"[…] the sustainable development of Europe based on […] a high level of protection and improvement of the quality of the environment."* This principle is also mentioned in recital 9 of the preamble, stating that the principle of sustainable development should be taken into account in economic and social progress. The UN General Assembly has defined sustainable development as *"[…] meeting the needs of the present without compromising the ability of future generations to meet their own needs".*[62] Blanke and Mangiameli holds that Article 3(3) TEU expands the scope of this principle,

> *[…] declaring a balanced economic growth and price stability, a highly competitive social market economy and a high level of protection and improvement of the quality of the environment as the basis of the 'sustainable development of Europe'.*[63]

Article 11 TFEU states that

> *Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.*

It can be held that the purpose of the Article is to include environmental protection in all areas of EU activity.[64] The 'environmental protection requirements' consists of the objectives, principles and criteria of Article 191 TFEU.[65] The second part of the Article emphasizes the achievement of sustainable development through the integration. However, this adds little to the legal obligation of the Article according to Nowag, since the concept lacks

[62] Resolution adopted by the General Assembly 42/187, 96th plenary meeting, 11 December 1987, A/RES/42/187, para 2.
[63] Blanke; Mangiameli (n 60), 172.
[64] Julian Nowag, 'The Sky is the Limit: On the drafting of Article 11 TFEU's integration obligation and its intended reach' (2014) University of Oslo Faculty of Law Research Paper No. 2014-45 <https://ssrn.com/abstract=2535273>, accessed on 2020-03-18, 4.
[65] Ibid, 25. For a discussion of whether or not the entire Article 191 TFEU should be included in such definition, please see the source.

clarity. It rather functions as a backing of the idea that environmental protection is not in opposition with economic aims.[66]

The CJEU has claimed that the obligation of environmental integration would reflect *"the principle whereby all Community measures must satisfy the requirements of environmental protection"*.[67] Whether this should apply to competition law, and particularly to the application of Article 101(3) TFEU, has been well debated. In *Continental Can*[68], the CJEU stated that Article 101 TFEU aims to bring about the aims of what is now Article 3 TEU, or at least that Article 101 cannot be interpreted in the opposite of the aims of Article 3 TEU.[69] Nowag formulates the question *"What reasons can justify non-compliance with the obligation in the area of competition law?"*[70], a relevant question in terms of whether environmental protection should be taken into the account when vertical restraints are assessed under Article 101 TFEU.

Environmental integration can be made in two ways. The first form of integration is *interpretation*, meaning that regulations are interpreted to include environmental policies. Integration is defined as *"maximizing synergies between economic and environmental objectives by preventing conflict"*.[71] This means that the economic and environmental aims are brought in line.[72] The second form of environmental integration, which should be used where interpretation is not possible, is *balancing* in the case of conflict. Both aims should then not be restricted more than necessary. The first form of integration should be preferred over the second form.[73]

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[66] Ibid, 26.
[67] Ibid, 32. Cf. Case C-62/88 *Hellenic Republic v Council* [1990] ECLI:EU:C:1990:153, para 20.
[68] Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECLI:EU:C:1973:22.
[69] Ibid, paras. 22-25.
[70] Julian Nowag, *Environmental integration in competition and free-movement laws* (Oxford University Press: Oxford Studies in European Law, 2017), 32-33.
[71] Ibid, 48.
[72] Ibid, 38.
[73] Ibid, 38.

1.2 Purpose, Aim and Research Questions

The purpose of this thesis is to examine to what extent environmental protection can be a part of the assessment of vertical restraints under EU competition law. Furthermore, the thesis aims to investigate to what extent the objective of the EU presented in Article 3(3) TEU, to create an internal market that works for a sustainable development and improvement and protection of the environment, is integrated in EU competition law. In order to achieve this purpose, it is necessary to investigate and elucidate applicable law in the area of competition law within the EU and environmental protection. The thesis also provides a case study of different types of environmental vertical agreements in order to provide the reader with a broader understanding of how the legislation applies and to what extent environmental protection can be a benefit to the assessment of the CJEU and the Commission. Lastly, the thesis aims to make an assessment of whether environmental protection should be heavier weighted in the assessment of vertical restraints than what is given today.

Therefore, the thesis intends to answer the following four research questions:

- How should EU competition law be applied to environmental vertical agreements?
- Can environmental protection be part of consumer welfare?
- To what extent can environmental protection be part of the assessment of vertical agreements in practice under existing EU competition law?
- Should environmental protection be heavier weighted in the assessment of vertical restraints?

1.3 Method and Material

The chosen research questions primarily aim at examining applicable EU law, which is why an EU legal method has been chosen. The thesis is therefore based on a review of different sources of EU law: regulations, case law, precedents, principles and policies. Official publications by EU entities, such

as the Commission guidelines, press releases and communications have been of great importance to this thesis. According to EU legal method, the overall aims and purpose of EU shall permeate all EU regulations and decisions.[74]

Great attention has been given to the Commission's *Guidelines on Vertical Restraints* and the *Guidelines for the Application of Article 81(3) in the Treaty* which provide essential guidance for the interpretation and application of what is now Article 101 TFEU to vertical restraints. However, none of the guidelines provide any details on how to apply the regulations in relation to environmental protection and sustainability. Another useful source has been case law from the CJEU and the Commission, although the area of environmental protection in vertical agreements is a very unexplored topic. Most of the cases from CJEU and the Commission concern horizontal agreements with an aspect of environmental protection. Hence, the relevant case law has been used as an indicator on how the CJEU and the Commission potentially would assess environmental vertical restraints. In general, many of the sources have been used to make analogies applicable to the relevant area. Reference has also been made to the *2001* and *2010 Horizontal Guidelines*[75], in order to assess and potentially apply the reasoning of the Commission to vertical agreements as well.

Doctrine on both competition law, environmental protection and environmental vertical agreements have been essential to this thesis. Alexander Maziarz's *Do Non-Economic Goals Count in Interpreting Article 101(3) TFEU?* from 2014 has been specifically important as it seeks to

[74] Jörgen Hettne; Ida Otken Eriksson (ed) *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2nd edn, Norstedts Juridik AB 2011), 40.
[75] Commission Notice, 'Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements' (2001 Horizontal Guidelines) OJ [2001] C 3/02; 2010 Horizontal Guidelines (n 50). It has been debated whether or not the 2001 Horizontal Guidelines should be seen as outdated as the Commission provided new Guidelines in 2010 which did not mention much in regard to environmental protection. Cf. C.J.A van der Weide, 'Sustainability and Article 101(3) TFEU: The undertakings perspective' (Master's thesis, Utrecht University 2013), 50.

explore and examine how the non-economic objectives can be integrated in EU competition law.

1.4 Organisation

The thesis begins with an abstract part where the legal framework of EU competition law regarding environmental protection is assessed. Thereafter follows a concrete part where the theory is applied in case studies. The division of the chapters is described below.

The intention of the second chapter is to answer the first research question: *How should EU competition law be applied to environmental vertical agreements?* The chapter evaluates positive and negative effects that can be created from vertical agreements. It then examines how the legislation on vertical restraints apply to environmental vertical agreements. The assessment is a thorough analysis of Article 101 TFEU: the scope of Article 101(1) TFEU, the four cumulative conditions of Article 101(3) TFEU and the application of those. The chapter lastly discusses consumer welfare in order to answer the second research question: *Can environmental protection be part of consumer welfare?* The examination includes case law mainly from the Commission and what conclusions can be drawn from previous assessments of non-economic benefits as an increase in consumer welfare.

The third chapter aims at answering the third research question: *To what extent can environmental protection be part of the assessment of vertical agreements in practice under existing EU competition law?* The assessment is made through a case study of classical vertical restraints such as resale price maintenance, selective and exclusive distribution, single branding, franchise agreements and parity provisions against Article 101 TFEU. Examples of how these could be used in order to protect the environment are provided.

The fourth chapter intends to answer the fourth research question: *Should environmental protection be heavier weighted in the assessment of vertical restraints?* The chapter proposes measures to be taken by the Commission

and the CJEU to involve environmental protection in order to obtain one of the general principles of EU provided in Article 3(3) TEU and Article 11 TFEU.

The fifth and last chapter is a final conclusion of the thesis, summarizing the previous chapters in order to compile all conclusions drawn in the thesis.

1.5 Limitations

The investigation of this thesis focuses solely on EU law. National laws of the Member States, except a few cases regarding areas which have not been covered by the CJEU, have not been taken into consideration. The main focus has been on Article 101 TFEU and the Block Exemption Regulation. Hence, this thesis is not examining the possible allegations of Article 102 TFEU, which regulates the abuse of a dominant position.

Furthermore, the thesis will not examine environmental horizontal agreements. Focus is on vertical agreement between undertakings, not including any agreements where public organizations take part. It will not account for economic theories of competition law or the history of EU competition law. Neither does it explore the development of environmental protection in EU legislation.

The thesis assumes that any vertical agreement with the objective of protecting the environment has as its genuine purpose to do so. Any potential harm of an agreement which uses environmental protection as a cover for an actual purpose of restricting competition will not be accounted.

2 Theory of Environmental Vertical Agreements

In order to achieve environmental protection, the vertical relations within a supply chain are essential.[76] To achieve a truly sustainable production, it needs to permeate the entire supply chain, starting with the first supplier. However, there are competition issues that might arise in conjunction with environmental vertical agreements.

Generally, it can be said that, since vertical restrictions are usually less anti-competitive than horizontal restrictions[77], they are more likely to be proportionate. For example, the existence of barriers to entry may be relevant in the context of environmental agreements. Several environmental regulations implied by governments or the EU may create barriers to entry. Equally, where markets for environmental products are innovative and rapidly changing, competition is less likely to be restricted under Article 101(1) TFEU.[78] If a vertical restraint is necessary in order to open up a new market, the Commission will generally not consider it restrictive.[79] Where environmental vertical agreements contain hardcore restrictions such as price fixing or reduction of output,[80] these will generally fall under the scope of Article 101(1) TFEU, as long as there are effects on inter-State trade and competition.[81]

Vertical agreements that demand the supplier to adapt the production so that materials or products meet certain sustainability requirements may be beneficial for a brand image and can increase attractiveness to consumers by creating uniformity and quality standardisation, generally through selective

[76] C.J.A van der Weide, 'Sustainability and Article 101(3) TFEU: The undertakings perspective' (Master's thesis, Utrecht University 2013), 50.
[77] Guidelines on Vertical Restrains (n 14), para 6.
[78] Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2011), 253.
[79] Guidelines on Vertical Restraints (n 14), para 107(b).
[80] Article 4 Block Exemption Regulation.
[81] Guidelines on Vertical Restraints (n 14), para 47.

distribution and franchising systems.[82] Van der Weide argues that the *Guidelines on Vertical Restraints* could be reinterpreted as referring to quality standardisation.[83]

One thing that often hinders undertakings to take the first step towards sustainability relates to the costs of such investments. The so-called 'first-mover disadvantage' refers to a situation where undertakings that readjust its production or sales to a more sustainable method may lose a crucial number of consumers to its competitors due to increased prices.[84] This may be a reason for undertakings not to initiate sustainable production as undertakings do not want to endanger their profit for the benefit of a more sustainable production. It has also been shown in a report by the Fairtrade Foundation from 2019 that this is considered a real issue for market actors in the UK grocery sector and a hindrance for undertakings to make actions that would raise the sustainability in products, such as pay higher prices and make courageous sustainability commitments.[85] The 'first-mover disadvantage' creates a risk that undertakings will fix prices in order to forward the costs of a conversion to a more sustainable production that in the end would harm the consumers financially.

