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Fairness in article 101(3) TFEU

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Summary

This thesis aims to assess article 101 (3) TFEU from fairness point of view. More specifically, the focus will be on assessing whether this article protects/ promotes fairness, and if so, who's fairness. A special focus will be on also assessing what is considered as fair under the second condition of article 101 (3) TFEU, which directly refers to fairness by requiring that consumers receive a fair share of the benefits resulting from the agreement that is subject to assessment under article 101(3) TFEU.

Firstly, an overview of fairness (and its varying meanings) in addition its role in EU competition law was given. From there, the thesis moved into assessing each of the conditions of article 101(3) TFEU from fairness point of view. It was found by assessing and utilizing various sources that all conditions of article 101 (3) TFEU can contribute towards fairness. The article primarily protects fairness for consumers, while also more indirectly protecting the fairness for competitors in certain cases. There should be also room for considering the fairness and interest of others, e.g. of society to limited extend, this however being a matter that is currently debated by various parties. Different interpretations of the current state of matters and suggestions for improvement were discussed relating to the article 101(3) TFEU's requirement of consumers receiving a fair share. It seems that in some of these approaches consumers fairness and interests are only seemingly protected, where on the other hand, the approach where consumers must be fully compensated for the negative effects with the benefits in order for the share to be considered fair was found to be unnecessarily strict in certain cases: these issues have been also noted by various parties, but none provided an appropriate solution from fairness point of view. A proposal was made in the thesis on how the second condition should be assessed in order to secure outcomes that are actually fair.

Abbreviations

AG	Advocate General
Commission	European Commission
CJEU	Court of Justice of the European Union
EU	European Union
GC	General Court
NCA	National competition authority
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

There has been discussion about the role of fairness in competition law: whether it is a goal, should it be pursued and should it be taken into account in competition law assessment, and if so, to what extent.¹ Some have discussed of a comeback of fairness considerations in competition law, and fairness has been for example frequently brought up by EU's commissioner for competition Margrethe Vestager in her speeches.² There's no one clear answer to the question of what is meant by fairness, and something that is fair for A might be actually cause unfair consequences for B.³

¹ Alfonso Lamadrid de Pablo, 'Competition Law as Fairness' (2017) 8 *Journal of European Competition Law & Practice* 147-148; Margrethe Vestager, 'Fairness and competition' (GCLC Annual Conference, Brussels, 25 January 2018) https://wayback.archive-it.org/12090/20191129212136/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fairness-and-competition_en accessed 1 February 2021; Ariel Ezrachi, 'EU Competition Law Goals and the Digital Economy' (2018) *Oxford Legal Studies Research Paper* 17/2018, 13-17 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766 accessed 28 January 2021; Francesco Ducci and Michael Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (2019) 64 *The Antitrust Bulletin* 79; Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law - A Comprehensive Empirical Investigation' (2020), 5, 13, 30, 32 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3735795 accessed 28 January 2021; Pinar Akman, "'Fairness" in article 102 TFEU' in Damien Gerard, Assimakis Komninos and Denis Waelbroeck (eds), *Fairness in EU Competition Policy: Significance and Implications An Inquiry into the Soul and Spirit of Competition Enforcement in Europe* (Bruylant 2020) 105-107; Maurits Dolmans and Wanjie Lin, 'How to avoid a fairness paradox in competition policy' in Damien Gerard, Assimakis Komninos and Denis Waelbroeck (eds), *Fairness in EU Competition Policy: Significance and Implications An Inquiry into the Soul and Spirit of Competition Enforcement in Europe* (Bruylant 2020); Niamh Dunne, 'Fairness and the Challenge of Making Markets Work Better' (2021) 84 *Modern law review* 230.

² Margrethe Vestager 'How competition can build trust in our societies' (Ted talk, New York, 21 September 2017) https://wayback.archive-it.org/12090/20191129213030/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/how-competition-can-build-trust-our-societies_en accessed 13 April 2021; Vestager, 'Fairness and competition' (n 1); Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 79-80; Stylianou and Iacovides (n 1) 5, 30, 32; Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 230-264. See also Anne Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2016) 98-109 for some points on the role of fairness in the earlier days.

³ Aristotle, *Nicomachean Ethics* (Roger Crips ed and tr, Cambridge University Press 2000) 81ff; Laura Parret, 'The multiple personalities of EU competition law: time for a comprehensive debate on its objectives' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar Publishing Press 2012) 74; François J. Dessart and Ginevra Marandola, 'Science for policy briefs European's perceptions of fairness'' (European Commission

Because of these conflicts that exist between different interests, fairness might need balancing between different interest.⁴ When there are various interest, some interests may be valued more than others and chosen as winners.⁵ Indeed, in addition to the meaning of fairness, the question of who's fairness is to be promoted can be asked.⁶

In the EU's competition provisions fairness is directly mentioned in articles 101(3) and 102 TFEU.⁷ Article 101 (3) TFEU contains certain conditions, and if they are fulfilled – all of them - article 101(1) TFEU can be found to not be applicable.⁸ Article 101 (1) TFEU contains a prohibition on:

all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market...⁹

2019), 1-4

https://ec.europa.eu/jrc/sites/jrcsh/files/fairness_pb2019_fairness_perceptions.pdf accessed 1 March 2021; Akman (n 1) 105-107,114-118; Dolmans and Lin (n 1) 22-31; Helene Jenkins and Aline Blankertz, 'Regulating e-commerce through competition rules: a fairness agenda?' in Damien Gerard, Assimakis Komninos and Denis Waelbroeck (eds), *Fairness in EU Competition Policy : Significance and Implications An Inquiry into the Soul and Spirit of Competition Enforcement in Europe* (Bruylant 2020) 92-94; Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 230-249.

⁴Juliane Kokott and Daniel Dittert, 'Fairness in competition law and policy' in Damien Gerard, Assimakis Komninos and Denis Waelbroeck (eds), *Fairness in EU Competition Policy : Significance and Implications An Inquiry into the Soul and Spirit of Competition Enforcement in Europe* (Bruylant 2020) 16-18; Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 239, 247-248.

⁵ Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 231,239, 247-248. See also Commission, 'XXVIIth Report on Competition Policy' (1997), para 77 https://ec.europa.eu/competition/publications/annual_report/1997/broch97_en.pdf accessed 24 may 2021; Dolmans and Lin (n 1) 26-28.

⁶ Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 230-234.

⁷ Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU), arts 101 (3)-102; Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2019) 42-44.

⁸TFEU, art 101(3); Joined Cases C-43/82 and C-63/82 *VBVB and VBBB v Commission* EU:C:1984:9 (VBVB and VBBB), para 61; Case T-17/93 *Matra Hachette v Commission* EU:T:1994:89 (Matra), para 85; Case T-185/00 *M6 and Others v Commission* EU:T:2002:242 (M 6 and others), para 86; Case T-213/00 *CMA CGM and Others v Commission* EU:T:2003:76 (CMA CGM), para 226; Commission, 'Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C101/97 paras 38-47.

⁹ TFEU, art 101 (1).