2.1 Effects of vertical agreements

As the assessment of vertical agreements is much based on the balance between pro- and anti-competitive effects of the agreement, it is important to know what general effects there are of vertical agreements. The following subchapter aims to give the reader an understanding of what effects on competition there might be from entering vertical agreements.

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[82] Whish, Bailey (n 13), 642.
[83] Van der Weide (n 76), 51.
[84] Giorgio Monti; Jotte Mulder, 'Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives' [2017] 42/5 European Law Review pp. 635-656 <http://awa2018.concurrences.com/IMG/pdf/monti_mulder_2017_42_elrev_issue_5_offprint.pdf> accessed 2020-02-20, 636.
[85] Long (n 4), 12.

2.1.1 Positive effects

The Commission recognises that vertical agreements often may have positive effects, promoting non-price competition and improving quality of products and services. Vertical restraints can help to solve a 'free-rider' problem, i.e. when a distributor free-rides on the promotion efforts of another distributor, something that is quite common at the wholesale and retail level. This can be solved by exclusive distribution agreements or other similar restrictions.[86]

Another situation where vertical restraints can give positive effects is when a manufacturer wants to enter a new geographic market. Exporting goods to another country for the first time may require special 'first time investments' by the distributor and in order to motivate a local distributor to make these investments, it may be necessary to provide the distributor territorial protection so that the distributor can temporarily charge a higher price. Such restraints may also prevent other already established distributors from selling on the new market for a limited period of time.[87]

The 'certification free-rider issue', which means that in some sectors, certain products benefit from being sold through retailers with a reputation of selling quality products, can also be solved by allowing, for a limited period, restrictions such as exclusive or selective distribution. The period should be long enough to guarantee introduction to the new product but not hindering large-scale distribution.[88]

There are several other examples given in the *Guidelines on Vertical Restraints*, however that list does not claim to be exhaustive. The situations listed make it clear that vertical agreements are a good help in realising efficiencies which may outweigh any negative effects. A good guideline is that vertical restraints can only exist for a limited period of time when they are of vital importance in order to introduce a product on a new market or to protect investments. Many of the vertical restraints have a degree of

[86] Guidelines on Vertical Restraints (n 14), para 106-107(a).
[87] Ibid, para 107(b).
[88] Ibid, para 107(c).

exchangeability, meaning that a certain inefficiency problem can be solved by several different vertical restraints. Nevertheless, the negative effects may differ depending on the chosen method, something that will play part in the indispensability test under Article 101(3).[89]

2.1.2 Negative effects

There are several negative effects that can be caused by vertical restraints. Foreclosure, softening of competition and collusion at the manufacturers' level can harm consumers by increased wholesale prices, lowered quality or innovation, or limited choice of products. At a distributor level, they can cause harm on retail prices, less choices and inferior quality of service.[90]

Generally, it can be said that a combination of vertical restraints can enhance the negative effects, however some restraints are less harmful combined than if used in isolation. One example is if a distributor in an exclusive distribution system is tempted to increase the prices, in which case a quantitative restriction or a set maximum resale price could counteract the negative effects of a price increase. Any negative effects are enhanced when distributors and their buyers organize their businesses in similar ways, which leads to so-called cumulative effects.[91]

2.2 Application of the legislation for environmental vertical agreements

The following subchapter examines how Article 101 TFEU applies to environmental vertical agreements. Article 101(1) TFEU prohibits agreements between undertakings that have as their object or effect of preventing, restricting or distorting competition within the internal market. Any agreement in the scope of Article 101(1) may be subject to the exception provided in Article 101(3), which lay out four cumulative criteria. The subchapter gives the reader a greater understanding of such assessment. The

[89] Guidelines on Vertical Restraints (n 14), para 108-109.
[90] Ibid, para 101.
[91] Ibid, para 105.

aim is to answer the research question: How should the conditions of Article 101 TFEU be applied to environmental vertical agreements?

2.2.1 Article 101(1) TFEU

The assessment of whether an agreement has anti-competitive effects should be made in the light of the situation that would be if the agreement and its limitations were to not exist.[92] The *Guidelines for the application of Article 81(3) of the Treaty* provides two questions that can be helpful as a framework for the assessment of anti-competitiveness. The first question focuses on whether the agreement affects the inter-brand competition, while the second question relates to the intra-brand competition.[93]

1. *"Does the agreement restrict actual or potential competition that would have existed without the agreement?"*[94]

The competition between parties and the competition from third parties must be taken into account. If a supplier demands their retailers to avoid selling competing products from a third party on the market that precludes third party access to the market, the actual or potential competition is restricted. If the answer to the question is yes, then the agreement may be in the scope of Article 101(1) TFEU.[95]

2. *"Does the agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)?"*[96]

If a supplier limits the possibilities for a distributor to compete with others, the competition is restricted compared to the situation in the absence of the restraints. There are however exceptions to this, for example if the restraint is necessary in order for the agreement to exist. Such an assessment must be

[92] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 17.
[93] Ibid, para 18. For a definition of inter- contra intra-brand competition, please see OECDs definition: OECD (n 41), para 19.
[94] Ibid, para 18(1).
[95] Ibid, para 18(1).
[96] Ibid, para 18(2).

made solely on objective factors and not subjective views or characteristics of the parties.[97]

This applies in the same way to environmental vertical agreements. An agreement cannot go further than what is necessary and cannot infringe on competition that would have existed without the agreement or in the absence of the contractual restraints. E.g. a single branding agreement which prevents a distributor from selling non-sustainable products from other suppliers would potentially restrict competition as it would hinder the third party from accessing the market. Such agreement would then probably fall into the scope of Article 101(1) TFEU.

2.2.2 Article 101(3) TFEU

As environmental protection constitutes one of the main goals of the EU, it must also be considered to be a non-economic goal of competition law. However, it is considered to be hard to classify environmental protection under the conditions of Article 101(3) TFEU. It is possible to argue that reduction of pollution or energy savings can help companies reduce production costs. Yet, such relationship is not always clear. Although reduced pollution can be seen as a benefit for consumers, it is not directly linked to the sold goods and thereby not an explicit way to achieve efficiency gains.[98]

2.2.2.1 First condition

The first condition set up in Article 101(3) TFEU requires an assessment of the objective benefits for production or distribution of goods, and for the economic and technical progress. Vertical agreements often have a potential to help effectuate efficiencies. According to the Commission, the provision applies by analogy to services.[99] The CJEU stated in *Consten and Grundig* that only objective circumstances can be taken into account.[100]

[97] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 18(2).
[98] Maziarz (n 8), 350.
[99] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 48.
[100] *Consten and Grundig* (n 15); Guidelines on the application of Article 81(3) of the Treaty (n 19), para 49.

The purpose of this condition is to define which efficiencies that can be subject to the following tests in the second and third condition. Since the pro-competitive effects of an agreement must outweigh the anti-competitive effects, it is necessary to identify the relation between the agreement and the efficiencies and evaluate the gains.[101] There must be a direct causality between the agreement and the claimed efficiency gains. Indirect effects are generally too uncertain and distanced to be taken into account. An example of indirect effect given in the *Guidelines for the application of Article 81(3) of the Treaty* is if the agreement allows for the undertakings to increase their profit and thereby invest more in research and development, which ultimately will benefit the consumers. This is generally held to be too vague to be considered an efficiency within the first condition.[102] This makes it difficult to argue that agreements that promote sustainability and environmental protection should fall under the scope of Article 101(3) TFEU as such benefits normally do not affect the consumers directly. Hence, it is not sufficient to argue that an increase in prices to facilitate sustainable fishing is motivated by the fact that it prevents overfishing in the sea.

In its *2001 Horizontal Guidelines*, the Commission argues that environmental agreements which are caught by Article 101(1) may be exempted in accordance with Article 101(3) if the economic benefits, on individual or aggregated consumer level, outweigh the negative effects on competition. There must be a reduced environmental pressure as a result of the agreement, compared to the baseline where nothing is made. If the individual benefits for consumers remains for a reasonable period of payback, there is no need to establish aggregate environmental benefits.[103] The Commission referred to 'economic benefits', however Vedder argues that the Commission in fact meant purely environmental benefits as it referred to *"net benefits in terms of reduced environmental pressure"*.[104]

[101] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 50.
[102] Ibid, para 54.
[103] 2001 Horizontal Guidelines (n 75), para 193-194.
[104] H.H.B. Vedder, 'Competition Law and Environmental Protection in Europe: Towards Sustainability?' (PhD thesis, Universiteit van Amsterdam 2003), 165.