Following the commission's approach in its article 101 (3) TFEU guidelines, all references to agreements in the context of article 101 (3) TFEU shall be understood to cover also decisions of associations of undertakings and in addition, also concerted practices unless otherwise is apparent from the context.¹⁰

There has been recently a lot of interesting discussion about article 101 (3) TFEU, relating for example to the second condition of article 101(3) TFEU which is the condition that directly refers to fairness.¹¹ The first condition of article 101 (3) TFEU requires benefits to arise from the agreement, and then the second condition requires that a fair share of the benefits must be received by the consumers.¹² In relation to the second question there has been, for example, discussion relating to the question of when the share can be considered to be fair, and what factors should be taken into account in the assessment.¹³ In addition to these two conditions, there exists also two other conditions in article 101 (3) TFEU.¹⁴ Article 101 (3) TFEU and its conditions, assessed from fairness point of view, will be the focus of this thesis as explained more in depth in next sections.

¹⁰ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 1, fn 1.

¹¹ Or Brook, 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities' (2019) 56 *Common Market Law Review* 121-156; Jones, Sufrin and Dunne (n 7) 42-44; Jordan Ellison, 'A Fair Share: Time for the Carbon Defence?' (2020), 1-16 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542186 accessed 19 February 2021; Simon Holmes, 'Climate change, sustainability, and competition law' (2020) 8 *Journal of Antitrust Enforcement* 354-371-382; Martin Gassler, 'Sustainability, the Green Deal and Art 101 TFEU: Where We Are and Where We Could Go' (2021) *Journal of European Competition Law & Practice*, 7-11 <https://academic.oup.com/jeclap/advance-article-abstract/doi/10.1093/jeclap/lpab001/6142276?redirectedFrom=fulltext> accessed 26 February 2021.

¹² TFEU, art 101(3); Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 48-72,83-104.

¹³ Ellison (n 11) 8-10; Holmes (n 11) 374; Netherlands Authority for Consumers and Markets, 'Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law' (2021), paras 45-52 <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf> accessed 26 February 2021; Gassler (n 11) 9-11.

¹⁴ TFEU, art 101(3); Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 38-39, 73-82, 105-116.

1.2 Purpose, research questions and delimitations

The purpose of this thesis will be to examine fairness in specific provision, which is article 101 (3) TFEU. More specifically, the purpose of this thesis is to gain insight into whether fairness is promoted/protected in article 101 (3) TFEU and its conditions, and if it is, who's fairness is promoted/protected? In addition, a specific focus of this thesis will be on determining how fairness is assessed in Article 101(3) TFEU's second condition (i.e. what is fair share?) and which factors are taken into account in this assessment. The aim is also to examine whether this assessment is satisfactory from fairness point of view and while the second condition directly refers to fairness, the aim is also to assess whether it really ensures shares that are fair.

The research questions are as follows:

- 1) Do article 101(3) TFEU's conditions promote/protect fairness, and if so, who's fairness?
- 2) What is considered as fair share, and how it is assessed whether the share is fair or not? Are the answers for these questions in research question 2 satisfactory from fairness point of view or is there room for improvement and if so, how this could be done?

Assessment of fairness purely from the view of undertakings that are parties to the agreement that is assessed under 101(3) TFEU is not within the scope of this thesis. Matters relating to procedural fairness will also not be assessed. It should also be noted that the writer does not claim that the fairness aspects would be the same for all EU competition provisions, and it is not the purpose of this thesis to assess the effect of fairness in these other provisions or in EU competition law in more general level.

1.3 Method, sources and structure

In this thesis, the legal dogmatic method will be used in connection to EU legal method(which could be also seen to fall within the legal dogmatic method).¹⁵ In legal dogmatic method, the law that is currently in force is examined, interpreted and systematized by utilizing various sources.¹⁶ De lege ferenda-recommendations are often connected to research conducted by using legal dogmatics as methodology.¹⁷ In EU legal method, EU law is analysed by using teleological interpretation that takes into account EU legal order's characteristics, EU law's general principles and the goals of the EU.¹⁸ As this thesis is focused on examining article 101 (3) TFEU as it currently stands and certain fairness (which could be seen as a goal of EU competition law)¹⁹ aspects in it as described in the purpose section, these methodologies serve the purpose of this thesis well.

Various sources are used in this thesis. The sources include, for example, commission's guidelines, EU's primary legislation, case law, books, wide variety of articles and also speeches. When it comes to fairness and its meaning, the sources were chosen with the purpose of providing a solid

¹⁵ Fredrika Wendleby, 'Towards a Stricter Comparability Test - An EU Law Analysis of the Swedish Dividend Withholding Tax Regime in Relation to Non-EU Investment Funds' (Master thesis, Uppsala University 2019) 10, fn 32; Ruth Nielsen, 'New European Legal Realism – New Problems, New Solutions?' in Ulla Neergaard and Ruth Nielsen (eds), *European Legal Method – towards a New European Legal Realism?* (Djøf Publishing 2013) 77-78,107-119.

¹⁶ Ari Hirvonen, *Mitkä menetit? Opas oikeustieteen metodologiaan* (Ari Hirvonen 2011) 21-27,36-53.

¹⁷ Tapio Määttä, 'Käytännöllinen lainoppi on tulkintajuridiikkaa' in Tapio Määttä (ed), *Oikeudellisen ajattelun perusteita* (University of Eastern Finland 2018) 21.

¹⁸ Witt, *The More Economic Approach to EU Antitrust Law* (n 2) 77-79; Karl Riesenhuber (ed), *European Legal Methodology* (Insertia 2017); Christina Eckes, 'European Union Legal Methods – Moving Away from Integration' in Ulla Neergaard and Ruth Nielsen (eds), *European Legal Method – towards a New European Legal Realism?* (Djøf Publishing 2013) 163-188; Azad Mammadli, 'Reflecting Environmental Protection Requirements in the EU State Aid Policy' (Master thesis, Lund University 2020) 3-4. See also some of the cases that have been referred by the above mentioned authors when discussing e.g EU legal order's characteristics, Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* EU:C:1963:1, 12-13; 14; Case C-6/64 *Costa v E.N.E.L.* EU:C:1964:66, 594; Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* EU:C:2014:1754 (Ascendi Beiras), para 48.

¹⁹ Stylianou and Iacovides (n 1) 1-36; Ezrachi (n 1) 4, 13-17.

overview and understanding of the term in mind, which was essential for the purposes of this thesis. In addition, when it comes to article 101(3) TFEU and its conditions, the sources relating to them were chosen so to gain understanding of the current state of matters (including different interpretations of it) from fairness point of view and to build my own views, suggestions and answers to the research questions.²⁰

This thesis starts with a brief introduction to goals of EU Competition law. After that, the discussion moves to the meaning of fairness in general and its role in (EU) competition law. From there, the discussion moves to looking into fairness under each of the conditions of article 101 (3) TFEU, after which conclusions are made.

²⁰ See for example Ellison (n 11) 1-16; Holmes (n 11) 354-405; Luc Peepkorn, 'Competition and sustainability: What can competition policy do?' [2020] (4) *Concurrences* 40, paras 30-46; Gassler (n 11) 8-10.