In the *CECED* case, which convers an agreement between producers of domestic washing machines to terminate the production and importation of the least energy efficient washing machines, the Commission argued that the agreement caused individual economic benefits as it would lower the energy costs for consumers.[105] The collective economic benefits could be drawn from the quantified avoided damages as a result from the reduced emissions.[106] The *CECED* decision differs from the statement in the *2001 Horizontal Guidelines* in relation to the individual and collective benefits, since the Commission in *CECED* showed that there were collective benefits even though the agreement did not generate benefits to individual consumers.[107]

Vedder draws the conclusion that it seems as if the Commission has not made up its mind regarding whether the first requirement for exception under Article 101(3) includes environmental benefits. Nevertheless, Vedder states that hopefully the Commission has placed environmental improvements on equal footing with 'economic benefits' and will not only "take account of" them.[108]

2.2.2.2 Second condition

The second condition demands for a fair share of the benefit to fall into the hands of consumers. This means that consumers of products purchased and/or (re)sold under a vertical agreement must at least be compensated for negative effects caused by the agreement. In other words, the efficiency gains must make up for the negative effects on prices, output and other relevant factors.[109]

The term 'fair share' refers to the benefit created and must at least counterweigh for any actual or likely negative impact caused to consumers by the restraint. The Commission states that *"[…] the net effect of the agreement must at least be neutral from the point of view of those consumers*

[105] 2001 Horizontal Guidelines (n 75), para 193; *CECED* (n 46), para 52.
[106] *CECED* (n 46), para 56.
[107] Ibid.
[108] Vedder (n 104), 167.
[109] Guidelines on Vertical Restraints (n 14), para 126.

directly or likely affected by the agreement."[110] It is not required that consumers get a share of every single efficiency caused by the agreement, but the sufficient benefits should compensate for the negative effects. Hence, if an agreement risks leading to higher prices for consumers, they should benefit from an improved quality or similar.[111]

"The easiest way to transfer benefits from the reduction of production costs is simply to reduce the price of goods."[112] However, there are also benefits that are not purely economic. This could e.g. be the introduction of new products to the market or improvement in quality.[113] The wording of Article 101(3) TFEU seems to require pure efficiency gains, and the aim of Article 101(3) hence seems to promote only economic goals. However, the sole goal of Article 101(3) cannot be held to be economic efficiency. The Article also requires that the benefits created from agreements are transferred to consumers and thereby has a protective role of the interests of consumers.[114]

There are different interpretations to whether other provisions in the Treaties can be taken into account in the assessment of agreements under Article 101(3). It has been argued that while Article 101(1) only requires balancing economic aspects of the agreement, Article 101(3) also allows taking into account non-economic goals such as the environment, employment and industrial policy. Some go further, stating that EU competition law excepts agreements that bring environmental protection as a benefit.[115]

The Commission has indicated that goals of other Treaty provisions can be taken into account provided that it can be included in one of the conditions of such exception.[116] Hence, the Commission assumes that created efficiency can also lead to the creation of other goals, such as environmental protection. The CJEU stated in *Métropole Télévision SA* that the Commission can base

[110] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 85.
[111] Ibid, para 86.
[112] Maziarz (n 8), 347
[113] Ibid.
[114] Ibid.
[115] Maziarz (n 8), 347-348.
[116] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 42.

assessment on considerations *"connected with the pursuit of the public interest"* when applying Article 101(3), meaning that the exception is not limited to the four mentioned conditions.[117] Furthermore, the wording of Article 101(3) does not exclude other factors than efficiency.[118]

The Commission emphasizes that the value of a benefit for consumers changes over time. It is allowed to have a time lag until the efficiencies materialize; however, the greater the time lag, the greater the efficiencies must be.[119] This makes it difficult for environmental agreements to fall under Article 101(3) as the benefit of such agreements often can be seen only in the future. However, as the Commission argued in *CECED*, lowered CO_2 emissions, although it did not benefit individual purchasers of washing machines directly, should still be seen as allowing consumers a fair share of the benefits of the agreement.[120] Nevertheless, the Commission did not mention the CO_2 related benefits when referring to the *CECED* case in their guidelines.[121] Instead the Commission only focused on the direct consumer benefits created from lowered energy costs accrued by the agreement. [122]

2.2.2.3 Third Condition

The third condition is an indispensability test under which the Commission will examine whether individual restrictions increase the efficiency of the production, purchase and/or (re)sale of the contract products compared to the case where the restriction was absent. Undertakings invoking Article 101(3) should not need to examine hypothetical or theoretical alternatives but need to prove why other options that may seem more realistic and less restrictive would be less efficient. If the undertakings succeed in explaining and

[117] Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision v Commission* [1996] ECLI:EU:T:1996:99, para 118.
[118] Maziarz (n 8), 348.
[119] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 87-88.
[120] *CECED* (n 46), para 56.
[121] 2001 Horizontal Guidelines (n 75), para 329.
[122] Jan Peter van der Veer, 'Art 101(3) and sustainability – new developments in the Netherlands' (Kluwer Competition Law Blog, 15 May 2014) <http://competitionlawblog.kluwercompetitionlaw.com/2014/05/15/art-1013-and-sustainability-new-developments-in-the-netherlands/> accessed 2020-03-27.

demonstrating the above, the restriction should be considered indispensable.[123]

The test is made in two steps. Firstly, the parties must prove that the restraining argument *as such* is necessary in order to achieve the claimed efficiencies.[124] Secondly, the individual anti-competitive measures must be reasonably necessary to achieve the efficiencies.[125] The crucial factor is to prove that the anti-competitive measures taken in the agreement enables the undertakings to conduct business in a more efficient way than what would be possible if the agreement or the restrains had not existed.[126]

The first test requires that the efficiencies are specific for the agreement, meaning that there are no economically possible, less restrictive measures that would result in the same efficiencies. It must be evaluated whether the parties could achieve the efficiencies individually without the agreement.[127]

When the parties have proved that the agreement is the only possible way to reach the efficiencies, the necessity of the restraints has to be assessed. The Commission considers a restraint necessary if its absence would significantly reduce or even eliminate the efficiencies created from the agreement. The greater the restriction of competition is, the stricter is the test in the third requisition. A restraint may be necessary only for a period of time, in which case the exception under Article 101(3) only applies during that time period.[128]

Restrictions in competition cannot go further than what is necessary to achieve the claimed efficiencies. The condition requires the undertaking that claims an exception under Article 101(3) proves that the measures taken are proportionate to the efficiencies it creates. In *Chicken of Tomorrow*[129] the

[123] Guidelines on Vertical Restraints (n 14), para 125.
[124] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 73.
[125] Ibid, para 73.
[126] Ibid, para 74.
[127] Ibid, para 75-76.
[128] Ibid, para 79, 81.
[129] Autoriteit Consument & Markt, 'ACM's analysis of the sustainability arrangements concerning the "Chicken of Tomorrow' (ACM/DM/2014/206028). See further section 2.3.

Dutch competition authority did not consider the restraints to be proportionate in regard to the benefits created for the consumers. In terms of measures of environmental protection, the parties of the agreement need to prove that the restraints are proportionate in comparison with the created benefits and also that the efficiencies created are directly attributable to the agreement.

2.2.2.4 Fourth condition

The fourth and last condition requires that the parties do not have the opportunity to jeopardize the competition for a substantial amount of the goods in question. This is examined by an evaluation of the remaining competition on the market and the effects of the agreement on that competition.[130] The reason for this condition is said to be the importance of competition as it is considered to be an *"essential driver of economic efficiency"*[131], e.g. to promote dynamic efficiencies such as innovation. When the competitive process is eliminated, the short-term efficiencies are outweighed by the long-term losses.[132] If there is no residual competition or threats of entry, the protection of competitive process and rivalry outweighs possible efficiency gains.[133]

In terms of the last condition of Article 101(3), whether the agreement restricts competition in general, when looking at environmental vertical restraints, it is important to maintain the competition in the relevant market. The condition aims at protecting the internal market. Although environmental protection is a common provision of the EU, it should not outrival the competition law and the protection of the internal market. Hence, the Commission will not make a different assessment in terms of whether the agreement affects the competition in general in the relevant market because it contains restraints to promote sustainability.

[130] Guidelines on Vertical Restraints (n 14), para 127.
[131] Ibid, para 127.
[132] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 105.
[133] Guidelines on Vertical Restraints (n 14), para 127.

2.3 Environmental protection as part of consumer welfare

According to Article 101(3) TFEU, it is important that consumers can benefit from restraining agreements. In the context of efficiency benefits of sustainability initiatives however, the benefits may be of non-economic nature. Another consequence might be that the benefits can only be seen in the future. One well-used example is a reduction of overfishing in the seas, which might not benefit the consumers of today with less supply and higher prices but may instead ensure that there are fish left in the sea for the generations of tomorrow.[134] Whether environmental protection can be included in consumer welfare is uncertain. The following subchapter aims at clarifying the area, answering the second research question; Can environmental protection be part of consumer welfare?

In the Dutch case *Chicken of Tomorrow*, the aim was to introduce sustainability in the chicken meat sector by introducing a minimum standard to how chicken meat should be produced. Another part of this was to remove regular chicken meat from the shelves of supermarkets. The standards would result in slightly more space, slightly more litter on the floor and a few days longer life-expectancy of the chickens.[135] The Dutch competition authority, ACM, concluded that the sustainability arrangements concerning the *Chicken of Tomorrow* lead to a restriction of competition in the consumer market. As the agreement would have led to consumers not being able to purchase regularly produced chicken in the Dutch supermarkets, the freedom of choice for consumes was considered threatened. The ACM also claimed that the arrangement would have cross-border effects as a substantial part of chicken meat is imported into the Netherlands from neighboring countries; meat that would not be allowed to be sold in participating Dutch supermarkets. The arrangement was therefore considered in the scope of Article 101(1) TFEU,

[134] Van der Veer (n 122).
[135] Autoriteit Consument & Markt, 'Industry-wide arrangements for the so-called Chicken of Tomorrow restrict competition' (ACM, 26 January 2015) <https://www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition> accessed 2020-05-20.

and the ACM tested the arrangement against the exception in Article 101(3) TFEU and the four conditions set up there.[136]

The main focus in the assessment of ACM was the potential benefits for consumers, with regard to animal welfare, environment and public health. In order to assess the value that consumers attach to animal welfare, the environment and public health, the ACM conducted a so-called 'willingness-to-pay' study which showed what consumers are willing to pay for such values.[137] The Chairman of the Board of ACM, Chris Fonteijn, held that although the study showed that consumers were willing to pay extra for sustainably produced chicken meat, the information about the production was not sufficient to the consumers. The study showed that consumers were willing to pay extra for both animal welfare guarantees and reduced negative environmental effects; however, not enough to cover the additional costs. Hence, the first criterion of Article 101(3) was not considered fulfilled. The ACM found that the arrangement did not lead to any net benefits for consumers, thus the second criterion was not met either.[138] In conclusion, the ACM found that the sustainability arrangements of the *Chicken of Tomorrow* resulted in a restriction in competition in the consumer market. The main issue of the arrangement was that it was not considered to generate net benefits for consumers and could thereby not be considered proportionate in accordance with the third criterion in Article 101(3). Benefits and costs for consumers in regard to animal welfare, the environment and public health was explicitly taken into account.[139]

This case shows that it is very important that benefits can be materialized in forms of economic or other measurable terms in order for competition authorities to make a complete analysis of the effects on the market. Some measures, like added space for chickens, are not possible to translate unless the information is sufficient enough. The demand that consumers need to be

[136] Autoriteit Consument & Markt, 'ACM's analysis of the sustainability arrangements concerning the "Chicken of Tomorrow' (ACM/DM/2014/206028), 4-5.
[137] Ibid, 6.
[138] Ibid, 6.
[139] Ibid, 8.

well-informed about the sustainability measures taken, which raises a question in regard to sustainability: who is responsible for an adaption to more sustainable productions? The case shows a clear example of producers and suppliers willing to cooperate in order to make sure chicken meat sold in the supermarkets are sustainably produced, a measure which was partly prohibited due to the fact that consumers were not informed enough or not willing to pay extra for it. This indicates that competition law values the benefits of the consumers extremely high and does not consider it legitimate for the actors of the market or the competition authority to market decision for them. The ACM held that the market was considered dynamic enough that joint arrangements could not be considered necessary.[140] However, it must be considered a disadvantage for producers making the move to a more sustainably produced product, the so-called first-mover disadvantage.