2 Fairness in EU competition law

2.1 Introduction to the goals of EU competition law

There is no clear universal consensus on the goals that competition law should pursue.²¹ When it comes to the discussion of what the goals should be, some are of the view that only economic goals should be part of the goals of competition law, whereas others advocate a broader approach.²² It is important to look into the goals of EU competition law, as they assist with interpreting competition law.²³ In the EU, teleological interpretation, meaning an method of interpretation that takes the purpose of the relevant legislation into account when interpreting unclear matters, has an notable role.²⁴ The goals of EU competition law come into play also when we are asking what certain provisions are supposed to protect - and the goals of EU competition law can provide insight into this.²⁵

Recently Konstantinos Stylianou and Marios Iacovides published an interesting empirical investigation about the goals of EU competition law.²⁶ Their research displays, for example, how EU's courts seem to emphasize goals that are notably different than the goals emphasized by the commission.²⁷ As displayed by the research, the courts and AGs place more emphasis on efficiency & competition process when compared to the commission, while on the other hand the commission seems to be more

²¹ Jones, Sufrin and Dunne (n 7) 11-36.

²² Jones, Sufrin and Dunne (n 7) 11-36.

²³ Witt, *The More Economic Approach to EU Antitrust Law* (n 2) 77-79.

²⁴ *Ascendi Beiras* (n 18), para 48; Witt, *The More Economic Approach to EU Antitrust Law* (n 2) 77-79.

²⁵ Witt, *The More Economic Approach to EU Antitrust Law* (n 2) 77-79, 88-109.

²⁶ Stylianou and Iacovides (n 1) 1-36.

²⁷ Stylianou and Iacovides (n 1) 5, 28-31.

focused on e.g. protection of competitors and welfare than AGs and the courts.²⁸ It is also interesting to see, how according to the research, fairness and welfare are present more in the speeches than in the actual practice of the EU institutions, and that there is a notable difference in the goals emphasized by different commissioners for competition.²⁹

With the adoption of the so called more economic approach the role of economics in EU competition law was emphasized, affecting e.g. negatively the room that fairness considerations could have in EU competition law.³⁰

The more economic approach is related to the concept of consumer welfare.³¹ It's a concept, an economic concept, on which the commission has placed a notable importance as the goal of EU competition law: pursuing consumer welfare means that the aim is to ensure that the market functions efficiently, while ensuring that consumers receive as much value (referring e.g. to quality that is considered as optimal) as possible.³² Consumer welfare could be seen to include considerations not only relating to prices or output

²⁸ Stylianou and Iacovides (n 1) 5, 14, 31.

²⁹ Stylianou and Iacovides (n 1) 28-32.

³⁰ Mario Monti, 'A European Competition Policy for today and tomorrow' (2000) 23 (2) *Journal of World Competition* 1 1-4 ; Witt, *The More Economic Approach to EU Antitrust Law* (n 2) 1-2, 54-74, 77-109,126; Anna Gerbrandy, 'Rethinking Competition Law within the European Economic Constitution' (2019) 57 *Journal of Common Market Studies* 127 127; Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 229-233.

³¹ Anne Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning?' (2019) 64 *The Antitrust Bulletin* 172 173.

³² Case C-8/08 *T-Mobile Netherlands and Others* EU:C:2009:343, para 38; Commission, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' [2004] OJ C31/03 para 8; Guidelines on the application of Article 81(3) of the Treaty (n 8) para 13; Neelin Kroes 'European Competition Policy – Delivering Better Markets and Better Choices' (European Consumer and Competition Day, London, 15 September 2005) https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512 accessed 22 April 2021; Commission, 'Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings' [2008] OJ C265/6 para 10 ; Commission, 'Guidelines on Vertical Restraints' [2010] OJ C130/1 para 7; Commission, 'Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements' [2014] OJ C89/03 para 5; Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) 11 *The competition law review* 131 131-132; Richard Whish and David Bailey, *Competition law* (9th edn, Oxford University Press 2018) 19-20; Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning?' (n 31) 173-177; Jones, Sufrin and Dunne (n 7) 46-51; Dolmans and Lin (n 1) 27-31.

(although some consider consumer welfare to be limited to them), but also three other factors, the first one being innovation.³³ The second and third factors are quality and choice.³⁴ EU's courts, however, have not been as keen on emphasizing consumer welfare.³⁵

Without going further into any other possible goals that could be considered³⁶, the analysis will move now into the meaning of fairness and its role in EU competition law.

2.2 The meaning of fairness and different aspects and notions of it

Before moving further into the discussion about fairness in EU Competition law, this section first provides view into the meaning of fairness. It shall be recalled that the question of what fairness means does not only have one simple answer – the term can be defined in many different ways, and for example, it has been stated that EU law does not contain a clear definition of the term.³⁷ The Cambridge dictionary offers a definition of the term, according to which it means ‘the quality of treating people equally or in a way that is right or reasonable...’.³⁸ Indeed, fairness has been seen to be closely related to equality, fairness requiring that treatment is equal, while

³³ Daskalova (n 32) 131-133, 143-149; Johannes Laitenberger ‘EU Competition Law: Relevance Anchored in Empiricism’ (CRA conference, Brussels, 5 December 2018),2-3 https://ec.europa.eu/competition/speeches/text/sp2018_16_en.pdf accessed 1 February 2021; Jones, Sufrin and Dunne (n 7) 48-50; Dolmans and Lin (n 1) 27-30.

³⁴ Laitenberger, ‘EU Competition Law: Relevance Anchored in Empiricism’ (n 33) 3-6; Jones, Sufrin and Dunne (n 7) 48-50.

³⁵ Case C-6/72 *Europemballage Corporation and Continental Can Company v Commission* EU:C:1973:22 (Continental Can), paras 24-27; Case C-52/09 *TeliaSonera Sverige* EU:C:2011:83, para 24; Case C-209/10 *Post Danmark* EU:C:2012:172 (Post Danmark I), para 20; Case C-23/14 *Post Danmark* EU:C:2015:651, para 69; José Luís da Cruz Vilaça, ‘The intensity of judicial review in complex economic matters—recent competition law judgments of the Court of Justice of the EU’ (2018) 6 *Journal of antitrust enforcement* 173 184; Jones, Sufrin and Dunne (n 7) 49-51.

³⁶ For other possible goals, see e.g. Ezrachi (n 1) 1-27; Whish and Bailey (n 32) 18-25; Jones, Sufrin and Dunne (n 7) 28-55.

³⁷ Dessart and Marandola (n 3) 1-4; Dolmans and Lin (n 1) 22-31; Jenkins and Blankertz (n 3) 92-94; Dunne, ‘Fairness and the Challenge of Making Markets Work Better’ (n 1) 230-249.