Lastly, the case clarifies the importance of the balancing between positive and negative effects of an agreement that might restrict competition. The conclusion drawn by the ACM was mainly based on the fact that the benefits in terms of animal welfare and sustainability were not sufficient to cover the disadvantage for consumers that would have to pay a higher price and were to be offered less choices.

In *Exxon/Shell*[141] the Commission recognized environmental protection as a relevant factor for the assessment of Article 101(3). The case concerned a joint venture between Exxon/Shell which purpose was to reduce production costs by reducing the use of raw materials and plastic waste.[142] Besides the benefits of the new technology which could be categorized under the first condition of Article 101(3), the Commission also recognized benefits to the consumers in terms of environmental protection.

[140] Autoriteit Consument & Markt, 'Industry-wide arrangements for the so-called Chicken of Tomorrow restrict competition' (n 135).
[141] *Exxon/Shell* (Case IV/33.640) Commission Decision 94/322/EC OJ [1994] L 144/20.
[142] Although this case concerned a horizontal joint venture, the reasoning of the Commission is relevant to this in order to make an analogic interpretation of how this could apply to vertical agreements.

> *It should also be noted that the reduction in the use of raw materials and of plastic waste and the avoidance of environmental risks involved in the transport of ethylene will be perceived as beneficial by many consumers at a time when the limitation of natural resources and threats to the environment are of increasing public concern.*[143]

The case confirms that non-economic benefits are also of importance to consumers and shows that even benefits that are not measurable today can have an impact on the evaluation of whether an agreement can be exempted under Article 101(3). The Commission stated in its *XXIst Report on Competition Policy* from 1993 that it would *"be wrong to look at the Community's competition policy in isolation from its other policies"*[144]. Commissioner Monti has also said that *"environmental concerns are in no way contradictory with competition policy"*[145] and also stated that the decision in *CECED*

> *clearly illustrates this principle, enshrined in the Treaty, provided that restrictions of competition are proportionate and necessary to achieving the environmental objectives aimed at, to the benefit of current and future generations.*[146]

The Commission also took into account the consumer protection goal and accounted for the reduction of pollution as a part of the benefit for consumers in *CECED*.[147] In *ATLAS*[148], the introduction of a new technology that would enable better technical harmonization counted as a consumer benefit[149] and in *Asahi*[150], the Commission stated that the new technology would enhance

[143] *Exxon/Shell* (n 141), para 71.
[144] European Commission, *XXIst Report on Competition – 1991* (Office for the Official Publications of the European Communities 1991), 39.
[145] Commission, 'Commission approves an agreement to improve energy efficiency of washing machines' [2000] Press Release IP/00/148.
[146] Ibid.
[147] Maziarz (n 8), 351.
[148] *Atlas* (Case IV/35.337) Commission Decision 96/546/EG, OJ [1996] L 239/23.
[149] Ibid, para 53-55.
[150] *Asahi/Saint-Gobain* (Case IV/33.863) Commission Decision 94/896/EC, OJ [1994] L354/87.

product safety.[151] In *EACEM*[152] the members of EACEM had signed a voluntary agreement to reduce electricity consumption of when television sets and video cassette recorders are in stand-by mode. The Commission argued that the saved energy as well as the environmental benefits *"clearly represented technical and economic progress and, by their nature, would be passed on to consumers"*.[153]

Kingston summarizes this by saying that when environmental agreements result in direct cost savings for individuals, there is little controversy and that the real question is whether environmental benefits in themselves can constitute 'technical and economic progress' within the meaning of Article 101(3) where there is an absence of objective economic benefits.[154]

All this indicates that there is a will both in the Commission and the CJEU to include environmental protection and other non-economic benefits of vertical agreements in the assessment under Article 101(3) TFEU. The cases discussed above indicate that non-economic benefits such as product safety or reduced pollution are considered to be passed on to consumers. However, none of the decisions have been dependent on the protection of the environment, but the measures have been mentioned and considered. Hence, it remains unclear to what extent environmental protection and sustainability measures should be accounted for as consumer benefits and how much weight it should be given in the assessment of potential anti-competitive effects. At least, it is clear that they should be attributed a certain amount of significance.

In order for environmental protection to be part of the consumer benefit, EU competition law would benefit from a more American rule of reason approach. The American rule of reason requires a weighing of all

[151] *Asahi/Saint-Gobain* (n 150), paras 24–26.
[152] *EACEM*, European Commission, *XXVIIIth Report on Competition Policy – 1998* (Office for the Official Publications of the European Communities 1999).
[153] Ibid, para 130.
[154] Kingston (n 78), 274.

circumstances in order to determine the legality of a restraint.[155] This allows for the authorities to take into account economic effects of agreements, avoiding different legal treatments of different vertical restraints with the same economic effects.[156] Hence, each restraint is examined on the facts of the case. The Court must therefore do a complicated and prolonged investigation on the market impact.[157] The demanding factor in such analysis is whether there is some degree of market power. Vertical restraints are usually not considered to have anti-competitive effects in the absence of market power.[158]

This would require an individual examination on each restraint against the facts of the case, meaning that special circumstances unique to the particular restraint can be considered. There are several examples of situations where the scope of consumer benefits could have been widened if the assessment would be made based on the facts of the case. A situation were a supplier requires a form of price fixing for the cause of donations to an NGO working for the protection of the environment would benefit from an assessment where focus lies on *why* the pricing restriction is implemented and the beneficial outcomes that it might generate in the future. As in the American rule of reason, the degree of market power should then be of great importance in the assessment in order to ensure that the effects of the agreement are not of such great impact that it will have a noticeable impact on the competition in the relevant market. The negative aspect of the American rule of reason approach

[155] Thomas A. Piraino Jr., 'Reconciling the per se and rule of reason approaches to antitrust analysis' [1991] 64/3 Southern California Law Review pp. 685-740 <http://heinonline.org.ludwig.lub.lu.se/HOL/Page?handle=hein.journals/scal64&div=25> accessed 2020-04-15, 686-687.
[156] Roger Van den Bergh, 'Vertical Restraints – the European part of the policy failure' [2016] 61/1 Antiturst Bulletin pp.167-185 <http://heinonline.org.ludwig.lub.lu.se/HOL/Page?handle=hein.journals/antibull61&div=11> accessed 2020-02-18, 176.
[157] A. Piraino Jr., (n 155), 690.
[158] Patrick F. Todd, 'Vertical restraints, the single market imperative and UK competition policy after Brexit' [2019] 18/3 Competition Law Journal pp. 122-129 <https://doi-org.ludwig.lub.lu.se/10.4337/clj.2019.03.05> accessed 2020-03-10, 124.

is that it provides little to no guidance to undertakings that want to avoid anti-competitive effects caused by the agreement.[159]

[159] A. Piraino Jr. (n 155), 690.

3 Case studies of vertical restraints

EU competition law aims at protecting the internal market of the Union, which is held to be one of the pillars on which the Union stands. Hence, competition law is highly valued and well protected by Union regulations, mainly in Article 101 TFEU. Environmental protection and sustainability are both objectives that should permeate the Union in all its policies and regulations in accordance with Article 3 TEU and Article 11 TFEU.

The main question is to what extent environmental protection can be considered in the assessment of vertical restraints under EU competition law. In order to examine this, a case study of different kinds of vertical restraints with the objective of environmental protection will be conducted.

3.1 Environmental protection in the assessment of vertical restraints

Environmental protection is considered one of the main objectives of the EU, as provided in Article 3(3) TEU. The Article provides goals that should be considered in all regulations and provisions provided by the Union, meaning that it is the general standpoint that it should also be taken into account under competition law. However, as previously shown, this is a well-debated subject where some argues that non-economic benefits such as environmental protection always should be taken into account under such assessment, while others argue that only quantified economic gains can be justified in regard to anti-competitive measures.

Article 101(1) TFEU holds that an agreement cannot go further than what is necessary and cannot affect competition which would have existed without the agreement or in the absence of the relevant contractual restraints. Environmental vertical agreements fall in the scope of Article 101(1) if they

affect trade between Member States and have as their object or effect to prevent, restrict or distort competition.[160]

According to Article 101(3) TFEU, there are four cumulative conditions that should be fulfilled in order for an anti-competitive agreement under Article 101(1) to be exempted. These have been assessed in terms of environmental protection in chapter 2.2.2. There are however some conclusions that can be drawn from this.

Firstly, it can be said that in order for environmental benefits to be considered under Article 101(3), it needs to be able to be quantified. This means that the undertakings should be able to prove, in quantitative terms, exactly to what extent the benefit can be transferred to consumers or how the benefits can be calculated to outweigh the negative effects of the agreement.

Secondly, the environmental benefits must materialize within a reasonable amount of time. The Commission holds that a certain time lag may be accepted; however, as the time lag increases, so must also the efficiencies do. The CJEU or the Commission has not defined how long such time lag can be.

Thirdly, Article 11 TFEU only states that environmental protection should be observed when applied to EU regulations. This means that an anti-competitive vertical agreement is not automatically given an advantage if it benefits the environment. The benefit should be considered in the assessment, but it will not have a predominant influence. Rather, non-economic benefits should be considered in the same amount as anything else.

Fourthly, the environmental benefits must be specific to the agreement, i.e. they cannot be achieved without a conclusion of the agreement. The burden of proof lies with the undertaking that claims an exception under Article 101(3).

[160] This has been further examined in section 2.2.1.

Lastly, the agreement cannot exclude competition in the relevant market. This is particularly important for the conservation of the environment. A lack of competition can be more harmful to the environmental protection as it can result in an inefficient allocation of resources.