³⁸ Cambridge dictionary, ‘fairness’ (Cambridge dictionary) <https://dictionary.cambridge.org/dictionary/english/fairness> accessed 4 April 2021.

also requiring treating e.g A and B unequally, because they are unequal, but treating B and C equally, because they are equal.³⁹ It has been also stated that distributive justice, non-discrimination and also social justice relate to fairness.⁴⁰ It should be also noted that Merriam-webster and the Cambridge dictionary actually see fairness as synonym for equity.⁴¹ According to Merriam-webster, equity can mean ‘something that is equitable’⁴², equitable being defined as ‘having or exhibiting equity : dealing fairly and equally with all concerned’⁴³. Cambridge dictionary provides similar definition of equity.⁴⁴

How different persons view fairness depends on multiple factors.⁴⁵ Factors that can affect persons view of fairness include for example matters that the person has experienced and also their socio-demographic group, e.g. age.⁴⁶ There’s an interesting research, relating to distributive fairness, where the conduct of children from notably different backgrounds in relation to distributing items was looked into.⁴⁷ In the research, it was found e.g. that there were differences on how fairly the children acted depending on their background - fairness here referring to lower self-interest.⁴⁸

It’s possible to find an example of how fairness can be understood from fair trade, where one of the criterions placed for fair trade requires that the price paid to producers must be fair – referring to a price that secures fair wage

³⁹ Aristotle (n 3) 81ff; Parret (n 3) 74; Akman (n 1) 105-107,114-118; Dolmans and Lin (n 1) 24-27.

⁴⁰ Parret (n 3) 74; Akman (n 1) 105-107,114-118; Dolmans and Lin (n 1) 24-27.

⁴¹ Cambridge dictionary, ‘equity’ (Cambridge dictionary) <https://dictionary.cambridge.org/dictionary/english/equity> accessed 4 April 2021; Merriam-Webster, ‘equity’ (Merriam-Webster) <https://www.merriam-webster.com/dictionary/equity> accessed 4 April 2021.

⁴² Merriam webster, ‘equity’ (n 41).

⁴³ Merriam-Webster, ‘equitable’ (Merriam-Webster) <https://www.merriam-webster.com/dictionary/equitable> accessed 4 April 2021

⁴⁴ Cambridge dictionary, ‘equity’ (n 41).

⁴⁵ Dessart and Marandola (n 3) 1-4

⁴⁶ Ken Binmore, *Natural Justice* (Oxford University Press 2005) 14ff; Dessart and Marandola (n 3) 1-4.

⁴⁷ Philippe Rochat and others, ‘Fairness in Distributive Justice by 3- and 5-Year-Olds Across Seven Cultures’ (2009) 40 *Journal of Cross-Cultural Psychology* 416 416-442. See also Dolmans and Lin (n 1) 24-26.

⁴⁸ Rochat and others (n 47) 416, 427-442. See also Dolmans and Lin (n 1) 24-26.

and which is sufficient to pay for the costs of living and production in a sustainable manner.⁴⁹ It should also be recalled here that fairness is subject to tensions and conflicts between the interests of different parties – conflicts that then need to be balanced between interests that are in conflict.⁵⁰ To exemplify the tension, it is possible to think about a situation where there aim is to provide fairer wages for employees.⁵¹ So, while the increase of wages for the employees could be considered as fair, and the resulting price increase of product as a consequence, what about when the situation is viewed from the point of the consumers who must as a result pay higher prices for the products?⁵² Some might say the situation is unfair for the consumers.⁵³

Before moving further in the discussion, Francesco Ducci's and Michael Trebilcock's article (in domestic market and competition law context), where they use four different notions of fairness shall be brought up.⁵⁴ They discuss about horizontal fairness, dividing it into two different types of horizontal fairness, one existing between actors on the demand side, and the other one existing on the supply side between the actors – actors on the demand side referring to consumers and actors on the supply side to producers.⁵⁵ The two other notions are vertical fairness, which they use when referring to the dimension of fairness that exists between the demand(consumers) and supply(producers) side, and lastly, procedural fairness.⁵⁶ These different notions, mainly vertical fairness in addition to

⁴⁹ European Parliament, 'European Parliament resolution on Fair Trade and development' [2006] OJ C303E/865 867-868; Holmes (n 11) 385.

⁵⁰ Dolmans and Lin (n 1) 22-31; Kokott and Dittert (n 4) 16-18; Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 239, 247-248.

⁵¹ Dolmans and Lin (n 1) 22-31; Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 239, 247-248. See also Kokott and Dittert (n 4) 16-18.

⁵² Dolmans and Lin (n 1)22-31; Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 239, 247-248. See also Kokott and Dittert (n 4) 16-18.

⁵³ Dolmans and Lin (n 1)22-31; Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 239, 247-248.

⁵⁴ Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 80. See also Jones, Sufrin and Dunne (n 7) 31-34.

⁵⁵ Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 80, 90,93. See also Jones, Sufrin and Dunne (n 7) 31-34.

⁵⁶ Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 80, 84, 98-99. See also Jones, Sufrin and Dunne (n 7) 31-34.

horizontal fairness on both supply and demand side, will be utilized in certain parts of this thesis to assess fairness. Procedural fairness on the other hand is not within the scope of this thesis.⁵⁷

2.3 Fairness and (EU) competition law

As already pointed out earlier, there has been discussion of a somewhat of a comeback of fairness considerations in competition law.⁵⁸ Wealth inequality has been stated to be the main driving force behind the current interest that there exists for competition law and fairness.⁵⁹ Interestingly, Dunne has looked into certain recent cases in the sphere of EU competition law from the point of view of the more economic approach and fairness, and in doing so Dunne has identified that certain elements of fairness have been present in these cases, while noting that divergence has been happening from the more economic approach⁶⁰ Dunne argues that fairness has influence by acting as the motivation behind interpretations that can be considered to be innovative.⁶¹

As has been noted already in the introduction section, fairness is directly referred to in articles 101 and 102 TFEU.⁶² Johannes Laitenberger, Director-General for Competition (European Commission) has also stated that even though fairness would not be directly mentioned in provisions, it is there behind as the underpinning reason in EU competition law, just as translated

⁵⁷ For procedural fairness, see Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 80-81, 98-102.

⁵⁸ Vestager, 'How competition can build trust in our societies' (n 2); Vestager, 'Fairness and competition' (n 1); Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1); Stylianou and Iacovides (n 1) 5, 30, 32; Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 230-264. See also Witt, *The More Economic Approach to EU Antitrust Law* (n 2) 98-109 for some points on the role of fairness in the earlier days.

⁵⁹ Jones, Sufrin and Dunne (n 7) 31-34. See also Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 79-80.

⁶⁰ Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 249-264. See also for examples of the cases discussed by Dunne, *Google Search (Shopping)* (Case AT.39740) [2017]; *Google Android* (Case AT.40099) [2018].

⁶¹ Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 249-264.

⁶² TFEU, art 101(3), 102 (2); Ezrachi (n 1) 13.

to provisions that are more specific.⁶³ Commissioner Vestager, however, in her speech, has stated that ‘It doesn't mean that just because something is unfair, it's automatically also against the competition rules’.⁶⁴

Fairness could be seen in the sphere of competition law as something that ensures for companies, no matter of their size, small or large, the possibility to enjoy opportunities that are (at least initially) same for all of them.⁶⁵ The concept of trust has also been closely linked to the concept of fairness.⁶⁶ It has been stated that fair deals increase trust and can result in political, economic and social benefits.⁶⁷ Commissioner Vestager has stated that if markets are considered unfair by the people, this can lead to situation where they lose trust in the society as a whole.⁶⁸ It has been also noted that public institutions and businesses are in situation, trust-wise, where additional trust placed on them by the people would be definitely warranted.⁶⁹ It is also possible to think about scenario where competition law enforcement would not be based on values.⁷⁰ It has been stated that the result would be in such scenario one that could be characterized as unthinking, in addition to being mechanical, which would benefit no one.⁷¹

⁶³ Johannes Laitenberger, ‘EU competition law in innovation and digital markets: fairness and the consumer welfare perspective’ (Hogan Lovells event, Brussels, 10 October 2017), 3-6 https://ec.europa.eu/competition/speeches/text/sp2017_15_en.pdf accessed 30 April 2021. See also TFEU, preamble, arts 101(3), 102 TFEU, which Laitenberger also discusses in his speech.