3.1.1 Resale Price Maintenance (RPM)

Agreements that include minimum or fixed resale prices to distributors and retailers will be considered to infringe Article 101(1) since such measures are held to have as their object restriction of competition.[161] This also constitutes a hardcore restriction in Article 4 of the Block Exemption Regulation.[162] RPM may lead to efficiencies under Article 101(3). An RPM imposed by a manufacturer who introduces a new product to the market may help enhance the manufacturer's interest in the way the distributors promotes the product, something that in the end will be beneficial for consumers too.[163]

A restraint that require a distributor or retailer to donate a percentage of the resale price to an NGO working with environmental protection could be considered an RPM under EU competition law. Agreements that establish, directly or indirectly, fixed or minimum resale prices are considered to have as their object restriction of competition.

In 2018, the Commission fined four actors in the e-commerce sector for restricting retailers' ability to set their own prices for electronic products.[164] Among the undertakings, Asus was punished the most since they had asked retailers that sold the products below recommended resale prices to increase the prices.[165] The Commission claimed that this led to limiting effective price competition and increased prices for consumers. Special to this case was that the actors had used algorithms to monitor the prices and thus were able to act

[161] Guidelines on Vertical Restraints (n 14), para 223.
[162] Article 4(a) Block Exemption Regulation.
[163] Guidelines on Vertical Restraints (n 14), para 225.
[164] *Asus* (Case AT.40465) C(2018) 4773 final; *Denon & Marantz* (Case AT.40469) C(2018) 4774 final; *Philips* (Case AT.40181) C(2018) 4797 final; *Pioneer* (Case AT.40182) C(2018) 4790 final.
[165] *Asus* (n 164).

quickly when they saw retailers that sold the products below the recommended resale prices.[166]

Regarding the imposition of a maximum price, the CJEU has stated that a maximum resale price will amount to a fixed or minimum resale price unless it is not *"[…] genuinely possible for the reseller to lower that sale price"* and also that it is *"[…] necessary to ascertain whether such a retail price is not, in reality, fixed by indirect or concealed means"*.[167] Maximum resale price is not considered a hardcore restriction under the Block Exemption Regulation, meaning that agreements containing a recommendation or a maximum price will be block exempted given that the market shares of the parties do not exceed 30%.[168] Maximum resale prices are allowed since it puts a roof to the prices, thus benefiting the consumers.[169] The market power is an essential factor to be considered; the stronger the power, the greater the risk that a maximum or recommended price will lead to uniform pricing.[170]

A requirement to donate a percentage to benefit environmental protection is not necessarily considered a restraint under Article 101 TFEU. It depends on whether the remaining part of the price can be set as low or high as the reseller requires. The hardcore restriction in the Block Exemption Regulation aims at protecting the consumers and to protect the effective competition in price setting. It is also reliant on the consequences that would follow from not following such recommendation. As the Commission stated in their latest cases from 2018, the undertakings were punished for requiring their resellers to maintain the recommended resale prices, threatening with suppressed supplies. In such case, a requirement to donate would most likely be prohibited under Article 101(1) TFEU. It is also important to make sure that

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[166] Commission, 'Antitrust: Commission fines four consumer electronics manufacturers for fixing online resale prices' [2018] Press Release IP/18/4601.
[167] Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL* [2008] ECLI:EU:C:2008:485, para 71.
[168] Guidelines on Vertical Restraints (n 14), para 226.
[169] James Kilick, 'European Commission fines for resale price maintenance e-commerce' (White and Case, 1 November 2018) <https://www.whitecase.com/publications/insight/european-commission-fines-resale-price-maintenance-e-commerce> accessed 2020-04-23.
[170] Guidelines on Vertical Restraints (n 14), para 228.

it cannot be seen as an indirect or concealed form of fixed price. One example of such assessment could be where the percentage constitutes such a large proportion of the total resale price that it forces resellers to increase the resale price.

Neither the Commission nor the CJEU will generally take into consideration the aspect of environmental protection in the assessment of an RPM. As seen in the four latest cases from the Commission, the main focus lies on how the RPM in a vertical agreement affects consumers and the effective price competition. In regard to that, environmental protection will have little effect in the defense of an RPM. EU competition law primarily takes an economic approach. It can be argued that such approach is not in line with the environmental protection approach taken in, among others, Article 11 TFEU. The negative outcome of such restraint would be that it forces distributors either to take from their profit, or more likely, to increase their prices, which in the end only affects the consumes negatively in terms of high prices. On the other hand, it is unlikely that competitors in the same market that do not have such a sustainability policy will increase their prices unless the producer or reseller has a very strong market position. This means that the market itself would solve an increased price as consumers who are willing to pay extra in order to donate for environmental protection can choose such products, while consumers who are unwilling can remain consumers of other products.

The essential thing regarding price maintenance is to avoid uniform pricing in the market which will harm consumers. Legally, price fixing due to environmental protection will not be exempted under Article 101(3); however, a recommendation or requirement of a percentage that should be donated to a certain NGO or equivalent which does not result in the distributors not being able to set their own prices without being affected should in theory be accepted.

3.1.2 Selective distribution system

Selective distribution agreements are agreements where a producer of a branded product establishes a system where authorized distributors and retailers get exclusive rights to sell the products. This may restrict intra-brand competition, hinder access to the market and soften competition.[171]

The Commission distinguishes between 'purely qualitative' systems and 'quantitative' systems. The CJEU has established three criteria in the *Metro* case that must be fulfilled in order for a system to be considered 'purely qualitative' and thereby fall outside the scope of Article 101(1).[172]

One kind of vertical environmental agreement may be that a producer requires that distributors of the product must have a sustainability policy, e.g. how they handle waste disposal. This would be considered a selective distribution system which may restrict intra-brand competition, hinder access to a market and soften competition in a certain market. As mentioned above, the Commission distinguishes between 'qualitative' and 'quantitative' systems. Selective distribution is usually viewed more favorably, as long as distributors are chosen on the basis of objective qualitative criteria, as established in the *Metro* doctrine.

Firstly, the product must justify selective distribution, which can be difficult to argue in regard to a requirement to have a sustainability policy. However, it depends on the product and the brand in question. Products that are technically advanced may require educated sales staff and suitable after-sales services, e.g. clocks and watches[173]. This can also change; a product which

[171] Guidelines on Vertical Restraints (n 14), para 174-175.
[172] Case 26/76 *Metro SB-Großmärkte GmbH v Commission,* [1977] ECLI:EU:C:1977:167, para 20; Case 31/80 *NV L'Oreal v PVBA De Nieuwe AMCK* [1980] ECLI:EU:C:1980:289, para 16.
[173] *Omega Watches* (Case IV/10.498) Commission Decision 70/488/EWG, OJ [1970] L 242/22. Cf. Case 31/85 *ETA Fabriques d'Ebauches v DK Investments SA* [1985] ECLI:EU:C:1985:494, where the Court questioned whether mass-produced watches really qualified for selective distribution.

originally benefited from the *Metro* precedent may cease to do so once it is understood that selective distribution is no longer justifiable.[174]

Selective distribution may also enable a producer to protect the brand image and thereby strengthen inter-brand competition, e.g. perfumes and luxury cosmetic products.[175] A brand well-known for its environmental protection and determination to act sustainably may fall under the precedent of *Coty*[176] where the Court argued that protection of a brand image, such as a luxury cosmetic product, can justify a selective distribution system under Article 101 TFEU. It is important that the preservation of the brand image, as in a sustainable undertaking, is closely linked to the restraint. Will a certain product be harmed by the fact that a retailer or distributor sell other products that are not sustainable?

This is certainly an uncertain area. Looking at the precedent of *L'Oreal*[177], the Court held that the selective distribution system should benefit the preservation of a product's quality and ensure its proper use.[178] Whether a sustainability policy such as how to dispose waste do that is questionable. In my opinion, this is the most difficult criterion to be fulfilled in order for a selective distribution system for environmental protection to be approved. A sustainably produced product may not necessarily benefit to such great extent from being sold by a distributor who has a sustainability policy and overall safeguards the environment that it justifies selective distribution.

The second criterion in the *Metro* precedent is that the requirement must apply equally and to all potential distributors in a non-discriminatory way.[179] Hence, as long as all distributors that fulfill the criterion on sustainability policy or a certain waste disposal are allowed to join the system, there should not be any

[174] Whish, Bailey (n 13), 655.
[175] Case 99/79 *SA Lancôme and Cosparfrance Nederland BV v Etos BV and Albert Heyn Supermart BV* [1980] ECLI:EU:C:1980:193.
[176] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] ECLI:EU:C:2017:941.
[177] Case 31/80 *NV L'Oreal v PVBA De Nieuwe AMCK* [1980] ECLI:EU:C:1980:289.
[178] Ibid, para 16.
[179] *Metro* (n 172), para 20.

issues in regard to anti-competitive measures.[180] The CJEU has given examples of what constitute qualitative criteria, such as requirements that state:

- goods can only be sold to retail outlets with suitably trained staff;
- resellers to be located in an appropriate area;
- suitable shop name consistent with the status of the brand;
- provision of proper after-sale services; or,
- no sales to non-authorized distributors and retailers.[181]

In the light of above mentioned examples of qualitative criteria, a requirement of a sustainability police or measures to protect the environment should be allowed under Article 101 TFEU.

Thirdly, any restrictions must be proportionate and not go further than is objectively necessary to protect the quality of the product in question.[182] The Commission has objected against provisions that enables the producer to exercise supervision of advertisement of its distributors and retailers, as this would mean that the supplier could control advertisements that indicate cuts in prices.[183] Regarding sales on internet, the CJEU has taken a little less restrictive position. In *Pierre Fabre*[184], the Court held that a restriction not to sell non-prescription cosmetic products online could not be justified by the need to provide individual assistance to customers and protection of brand image.[185] However, in *Coty,* where the distributors were restricted from selling products through third party marketplaces but allowed to sell through their own web shops, the Court held that such restriction would fall outside

[180] Whish, Bailey (n 13), 656.
[181] Ibid.
[182] *Metro* (n 172), para 20.
[183] *Hasselblad* (Case IV/25.757) Commission Decision 82/367/EEC, OJ [1982] L 161/18, para 60-61.
[184] Case C-439/09 *Pierre Fabre Dermo-Cosmetique SAS v President de l'Autorite de la Concurrence* [2011] ECLI:EU:C:2011:649.
[185] Ibid, paras 42-46.

Article 101(1) provided that it was objectively necessary to preserve the luxury image.[186]

With respect to the *Coty* case, AG Wahl claimed in his opinion that although price competition is important, it is not the only effective form of competition and should therefore not necessarily be the absolute priority in all circumstances. Competition should instead be a driving force for diversity in the product range, optimize quality in products and increase innovation. Further, AG Wahl held that it is what selective distribution systems should be assessed on.[187] The precedent of both *Coty* and *Metro* mainly focuses on 'luxury products' and exemplifies cosmetics. The question is whether such precedents can be applied to systems with the aim to benefit environmental protection and sustainability or to any other product that lacks the luxury which was used to motivate the selective distribution in *Coty* and other precedents.

It can be claimed that the *Metro* criteria should apply equally to any qualitative system that fulfill the criteria, independent of whether or not the system is used to preserve a luxury brand image. Any brand image that a producer would like to protect, under the condition that the purpose of the protection is clear and cannot be considered a pretext, should be allowed in accordance with the *Metro* criteria and the *Coty* precedent. Hence, also a sustainability brand image should in theory be covered.

A selective distribution system that does not fulfill the *Metro* criteria is considered to have quantitative restrictions and may therefore be caught by Article 101(1) as it is considered restrictive of competition by object.[188] In the assessment of a quantitative system, the Commission looks at market positions of the supplier and its competitors.[189] Environmental protection will

[186] *Coty* (n 176), para 58.
[187] *Coty* (n 176), Opinion of AG Wahl, ECLI:EU:C:2017:603, para 32-34.
[188] Case 107/82 *AEG-Telefunken v Commission* [1983] ECLI:EU:C:1983:293, para 34. Cf. *Pierre Fabre* (n 184), para 39 where this is discussed further.
[189] Guidelines on Vertical Restraints (n 14), para 177.

therefore not be given any special treatment in terms of the assessment of selective distribution systems.

An agreement cannot have as its direct or indirect purpose to prevent active or passive selling between selected distributors. Selected distributors should be free to trade the contracted goods with each other, as long as they are in the same network working either at the same or at a different level of trade. Thus, selective distribution cannot be combined with vertical restraints intended to force distributors to buy products from only one given source.[190]

Conclusively, in order to protect the environment, a selective distribution system based on qualitative criteria, such as waste disposal, should not be subject to Article 101(1) TFEU in accordance with the *Metro* and *Coty* precedents. Any quantitative system should be assessed in the light of market shares and will not derive particular benefits from having an objective of protecting the environment.

3.1.3 Exclusive distribution agreements

Exclusive distribution rights can be granted from a supplier to a distributor for a specified territory. The distributor can also agree not to sell products directly into the territories granted to other distributors. The risks in terms of restricted competition are mainly reduced intra-brand competition and market division, which in turn can enable price discrimination.[191] If most suppliers in a market adopt exclusive distribution agreements this can soften competition and enable collusion at both suppliers' and distributors' level; which in turn can cause harm on inter-brand competition.[192] Exclusive distribution may also have beneficial effects such as efficiencies and economics of scale. [193] The CJEU has stated that exclusive distribution agreements are not designed to

[190] Guidelines on Vertical Restraints (n 14), para 58.
[191] Ibid, para 151.
[192] Whish, Bailey (n 13), 653.
[193] Kingston (n 78), 253.

hamper competition, however the agreement must be considered in the light of the market it operates in to establish whether it has such effect.[194]

In the case *International Fruit Container Organisation (IFCO)* the IFCO offered to produce, supply, take back and clean the containers to permit re-use. The food traders informed suppliers of fruit and vegetables to *"whenever possible, buy only goods delivered in IFCO crates"*. The system was considered an exclusivity provision by the Commission, but as this was removed from the agreement and some amendments were added, it was found to be outside the scope of Article 101(1).[195]

Exclusive distribution systems may be a good way for a sustainable brand or product to establish itself on the market; something that otherwise may be difficult for sustainably produced products that tend to be more expensive than equivalent non-sustainable products. However, it is important that the supplier does not hinder passive sales to end-users. Passive sales are defined as responding to spontaneous requests from individual customers. General advertising that reaches customers in other distributors' territory but are only intended to target customers within their own area is considered passive sales.[196] Any measures that deters distributors from using internet as a promotional channel to reach a bigger customer crowd are considered by the Commission as a hardcore restriction.[197] Generally, every retailer should be allowed to have a web shop. Sales through a web shop is considered a form of passive sales since it is legitimate to provide a possibility for customers to reach the retailer, unless territory-based banners on third party websites is used to target particular consumers.[198] Hence, the Commission considers any

[194] Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECLI:EU:C:1966:38, 249-250.
[195] European Commission, *XXIIIrd Report on Competition Policy– 1993* (Office for the Official Publications of the European Communities 1993), 95.
[196] Guidelines on Vertical Restraints (n 14), para 56.
[197] Ibid, para 56.
[198] Ibid, para 53.

restrictions on the distributor's possibility to make sales online a hardcore restriction.[199]

In summary, sustainable exclusive distribution agreements are assessed in the light of the market position of the parties to the agreement. An environmental protection objective will not give any extra advantages in the assessment, but as such agreements are not considered to have as their goal to hinder competition, any agreement that does not go beyond what is necessary should in theory be allowed.

3.1.4 Single Branding Agreements

In single branding agreements, the buyer is obliged or encouraged to concentrate its orders for a particular product from one supplier, through e.g. exclusive purchasing and non-compete obligations.[200] According to the Commission, this could restrict inter-brand competition by preventing other suppliers from accessing the market, but also by facilitating collusion or limiting in-store inter-brand competition.[201]

If a supplier encourages or limits the reseller to only buy products from that particular sustainable supplier in order to preserve the environment, it constitutes a form of single branding, which is held by both the Commission and the CJEU not to have as its object to restrict competition. The assessment is therefore done in an economic context, based on the conditions set up in *Delimitis*.

In the *Delimitis*[202] case, the CJEU created a test for the anti-competitiveness of a single branding agreement. The test assesses the possibility for a new competitor to enter the market. If an agreement contributes to the denial of access to the relevant market, it should fall under Article 101(1) TFEU. The assessment includes (1) the market positions of the relevant parties;[203] (2) the

[199] Guidelines on Vertical Restraints (n 14), para 52.
[200] Ibid, para 129.
[201] Ibid, para 130.
[202] Case C-234/89 *Delimitis v Henninger Bräu AG* [1991] ECLI:EU:C:1991:91.
[203] Ibid, para 25.

duration of the agreement, as a longer duration is more likely to cause significant foreclosure;[204] and (3) other factors relating to entry barriers and legal rules.[205]

If the supplier has a very strong market position, a restraint to limit the reseller from not buying products from other suppliers will have a great impact on the inter-brand competition in the relevant market. In order for such restraint to be allowed, it is important that the agreement does not last for too long as the longer duration of such restraint, the more impact it will have on the market and in the extension, it will be considered to have anti-competitive effects.

Nevertheless, it is likely that the Commission may consider such restraint legitimate in the beginning, as single branding agreements are often used to establish a new product on a certain market. Sustainable products can be more expensive to produce which can make it harder to enter a market. As soon as the product has been established, the restraint can no longer be considered legitimate.

Another environmental vertical restraint may be that the supplier requires that the distributor can only sell sustainably produced products in order for the distributor to be allowed to sell products of that supplier. This would probably be categorized as a combination of a single branding agreement and a selective distribution. The assessment of such agreement should be done in accordance with the *Metro* criteria as described in subchapter 0. Such restraint may however be considered more anti-competitive as it limits the possibility for the reseller to determine what other products can be sold, something that may harm the intra-brand competition in the relevant market.

[204] *Delimitis* (n 202), para 26.
[205] Ibid, paras 21-22.

3.1.5 Franchise agreements

A franchise agreement gives the franchisee the right to use the name and know-how of the franchisor but operate as an independent business.[206] The unique thing about a franchise agreement is that the franchisee pays a fee for the intellectual property rights ('IPRs').

Franchise agreements may be used to require the franchisee to operate in a sustainable manner; demanding an environmentally friendly disposal system, sustainable products etc. As long as the concept of the franchisor is to have a sustainable business and a brand well-known for its work on sustainability, which applies to all franchisees in the system, the agreement will not infringe competition. The assessment of a franchise agreement in the scope of Article 101(1) should be done under the conditions of Article 101(3) TFEU. As for any exception, it is important that the restraints are objectively necessary and benefit the consumers.

Article 101 TFEU was first applied to franchise agreements by the CJEU in *Pronuptia de Paris v Schillgalis*.[207] The Court then held that restrictions intended to maintain the same standard in all franchised outlets, protection of the intellectual property, recommendations of resale prices and territorial exclusivity where the trademark is not well-known do not infringe Article 101(1).[208] In the assessment of franchise agreements under Article 101, it is important to look at the main object of the agreement. Unless the main object is to restrict competition, restraints aiming at protecting the uniformity and reputation of the franchisor, it generally falls outside the scope of the Article.[209] Many franchise agreements are covered by Article 2(3) Block Exemption Regulation, as the intellectual property rights are directly related to the use, sale or resale of the franchisee.[210]

[206] Guidelines on Vertical Restraints (n 14), paras 189-191
[207] Case 161/84 *Pronuptia de Paris v Schillgalis* [1986] ECLI:EU:C:1986:41.
[208] Ibid, para 9.
[209] Guidelines on the application of Article 81(3) of the Treaty (n 19), para 31.
[210] Guidelines on Vertical Restraints (n 14), para 44.

3.1.6 Parity provisions

Parity provisions, also known as 'most favored nation' clauses, usually relates to agreements where company A requests supplier B not to sell products to C at a lower price than what has been agreed with B. Non-price parity provisions, where e.g. A requests B not to agree to a business model with C that is different from the one agreed with B, or an agreement not to offer better service terms to C.[211] Parity provisions may lead to a reduction of intra-brand competition, e.g. if a retailer requires a supplier to provide parity with other retailers which would cause less competition in the selling of the supplier's products. The use of price parity provisions can transform a recommended or maximum resale price into a minimum resale price.[212] Parity provisions may also reduce inter-brand competition, if it makes the entry or expansion more difficult, or may facilitate collusion between suppliers to a certain platform.[213]

In *Apple/e-books*, the Commission was worried that the agency contracts that Apple had with five publishers might had been coordinated as a part of a common strategy to raise the retail prices for e-books or to prevent lower retail prices on a global scale. However, Apple committed to terminate the agency agreements with the publishers and committed to not enter any retail price parity provisions in any new or existing agency agreements for the next five years.[214] Furthermore, it is important that the provision does not last for a longer duration than what is necessary. The Commission held in *Amazon*[215] that a longer period than five years would go beyond what is necessary to protect competition and referred to the fast-moving market of e-books to consumers.[216]

Parity provisions may be a possible way of ensuring that a certain product is not sold by non-sustainable undertakings. An example of this would be that

[211] Whish, Bailey (n 13), 663.
[212] Ibid, 663.
[213] Ibid, 663.
[214] Commission Notice, 'Commission accepts legally binding commitments from Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Apple for sale of e-books' [2012] Press Release IP/12/1367.
[215] *E-book MFNs and related matters (Amazon)* (Case AT. 40153) C(2017) 2876 final.
[216] *Amazon* (n 214), para 193.

undertaking A requests supplier B not to sell products to C unless C can ensure a sustainable business. In order for a parity provision not to fall under Article 101(1) TFEU, it is important to ensure that it is not for the purpose of raising retail prices or in other ways to infringe competition. The restraints must be for the sake of protecting the environment, not to be used as a cover for restraints of trade. As shown in *Amazon*, the duration for which the provision should last cannot go further than what is necessary to establish the product on the market.