⁶⁴ Vestager, ‘Fairness and competition’ (n 1). See also Ezrachi (n 1) 15.

⁶⁵ Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 26-33; Parret (n 3) 74; Dunne, ‘Fairness and the Challenge of Making Markets Work Better’ (n 1) 236-237.

⁶⁶ Vestager, ‘Fairness and competition’ (n 1); Johannes Laitenberger, ‘Fairness in EU competition law enforcement’ (British Chamber of Commerce, Brussels, 20 June 2018), 7 https://ec.europa.eu/competition/speeches/text/sp2018_10_en.pdf accessed 6 March 2021; Dunne, ‘Fairness and the Challenge of Making Markets Work Better’ (n 1) 241-243.

⁶⁷ Laitenberger, ‘Fairness in EU competition law enforcement’ (n 66) 7. See also Dunne, ‘Fairness and the Challenge of Making Markets Work Better’ (n 1) 241-243.

⁶⁸ Vestager, ‘Fairness and competition’ (n 1). See also Dunne, ‘Fairness and the Challenge of Making Markets Work Better’ (n 1) 241-243.

⁶⁹ Laitenberger, ‘Fairness in EU competition law enforcement’ (n 66) 7. See also Dunne, ‘Fairness and the Challenge of Making Markets Work Better’ (n 1) 241-243.

⁷⁰ Johannes Laitenberger, ‘Restoring confidence in a world in flux: The contribution of competition policy and enforcement’ (GCLC Annual conference: “Dynamic markets and dynamic enforcement: Which competition policy for a world in flux?”), Brussels, 26 January 2017)

https://ec.europa.eu/competition/speeches/text/sp2017_01_en.pdf accessed 6 March 2021

⁷¹ Johannes Laitenberger, ‘Restoring confidence in a world in flux: The contribution of competition policy and enforcement’ (n 70) 3.

When it comes to the outcomes of competition and the equality of them, it has been stated that from the competition policy's point of view equality considerations related to the outcome are somewhat problematic: markets function in a way that those actors that, for example, are superior when compared to others in terms of innovation are able to gain better profits.⁷² Fairness has been stated to not mean that all competitors should be protected - currently as a part of legitimate competition in the EU the result might be that certain competitors lose due to them being less efficient than their competitors.⁷³ Supporting competitors or cooperating with them is not normally something that would be considered to be competition law compliant: on the other hand, it could also possibly be stated that this something that fairness advocates.⁷⁴ In addition, it has been stated that where competitors would act in a fair manner (from the point of view of competitors), the harmful effects of such "fairness" could be notable for the consumers.⁷⁵

It has been argued that the utility of fairness could be higher if it would be defined more clearly.⁷⁶ It has also been stated that the task of creating thresholds that clearly state when authorities could intervene with unfair actions could prove to be problematical task.⁷⁷ It has been also asked how much a simple instruction not to be unfair really provides a guidance on a undertaking on what not to do.⁷⁸ Fairness and the role it has to play in competition law has been discussed also by Dolmans and Lin: they provide an critical view on the role of fairness.⁷⁹ Dolmans and Lin talk about so

⁷² Motta (n 65) 25-33; Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 236-237.

⁷³ Post Danmark I (n 35), para 21; Ezrachi (n 1) 13.

⁷⁴ Dolmans and Lin (n 1) 26-28.

⁷⁵ Dolmans and Lin (n 1) 30-32.

⁷⁶ Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 247. See also Dolmans and Lin (n 1).

⁷⁷ Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 246-249. See also Dolmans and Lin (n 1) 22-31.

⁷⁸ Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 246-249. See also Dolmans and Lin (n 1) 22-31.

⁷⁹ Dolmans and Lin (n 1) 22-24.

called “fairness paradox”.⁸⁰ The fairness paradox consists from two factors – the first factor is competition law that is supposed to take fairness considerations into account.⁸¹ The second factor is closely related to people’s dissimilar interpretations of what is considered to be fair - the usage of fairness criterion in competition law would cause situations where the results would not potentially be efficient and fair: this is because of the above mentioned, dissimilar interpretations of fairness.⁸²

This section has provided insight into to the role of fairness in competition law on more general level. In this thesis, fairness will be understood and viewed in accordance with these various elements and meanings of fairness that are discussed in this thesis. From here, the discussion now moves on to assessing certain fairness aspects in a specific provision, article 101 (3) TFEU.

⁸⁰ Dolmans and Lin (n 1) 26-28.

⁸¹ Dolmans and Lin (n 1) 26-28; Binmore (n 46) 14ff.

⁸² Binmore (n 46) 14ff; Dessart and Marandola (n 3) 1-4; Dolmans and Lin (n 1) 26-28; Jenkins and Blankertz (n 3) 92-94; Dunne, ‘Fairness and the Challenge of Making Markets Work Better’ (n 1) 231-249.

3 Article 101 (3) TFEU and fairness

3.1 The structure of article 101 (3) TFEU

In this section the focus will be on looking into fairness in article 101(3) TFEU. As discussed earlier, Article 101 (3) TFEU contains certain conditions, and if all of the requirements imposed by these four conditions can be successfully fulfilled, then article 101(1) TFEU can be found to not be applicable.⁸³ First, it shall be noted that consumer welfare is viewed by the commission as the goal of article 101 TFEU.⁸⁴ It's also possible to view the decision of choosing consumer welfare instead of total welfare from vertical fairness point of view.⁸⁵ When the consumer welfare standard is chosen, it has been argued that it is possible to find this decision to reflect at least to some extent distributive fairness for consumers - the other party of vertical fairness.⁸⁶

Coming back to article 101(3) TFEUs conditions, in a situation where the agreement in question 'contributes to improving the production or distribution of goods or to promoting technical or economic progress...' ⁸⁷ it

⁸³TFEU, art 101(3); *VBVB and VBBB* (n 8), para 61; *Matra* (n 8), para 85; *M6 and Others* (n 8), para 86; *CGM and Others* (n 8), para 226; Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 38-47.

⁸⁴ Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 13, 83-104; Francesco Ducci, 'Out-of-Market Efficiencies, Two-Sided Platforms and Consumer Welfare: A Legal and Economic Analysis' (2016) 12 *Journal of Competition Law & Economics* 591 611-616, 618, 622; Jones, Sufrin and Dunne (n 7) 1-69, 268-269;

⁸⁵ Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 84-90.

⁸⁶ Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 80, 84-90.