4 Environmental Protection in the Future

In the previous chapters, it has been shown that under current law, environmental protection is not assessed differently than other non-economic efficiencies of a vertical agreement. Therefore, the following question arises: Should environmental protection be heavier weighted in the assessment of vertical restraints than under current EU law?

The purpose of EU competition law is primarily to protect the competition in order to maintain and improve the internal market of the Union. Although there are regulations within the Treaties that provide for environmental protection to be considered and integrated in the Union's policies and activities, it is unclear to what extent this should include competition law. However, as previously stated, at least environmental protection is not in opposition with economic aims such as the ones in competition law. Looking at the way environmental integration should be done, it should at a first instance be done by interpreting regulations to bring economic and environmental objectives in line. If that is not possible, the two aims should be balanced so that none is restricted more than necessary. In light of the above, in applicable law this is not done sufficiently. Hence, it is my opinion that environmental protection should be weighted heavier in the assessment of vertical restraints.

4.1.1 Proposed measures

In order to include environmental protection in the assessment of vertical restraints, the Commission should clarify in their *Guidelines on Vertical Restraints* what role environmental protection should have in competition law. This is important in order to follow the aims of the EU, particularly Article 3(3) TEU and Article 11 TFEU where it is stated that environmental protection should be part of the EU policies and activities. By stating the importance of environmental protection in the guidelines, the Commission

makes a clear statement to actors on the internal market that environmental protection has a great role in EU competition law. A clarification will also assist national competition authorities and courts in their assessment of environmental vertical restraints.

Another important measure to be taken into account is to make sure that environmental vertical restraints are brought to the CJEU in order to elucidate the importance of environmental protection in EU competition law. It is also important in order to set precedent for that type of restraints and make it clear for actors in the market what applies to that type of agreements. By making it clearer for undertakings how their agreements and restraints will be assessed in terms of environmental protection and sustainability, more undertakings will be encouraged to incorporate such restraints in their agreements.

Regarding the assessment of potential exceptions under Article 101(3) TFEU, there are several measures that should be taken in regard to each condition laid out in that Article.

The scope of what constitutes improvement in quality should be widened to also include sustainably produced products. As anti-competitive effects can only be outweighed by pro-competitive effects such as consumer benefits, it is important that environmental protection can be considered pro-competitive. Quality today often refers to improvement in technology and the durability of the product. Although a sustainably produced product may not last longer or improve in the physical quality, it implies a better way of production in terms of environmental protection which in the long term will increase quality in the environment, in accordance with the aims of the Union.

Moreover, the time span in the assessment of consumer benefit should be widened. Today, the Commission and the CJEU only looks at the short-term benefits of an agreement, which results in many of the environmental benefits being excluded. Environmental protection, although some results may be visible in the near future, is a result of a long-term work. The result of sustainable fishing is not seen directly, but it will have a great impact on the

environment in the long term. This is the difficulty with working for a more sustainable world as the results are not seen today but will benefit future generations. The Commission has previously stated that, although a certain time lag can be accepted, it requires greater efficiencies. It has been debated whether the importance of the long-term efficiencies in *CECED* really had an impact on the assessment. The way the Commission reasoned, stating that the collective benefits of the agreement visible in the long-term should be seen as a consumer benefit, should be adopted in the guidelines.

Additionally, the Commission should adopt the European rule of reason approach to a greater extent in order to be able make exceptions regarding environmental protection. The European rule of reason stems from the case *Wouters.*[217] The European rule of reason implies that cases that affect competition in accordance with Article 101(1) TFEU should nevertheless be allowed if they are considered to have a legitimate objective. However, it remains unclear how one judges legitimacy.[218]

AG Mazak argued in *Pierre Fabre*[219] that the legitimate objective should be

> *[…] of a public nature and therefore aimed at protecting a public good and extend beyond the protection of the image of the products concerned or the manner in which an undertaking wishes to market its products.*[220]

From that statement it can held that the CJEU should expand the scope and include environmental protection and sustainability. Monti and Mulder argue that, against the background of AG Mazak's statement, it seems plausible that an agreement which reduce carbon emissions could fall in the scope of the rule.[221]

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[217] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECLI:EU:C:2002:98.
[218] Monti, Mulder (n 84), 646.
[219] *Pierre Fabre* (n 184).
[220] *Pierre Fabre* (n 184) Opinion of AG Mazak, ECLI:EU:C:2011:113, para 35.
[221] Monti, Mulder (n 84), 646.

Since environmental protection is a highly prioritized question and one of the main objectives of the EU, it can be argued that sustainability is for the cause of the public good. Hence, environmental protection should be within the scope of 'legitimate objective' in accordance with European rule of reason and the *Wouters* case law. By ensuring that environmental protection and sustainability can be considered a 'legitimate objective', this would further encourage undertakings to adopt environmental vertical restraints. This would make it easier for the Commission and CJEU to allow vertical restraints with the objective of sustainability without changing the wording of Article 101 TFEU and expanding the scope to cover other non-economic benefit. In some cases, it might even be helpful to adopt more of an American rule of reason approach as previously argued. By such approach, it is easier for the Commission or the Court to take into considerations all factual circumstances of a case.

Furthermore, undertakings engaging in agreements containing environmental vertical restraints should try to translate the benefits of the environmental achieved by the agreement into measurable standards. As the burden of proof lies with the undertakings and not the Commission, it is important to make it easy for the Commission to see in real numbers what an agreement will result in. This also makes it easier for the Commission to compare the net efficiencies against the losses of an agreement in order to assess the legality of an agreement. In the case *Chicken of Tomorrow*, the ACM took into account exactly what consumers were willing to pay extra for sustainably produced chicken meat. As the study showed that consumes were not willing to pay so much as to cover the costs, the net consumer benefits were not considered sufficient.

Lastly, and to clarify, it is of my strong opinion that the competition law and internal market of the EU should be preserved and protected. The internal market is one of the pillars on which the EU rests. Environmental vertical restraints that heavily affect the competition in a relevant market should not be exempted solely based on the ground of environmental protection. However, by including environmental protection and sustainability as a

criterion in the assessment of vertical restraints, the EU benefits undertakings who wants to improve the sustainability in a supply chain and such.

5 A Final Conclusion

The thesis has as its aim to answer the following four research questions:

- How should EU competition law be applied to environmental vertical agreements?
- Can environmental protection be part of consumer welfare?
- To what extent can environmental protection be part of the assessment of vertical agreements in practice under current EU competition law?
- Should environmental protection be heavier weight in the assessment of vertical restraints?

Firstly, the thesis has discussed the legal framework of vertical restraints apply to environmental vertical agreements. Effects created by vertical restraints have been evaluated. Positive effects may be that it leads to improved quality of products and services, allowing for manufacturers to enter new markets and in other ways realizing efficiencies that can outweigh any negative effects. Negative effects that may occur from vertical restraints can be foreclosure, softening of competition and collusion at manufacturer level. The more vertical restraints in an agreement, the more likely that the agreement has an anti-competitive effect.

The answer to the first research question is that Article 101(1) TFEU applies to vertical agreements that are considered anti-competitive and affects trade between Member States. Environmental vertical agreements are not *per se* considered anti-competitive; the assessment is made in the same way independent of an environmental objective. The analysis of how the exception criteria in Article 101(3) TFEU would apply in terms of environmental protection has been conducted. It shows that it is important that there is a causality between efficiencies created and the agreement in question. The Commission will in general not take into consideration efficiencies that only arise over a long-term horizon. The measure must be proportionate and cannot affect competition in general. Furthermore, the environmental efficiencies

must benefit the consumers, something that has not yet been brought up by the Commission or the CJEU. However, the Commission has held (in the case of a horizontal agreement) that consumers can be considered to have been allowed a fair share of benefits even if the benefits have not accrued to individual purchasers.

Regarding the second research question, it has been found that consumer welfare includes environmental protection to some extent. Case law from the Commission and the Dutch competition authority ACM shows that they have taken environmental protection and sustainability into consideration in their assessment, however it has not been considered the essential argument. The thesis has suggested that the Commission should adopt an American rule of reason approach which would benefit undertakings implementing vertical restraints to protect the environment as it requires an individual examination of each restraint against the facts of the case which could widen the scope of consumer benefits.

The third research question has been examined through a case study where examples of vertical restraints with an objective of environmental protection have been assessed in order to chart to what extent environmental protection can be considered in the assessment of vertical restraints. Vertical restraints such as resale price maintenance, selective and exclusive distribution, single branding, franchise agreements and parity provisions have been examined by stated examples of environmental vertical restraints that can be conducted in order to protect the environment. The findings have been that the area in general is very uncertain as there are no precedents available. Analogic interpretations of case law on horizontal agreements have been done in order to map out possible reasonings of the Commission and the CJEU. The conclusion that can be drawn from this is that environmental benefits that can be translated into economic or other measurable terms will generally be considered to a greater extent than qualitative measures which are difficult to materialize. Nevertheless, what plays the essential part is that the benefits of the agreement are greater than the detriments caused.

Lastly, the thesis has examined whether environmental protection should be given greater weight in the assessment of vertical restraints in order to meet the aim of Article 3(3) TEU and Article 11 TFEU. The conclusion has been that under current EU competition law, environmental protection is not given any extra weight in an assessment of vertical restraints. In order to involve environmental protection in accordance with general provisions provided in Article 3(3) TEU and Article 11 TFEU, this chapter has provided suggested measures to be taken by the Commission and the CJEU. In summary, these are:

- Clearance by the Commission in their Guidelines on Vertical Restraints what role environmental protection should have in competition law;
- Bring more cases regarding environmental vertical restraints to the CJEU in order to set precedents;
- Widen the scope of improvement in quality in order to include sustainable production;
- Widen the time span in the assessment of consumer benefits; and
- Consider environmental protection as a legitimate objective to vertical restraints.