⁸⁷ TFEU, art 101 (3).

can satisfy the first condition.⁸⁸ The second condition then requires that ‘a fair share of the resulting benefit...’⁸⁹ is received by consumers.⁹⁰ Article 101(3) TFEU also places condition on the necessity of the restrictions contained in the agreement: they must be considered to be indispensable for the purpose of achieving the efficiencies.⁹¹ In addition to these other conditions, there is also a fourth condition – which requires that the undertakings that are concerned with the agreement do not have ‘the possibility of eliminating competition in respect of a substantial part of the products in question’.⁹² These conditions – and fairness aspects in them - will be further discussed in their respective sections below.

Article 101(3) TFEU can be applied to all agreements, regardless of the type of the agreement.⁹³ Despite this, it should be pointed that when agreements contain restrictions of competition that can be considered to be severe, it is not probable that the necessary conditions are satisfied - the second condition being problematical in this case, in addition to issues related to the first condition and generating the economic benefits that have to be objective in order to be considered.⁹⁴ There also exists block exemptions, and if an agreement falls within a block exemption, there is a presumption that article 101 (3) TFEU and its conditions are satisfied: however, this presumption is rebuttable and block exemptions cover specific categories of

⁸⁸ TFEU, art 101(3). See also Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 48-72.

⁸⁹ TFEU, art 101(3). See also Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 83-104.

⁹⁰ TFEU, art 101(3). See also Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 83-104.

⁹¹ TFEU, art 101(3). See also Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 73-81.

⁹² TFEU, art 101(3). See also Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 105-116.

⁹³ *Matra* (n 8), para 85; Guidelines on the application of Article 81(3) of the Treaty (n 8) para 46.

⁹⁴ *Case C-56/64 Consten and Grundig v. Commission of the EEC* EU:C:1966:41 (*Consten and Grundig*); *Case T-29/92 SPO and Others v Commission* EU:T:1995:34, paras 266-300; *Van den berg Foods Limited* (Cases IV/34.073, IV/34.395 and IV/35.436) [1998]; Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 46, 49.

agreements – there is for example block exemption on vertical agreements.

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As the upcoming sections are going to look into e.g. article 101(3) guidelines, it should be kept in mind that they – guidelines provided by the commission - are soft law, and not binding.⁹⁶ Hence, the CJEU is not obliged to follow these guidelines, same being true for other actors such as NCAs.⁹⁷

3.2 Benefits

Article 101 (3) TFEU's first condition, as also noted above, requires that the agreement that is in question must be such that it 'contributes to improving the production or distribution of goods or to promoting technical or economic progress...'⁹⁸ in order for the agreement to successfully fulfil the condition.⁹⁹ These improvements have to 'show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition'.¹⁰⁰ The fact that only objective benefits are taken into account means that e.g. benefits, which are the result of exercise of market power and received by the undertakings that are parties of the agreement, are not considered under this condition.¹⁰¹

⁹⁵ TFEU, art 101 (3); Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L1/1 (Regulation 1/2003), recital 10, art 2, 29; Commission Regulation (EU) 330/2010 of 20 April 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 [2010] OJ L102/1; Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 2, 35-37; Whish and Bailey (n 32) 158, 176-179.

⁹⁶ Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning?' (n 31) 173-177, 181; See also Guidelines on the application of Article 81(3) of the Treaty (n 8).

⁹⁷ Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning?' (n 31) 173-177, 181.

⁹⁸ TFEU, art 101 (3).

⁹⁹ TFEU, art 101(3). See also Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 48-72.

¹⁰⁰ *Consten and Grundig* (n 94) 348. See also Jones, Sufrin and Dunne (n 7) 263-264.

¹⁰¹ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 49. See also Jones, Sufrin and Dunne (n 7) 263-264.

It's possible to make a distinction between economic and non-economic benefits.¹⁰² Benefits that are considered as non-economic are those that 'are not directly related to the characteristics of the product or service of the agreement in question.'¹⁰³ In addition, benefits that fall under this category are non-pecuniary, and economic benefits (referring to two types of efficiencies, qualitative and cost) have been stated to be usually less subjective when compared to non-economic benefits.¹⁰⁴ Benefits related to culture and national interests are examples of non-economic benefits.¹⁰⁵

It has been however stated that when it comes to concrete cases, certain non-economic benefits can actually be assessed in monetary terms or they could be seen as improvement of quality, making the distinction between non-economic benefits and economic benefits in certain cases something that cannot be described as straightforward.¹⁰⁶ It should also be also pointed out that quantifying non-economic benefits has been stated to be potentially quite difficult.¹⁰⁷

The commission has been viewed to have taken an approach, where for article 101 (3) TFEU benefits that are objective and economic can only be considered.¹⁰⁸ This includes cost efficiencies, for example price reductions,

¹⁰² Office of Fair Trading, 'Article 101 (3)– A discussion of narrow versus broad definition of benefits discussion note for OFT breakfast roundtable' (2010), paras 3.1-3.17 [https://webarchive.nationalarchives.gov.uk/20100913132156/http://www.oft.gov.uk/shared_of/events/Article101\(3\)-discussionnote.pdf](https://webarchive.nationalarchives.gov.uk/20100913132156/http://www.oft.gov.uk/shared_of/events/Article101(3)-discussionnote.pdf) accessed 30 March 2021; Brook (n 11) 126.

¹⁰³ Brook (n 11) 126. See also Office of Fair Trading (n 102) paras 3.3, 1.10, 3.14.

¹⁰⁴ Brook (n 11) 126; Office of Fair Trading (n 102) para 3.3, 1.10, 3.14.

¹⁰⁵ Brook (n 11) 126; Office of Fair Trading (n 102) para 3.17.

¹⁰⁶ Office of Fair Trading (n 102) para 3.40-3.52; Holmes (n 11) 371-383; Cristina A. Volpin, 'Sustainability as a Quality Dimension of Competition: Protecting Our Future' (2020) 43 *Competition Policy International* 9-18; Julian Nowag, 'Sustainability & Competition Law and Policy – Background Note' (Organisation for Economic Co-operation and Development 1 December 2020), paras 80-82 [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2020\)3&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2020)3&docLanguage=En) accessed 4 April 2021.

¹⁰⁷ Office of Fair Trading (n 102) para 3.40-3.52

¹⁰⁸ Commission, 'White paper on modernisation of the rules implementing articles 85 and 86 of the ec treaty' [1999] OJ C 132/1 paras 57,72; Guidelines on the application of Article 81(3) of the Treaty (n 8) para 4, 33,42,43,57,59; Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2011) 261-265; Brook (n 11) 135-138; Niamh Dunne, 'Public Interest and EU Competition Law' (2020) 62 *The Antitrust Bulletin* 256 266; Gassler (n 11) 8.

and qualitative efficiencies, that can refer to e.g. improvement of quality.¹⁰⁹ It should be noted that the commission used to follow a different approach by considering non-economic benefits in the assessment.¹¹⁰ Currently, there's however the question of taking into account non-economic benefits: is it possible or not?¹¹¹

The next section will look into non-economic benefits. Before that, it shall be noted that fairness could be considered as economic benefit in certain cases: it has been stated that fairness can be considered as a quality factor of products by consumers when they value fairness, an example of this being products adhering to a fair trade standard.¹¹² Hence, in this sense, article 101(3) TFEUs first condition could be seen to promote fairness. However, the consideration of fairness as quality – and as a conomic benefit - is dependent on it being valued by the consumers.¹¹³

3.2.1 Non-economic benefits

It should be noted that despite the commission's approach, in the case law of the EU's courts non-economic benefits have been still assessed in article 101(3) TFEU cases, relating for example to sports and regulated professions.¹¹⁴ In addition, according to the court's case law, in the

¹⁰⁹ Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 59, 64-66,69-70,96-97; Office of Fair Trading (n 102) paras 3.3-3.4, 3.19; Dunne, 'Public Interest and EU Competition Law' (n 108) 266.

¹¹⁰ *International Energy Agency* (Case IV /30.525) [1983] paras 28-29; *Ford/Volkswagen* (Case IV/33.814) [1992] paras 24-25; *CECED* (Case IV.F.1/36.718) [1999] paras 47-57; *Brook* (n 11) 133-136; *Gassler* (n 11) 8.

¹¹¹ See, for example Office of Fair Trading (n 102) paras 3.14-3.17, 3.22-3.60; *Gassler* (n 11) 8.

¹¹² Office of Fair Trading (n 102) para 3.4-3.5, fn 27,28; Gabriella Muscolo and others, 'Italy' in Daniel Mândrescu (Ed), *EU Competition Law and the Digital Economy Protecting Free and Fair Competition in an Age of Technological (R)evolution* (Eleven International Publishing 2020) 348; See also for discussion about fair trade and fairness, *Holmes* (n 11) 359-362, 385-388.

¹¹³ Office of Fair Trading (n 102) para 3.4-3.5, fn 27, 28.

¹¹⁴ Case T-193/02 *Piau v Commission* EU:T:2005:22, paras 100-104; Joined cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich v Commission* EU:T:2006:396, paras 213-214; Case C-238/05 *Asnef-equifax* EU:C:2006:734, paras 65-71; Case C-209/07 *Beef Industry Development and Barry Brothers* EU:C:2008:643, para 39; Joined cases C-403/08 and C-429/08 *Football Association Premier League and Others* EU:C:2011:631, paras 145-146; Case C-439/09 *Pierre Fabre Dermo-Cosmétique* EU:C:2011:649, para 50; Case C-1/12 *Ordem dos Técnicos Oficiais de Contas*

interpretation of EU's competition provisions other objectives included in treaty should not be ignored - they should be taken into account, article 7 of TFEU also stating that all objectives should be considered: when the objectives are considered, they need to be balanced, the objectives being stated in, for example, Articles 9,12 and 167(4) TFEU.¹¹⁵ Certain other examples of these objectives shall be briefly mentioned here. Article 8 TFEU states that 'In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.'¹¹⁶ TEU contains also certain objectives of the EU.¹¹⁷ These include, for example, the promotion of equality between different sexes, well-being of the people of EU and social justice, and when it comes to the wider world and EU's relations with it, the objectives include, for example, contributing to fair trade.¹¹⁸ As noted earlier, it has been stated that equality, social justice and fair trade are connected to fairness.¹¹⁹ These goals have also been stated to create an obligation to take into account benefits related to them that are classified as non-economic when assessing article 101(3) TFEU.¹²⁰

So – can non-economic benefits be considered? It has been stated by some that non-economic benefits could have a room in courts case law – to which

EU:C:2013:127, paras 100-103; Chris Townley, 'Which goals count in article 101 TFEU?: Public policy and its discontents' (2011) 32 *European Competition Law Review* 441-442-443; Brook (n 11) 133-138, 148-152. See also Anne Witt, 'Public policy goals under EU competition law – now is the time to set the house in order' (2012) 8 *European Competition Journal* 443-464-471.

¹¹⁵ TFEU, arts 7, 9, 12, 167(4); *Continental Can* (n 35), paras 24-27; Case C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42, para 8; Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* EU:C:1995:463, para 104; Witt, 'Public policy goals under EU competition law – now is the time to set the house in order' (n 114) 464-466; Brook (n 11) 148-152; See also Holmes (n 11) 359-362.

¹¹⁶ TFEU, art 8. See also Holmes (n 11) 359-362.

¹¹⁷ TEU, art 3; Witt, 'Public policy goals under EU competition law – now is the time to set the house in order' (n 114) 464-466; Holmes (n 11) 359-362.

¹¹⁸ TEU, art 3; Witt, 'Public policy goals under EU competition law – now is the time to set the house in order' (n 114) 464-466; Holmes (n 11) 359-362.

¹¹⁹ Aristotle (n 3) 81ff; Office of Fair Trading (n 102) para 3.5, fn 27; Parrett (n 3) 74; Akman (n 1) 105-107,114-118; Dolmans and Lin (n 1) 24-27; Holmes (n 11) 359-362, 385-388.

¹²⁰ Case T-451/08 *Stim v Commission* EU:T:2013:189, para 103; TFEU; Witt, 'Public policy goals under EU competition law – now is the time to set the house in order' (n 114) 464-466; Brook (n 11) 152.

I agree based on the discussion above.¹²¹ Hence, it also seems that even where fairness is classified as non-economic benefit it could have a room in courts case law. As has been noted, the commission's current approach is not very welcoming towards non-economic benefits.¹²² Hence, if the commissions approach is followed, this of course means that the extent to which fairness can be considered as benefit could be more limited. However, the commission has also left some room for non-economic benefits, which can be considered under article 101(3) TFEU assessment – if they are treaty goals - ¹²³ 'to the extent that they can be subsumed under the four conditions...'.¹²⁴

3.2.2 Benefits and the first condition: preliminary conclusion

Considering above as a whole, non-economic and economic benefits, article 101 (3) TFEU's first condition can be seen to contain certain fairness considerations.¹²⁵ In article 101 (3) TFEU's first condition, fairness can be promoted for those who enjoy the effects of the fairness that is considered as benefit (e.g. those who start to receive a fair wage due to fairness being considered by consumers as quality factor) and in addition, also in more general sense regarding benefits that can be considered under article 101(3) TFEU it does not seem likely that those consumers who value the benefit would consider it as unfair to consider such benefits: however, on the other

¹²¹ Chris Townley, 'Which goals count in article 101 TFEU?: Public policy and its discontents' (n 114) 441-448; Witt, 'Public policy goals under EU competition law – now is the time to set the house in order' (n 114) 464-471. See also Brook (n 11) 137,151-152.

¹²² White paper on modernisation of the rules implementing articles 85 and 86 of the ec treaty (n 108) paras 57,72; Guidelines on the application of Article 81(3) of the Treaty (n 8) para 4, 33,42,43,57,59; Kingston (n 108) 261-265; Brook (n 11) 135-138; Niamh Dunne, 'Public Interest and EU Competition Law' (2020) 62 *The Antitrust Bulletin* 256 266; Gassler (n 11) 8.

¹²³ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 42; Witt, 'Public policy goals under EU competition law – now is the time to set the house in order' (n 114) 464-471; Brook (n 11) 137.

¹²⁴ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 42, fn 54; Brook (n 11) 148-156. See also the cases to which the commission refers to support its view in paragraph 42/footnote 54 Case C-26/76, *Metro v Commission* EU:C:1977:167 (Metro), para 43; *Matra* (n 8), para 139.