Conclusively, environmental protection should not be prioritized over the protection of the internal market and competition law. As mentioned in the introduction, it is important to have a balance between the two important aims of the EU. Only with balance can both the environment and the competition be preserved.

Bibliography

Primary sources

United Nations

Resolution adopted by the General Assembly 42/187, 96th plenary meeting, 11 December 1987, A/RES/42/187

European Union

Legislation

Consolidated version of the Treaty on European Union [2008] OJ C115/13 (TEU).

Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/49 (TFEU).

Regulations and Directives

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003).

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1 (EUMR).

Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Block Exemption Regulation).

Communications and Notices

Laky Z, *'Environment Policy: general principles and basic framework'* (Factsheet, European Parliament, 2019) <https://www.europarl.europa.eu/factsheets/en/sheet/71/vides-politika-visparigi-principi-un-pamatsistema> accessed 2020-05-05.

Commission Notice, 'Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements' (2001 Horizontal Guidelines) OJ [2001] C 3/02.

Commission Notice, 'Guidelines on the application of Article 81(3) of the Treaty' OJ [2004] C 101/08.

Commission Communication, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (Horizontal Merger Guidelines) OJ [2004] C 31/5.

Commission Communications, 'Guidelines on Vertical Restraints' OJ [2010] C 130/01.

Commission Communication, 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements' (2010 Horizontal Guidelines) OJ [2011] C 11/9.

Press Releases

Commission, 'Commission approves an agreement to improve energy efficiency of washing machines' [2000] Press Release IP/00/148.

Commission, 'Commission accepts legally binding commitments from Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Apple for sale of e-books' [2012] Press Release IP/12/1367.

Commission, 'Antitrust: Commission fines four consumer electronics manufacturers for fixing online resale prices' [2018] Press Release IP/18/4601.

Reports and Working Papers

European Commission, *XXIst Report on Competition Policy – 1991* (Office for the Official Publications of the European Communities 1991).

European Commission, *XXIIIrd Report on Competition Policy – 1993* (Office for the Official Publications of the European Communities 1993).

European Commission, *XXVIIIth Report on Competition Policy – 1998* (Office for the Official Publications of the European Communities 1999).

Speeches

Vestager M, *'The Values of Competition Policy'* (European Commission, 13 October 2015) available at <https://ec.europa.eu/competition/speeches/index_2015.html> accessed 2020-04-07.

Secondary Sources

Books

Blanke H.J.; Mangiameli S, *The Treaty on European Union (TEU): A Commentary* (2013 edn, Springer-Verlag Berlin and Heidelberg GmbH & Co. K 2013).

Hettne J; Eriksson I.O. (ed), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2nd edn, Norstedts Juridik AB 2011).
Jones A; Sufrin B, *EU Competition Law: text, cases, and materials* (6th edn, Oxford University Press 2016).

Kingston S, *Greening EU Competition Law and Policy* (Cambridge University Press 2011).

Nowag J, *Environmental integration in competition and free-movement laws* (Oxford University Press: Oxford Studies in European Law 2017).

Whish R; Bailey D, *Competition Law* (9th edn, Oxford University Press 2018).

Online Journals

A. Piraino Jr. T, 'Reconciling the per se and rule of reason approaches to antitrust analysis' [1991] 64/3 Southern California Law Review pp. 685-740 <http://heinonline.org.ludwig.lub.lu.se/HOL/Page?handle=hein.journals/scal64&div=25> accessed 2020-04-15.

Daskalova V, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11/1 The Competition Law Review p. 131-160 <https://ssrn.com/abstract=2605777> accessed 2020-03-23.

Gerbrandy A, 'Addressing the Legitimacy Problem for Competition Authorities Taking into Account Non-Economic Values: The Position of the Dutch Competition Authority' [2019] Forthcoming, European Law Review <https://ssrn.com/abstract=3364131> accessed 2020-03-04.

Maziarz A, *'Do Non-Economic Goals Count in Interpreting Article 101(3) TFEU?'* [2014] 10/2 European Competition Journal <https://doi.org/10.5235/17441056.10.2.341> accessed 2020-04-06.

Monti G; Mulder J, 'Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives' [2017] 42/5 European Law Review pp. 635-656 <http://awa2018.concurrences.com/IMG/pdf/monti_mulder_2017_42_elrev_issue_5_offprint.pdf> accessed 2020-02-20.

Nowag J, ‘The Sky is the Limit: On the drafting of Article 11 TFEU’s integration obligation and its intended reach’ (2014) University of Oslo Faculty of Law Research Paper No. 2014-45
<https://ssrn.com/abstract=2535273>, accessed 2020-03-18.

Todd P.F., ‘Vertical restraints, the single market imperative and UK competition policy after Brexit’ [2019] 18/3 Competition Law Journal pp. 122-129
<https://doi-org.ludwig.lub.lu.se/10.4337/clj.2019.03.05> accessed 2020-03-10.

Van den Bergh R, ‘Vertical Restraints – the European part of the policy failure’ [2016] 61/1 Antiturst Bulletin pp.167-185
<http://heinonline.org.ludwig.lub.lu.se/HOL/Page?handle=hein.journals/antibull61&div=11> accessed 2020-02-18.

Reports

Long S, *‘Competition Law and Sustainability: A Study of Industry Attitudes Towards Multi-Stakeholder Collaboration in the UK Grocery Sector’* (Fairtrade Foundation, 2019).

Willoughby R; Gore T, *‘Ripe for Change – Ending Human Suffering in Supermarket Supply Chains’* (Oxfam International, June 2018).

Websites and Blogs

Autoreit Consument & Markt, ‘Industry-wide arrangements for the so-called Chicken of Tomorrow restrict competition’ (ACM, 26 January 2015)
<https://www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition> accessed 2020-05-20.

Kilick J, ‘European Commission fines for resale price maintenance e-commerce’ (White and Case, 1 November 2018)
<https://www.whitecase.com/publications/insight/european-commission-fines-resale-price-maintenance-e-commerce> accessed 2020-04-23.

OECD ‘Glossary of Industrial Organisation Economics and Competition Law’
<http://www.oecd.org/regreform/sectors/2376087.pdf> accessed 2020-03-27.

Van der Veer J.P., ’Art 101(3) and sustainability – new developments in the Netherlands’ (Kluwer Competition Law Blog, 15 May 2014)
<http://competitionlawblog.kluwercompetitionlaw.com/2014/05/15/art-1013-and-sustainability-new-developments-in-the-netherlands/> accessed 2020-03-27.

Theses

Van der Weide C.J.A, 'Sustainability and Article 101(3) TFEU: The undertakings perspective' (Master's thesis, Utrecht University 2013).

Vedder H.H.B., 'Competition Law and Environmental Protection in Europe: Towards Sustainability?' (PhD thesis, Universiteit van Amsterdam 2003).

Table of Cases

The Court of Justice of the European Union

Case 107/82 AEG-Telefunken v Commission [1983] ECLI:EU:C:1983:293.

Case C-279/06 CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL [2008] ECLI:EU:C:2008:485.

Case C-230/16 Coty Germany GmbH v Parfümerie Akzente GmbH [2017] ECLI:EU:C:2017:941.

Joined Cases 56 and 58/64 Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community [1966] ECLI:EU:C:1966:41.

Case 6/72 Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities [1973] ECLI:EU:C:1973:22.

Case C-234/89 Delimitis v Henninger Bräu AG [1991] ECLI:EU:C:1991:91.

Case 31/85 ETA Fabriques d'Ebauches v DK Investments SA [1985] ECLI:EU:C:1985:494.

Case T-168/01 GlaxoSmithKline Services Unlimited v Commission of the European Communities [2006] ECLI:EU:T:2006:265.

Case C-501/06 *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECLI:EU:C:2009:610.

Case C-62/88 Hellenic Republic v Council [1990] ECLI:EU:C:1990:153.

Case 99/79 *SA Lancôme and Cosparfrance Nederland BV v Etos BV and Albert Heyn Supermart BV* [1980] ECLI:EU:C:1980:193.

Case 31/80 NV L'Oreal v PVBA De Nieuwe AMCK [1980] ECLI:EU:C:1980:289.

Case 26/76 Metro SB-Großmärkte GmbH v Commission (Metro), [1977] ECLI:EU:C:1977:167.

Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 Métropole Télévision v Commission [1996] ECLI:EU:T:1996:99.

Case C-260/07 Pedro IV Servicios SL v Total España SA [2009] EU:C:2009:215.

Case C-439/09 Pierre Fabre Dermo-Cosmetique SAS v President de l'Autorite de la Concurrence [2011] ECLI:EU:C:2011:649.

Case 161/84 Pronuptia de Paris v Schillgalis [1986] ECLI:EU:C:1986:41.

Case 56/65 Société Technique Minière v Maschinenbau Ulm [1966] ECLI:EU:C:1966:38.

Case C-309/99 Wouters v Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECLI:EU:C:2002:98.

Case T-213 and 214/01 Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission [2006] ECLI:EU:T:2006:151.

Opinions of Advocates General

Case C-439/09 Pierre Fabre Dermo-Cosmetique SAS v President de l'Autorite de la Concurrence [2011] Opinion of AG Mazak, ECLI:EU:C:2011:113.

Case C-230/16 Coty Germany GmbH v Parfümerie Akzente GmbH [2017] Opinion of AG Wahl, ECLI:EU:C:2017:603.

Commission Decisions

Asahi/Saint-Gobain (Case IV/33.863) Commission Decision 94/896/EC, OJ [1994] L354/87.

Asus (Case AT.40465) C(2018) 4773 final.

Atlas (Case IV/35.337) Commission Decision 96/546/EG, OJ [1996] L 239/23.

CECED (Case IV.F.1/36.718) Commission Decision 2000/475/EC, OJ [1999] L 187/47.

E-book MFNs and related matters (Amazon) (Case AT. 40153) C(2017) 2876 final.

Exxon/Shell (Case IV/33.640) Commission Decision 94/322/EC OJ [1994] L 144/20.

Denon & Marantz (Case AT.40469) C(2018) 4774 final.

Hasselblad (Case IV/25.757) Commission Decision 82/367/EEC, OJ [1982] L 161/18.

Omega Watches (Case IV/10.498) Commission Decision 70/488/EWG, OJ [1970] L 242/22.

Philips (Case AT.40181) C(2018) 4797 final.

Pioneer (Case AT.40182) C(2018) 4790 final.

National Competition Authorities

Autoriteit Consument & Markt, 'ACM's analysis of the sustainability arrangements concerning the "Chicken of Tomorrow' (ACM/DM/2014/206028).