¹²⁵ See also Office of Fair Trading (n 102) para 3.4-3.5, fn 27,28.

hand, it seems possible that certain consumers who do not place importance on e.g certain non-economic benefits in question might feel that the situation is unfair for them.¹²⁶

In addition, it shall be noted that the benefits defined by the first condition are also utilized by third condition of article 101 (3) TFEU.¹²⁷ Similarly, it should also be pointed out that this first condition of article 101 (3) TFEU is closely linked to the second condition of article 101(3) TFEU: the benefits that can be considered under the second condition are defined and set by the first condition.¹²⁸ Another example of the first condition's effect on the second condition from fairness point of view can be seen in a case where e.g fairness for others is considered as an economic benefit(improvement of quality, as discussed above) for the consumers. Here, benefits for others are partly included in the benefits for consumers. As will be discussed more in depth in the upcoming sections, there has been discussion about benefits for these others(not included in the benefit for consumers in the relevant market but as a separate element) affecting the assessment of fair share for consumers.¹²⁹ Even if the interpretation would be considered where benefits for others would not have place as a separate element in considering whether the share is fair,¹³⁰ their fairness could still be promoted as the benefit taken into account for consumers can be of such kind that can also promote fairness for others as noted above. Certain important points relating to the benefits, first condition and fairness will also be made in the next sections.

¹²⁶ Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 94, 103-104; European Parliament resolution on Fair Trade and development (n 49) 867-868; Office of Fair Trading (n 102) para 3.4-3.5, 3.40-3.60, fn 27,28; Ellison (n 11) 15; Holmes (n 11) 372-374, 379-380; Although not in the context of article 101 (3) TFEU, for similar views of what is fair/unfair see Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 239, 247-248.

¹²⁷ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 50.

¹²⁸ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 50.

¹²⁹ See for example Gassler (n 11) 9-11; Netherlands Authority for Consumers and Markets, 'Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law' (n 13) paras 45-52,60.

¹³⁰ Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 83-101.

3.3 Fair share for the consumers

When it comes to the second condition of article 101 (3) TFEU, there is a question to be answered - when the share of the benefits is fair for the consumers?¹³¹ In the commission's view, the answer to the question is that the share is fair when the benefits originating from the agreement, which generally the consumers who are subject to the negative effects (whether they are likely or actual) located in the relevant markets must receive, are of such amount that they compensate/outweigh the negative effects: this has been also referred as no worse off- standard.¹³²

Under the second condition when the term consumers is used, it refers to, according to the 101(3) guidelines, 'all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers...'.¹³³ It has been stated regarding article 101(3) TFEU's second condition that the requirement of consumers being compensated by receiving a share of the benefits that is considered to be fair can be seen to reflect fairness considerations towards consumers.¹³⁴

The condition in question can be satisfied according to the commission even by providing the consumers (in the relevant market) with a share of some of the efficiencies – receiving a share from all of them is not a requirement of

¹³¹ Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 84-85; Ellison (n 11) 8-10; Holmes (n 11) 374.

¹³² TFEU, art 101 (3); Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 33, 43, 50, 83-86, 89, fn 57; Ellison (n 11) 6-10; Dunne, 'Public Interest and EU Competition Law' (n 108) 266. See also the case law used to support this by Commission, *Consten and Grundig* (n 94); *Metro* (n 124), para 48; Case T-86/95 *Compagnie générale maritime and Others v Commission* EU:T:2002:50 (*Compagnie Générale Maritime*), paras 343-345; Case T-131/99 *Shaw and Falla v Commission* EU:T:2002:83 (*Shaw*), para 163.

¹³³ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 84.

¹³⁴ TFEU, art 101 (3); Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 85-86.

this condition.¹³⁵ The assessment is not focused on individual consumers - instead, the focus is on the overall impact.¹³⁶

It is possible to view the approach of not placing importance on distribution within the consumers in the relevant market the matter from horizontal fairness (between the consumers) point of view: where some of the consumers in the relevant market receive lower amount of benefits than the other consumers, it could be viewed as unfair distribution.¹³⁷ However, when it comes to fairness and conflicting interest, there may be situations where an interest is favoured over others, meaning that essentially a winner is chosen.¹³⁸ Second condition of article 101 (3) TFEU has been stated to reflect fairness towards consumers – and that it is the consumers as group on the relevant market that is protected – not the individual consumers.¹³⁹ Hence, from this perspective it makes sense to consider the overall benefits for those who have suffered negative effects in the relevant market as a group, as it is their interests, as group, that is protected.¹⁴⁰ There has been

¹³⁵ Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 43,84-87. See also the case law used to support this by Commission, *Shaw* (n 132), para 163; *Metro* (n52) para 48.

¹³⁶ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 87. See also the case law used to support this by Commission, *Shaw* (n 132), para 163. In addition, see *Asnef-Equifax* (n 114) para 70.

¹³⁷ Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 85-86, 90-93. See also Chris Townley, 'Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.' (2011) 32 *European Competition Law Review* 580 580-590. See also Ducci, 'Out-of-Market Efficiencies, Two-Sided Platforms and Consumer Welfare: A Legal and Economic Analysis' (n 84) 600, 611-616, 618.

¹³⁸ Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 239, 247-248. See also XXVIIth Report on Competition Policy (n 5), para 77; Dolmans and Lin (n 1) 26-28.

¹³⁹ *Shaw* (n 132), para 163; *Asnef-Equifax* (n 114), para 70; Guidelines on the application of Article 81(3) of the Treaty (n 8) para 87; K J Cseres, 'The Controversies of the Consumer Welfare Standard' (2007) 3 *The competition law review* 121 121-173; Townley, 'Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.' (n 137) 580-590; Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 85-86, 90-93; Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 239, 247-248.

¹⁴⁰ Townley, 'Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.' (n 137) 580-590; Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 85-86, 90-93. See also Ducci, 'Out-of-Market Efficiencies, Two-Sided Platforms and Consumer Welfare: A Legal and Economic Analysis' (n 84) 600, 611-618. Ducci sees the decision of not being concerned with distribution within the consumers in the relevant market as value judgement.

also discussion relating to the inclusion of future consumers under the term consumer, which will be further discussed in section 3.3.1.¹⁴¹

The commission has stated in its guidelines for article 101 (3) TFEU that benefits are taken usually into account in the assessment to the extent that they are in the relevant market.¹⁴² However, the commission notes that it is exceptionally possible to take also look further into other markets - beyond the relevant markets -when assessing whether the consumers have received a share of the benefits that can be considered to be fair: this is the case if the those receiving benefits in these other markets are considered to be same to substantial extent as consumers who are subject to the effects of the restriction, and in addition, the markets in question have to be related.¹⁴³

The commission has also provided guidance for situations where the gain is received earlier by the consumers as a result of the agreement.¹⁴⁴ There could be for example a situation where a new, improved product is introduced to the market earlier a result of the agreement.¹⁴⁵ In order for the consumers to have received a fair share, the earlier gain must be able to compensate for the loss caused by the agreement.¹⁴⁶

The commission has also provided some guidance about the significance of the time that it takes for the fair share of the benefits to be received by consumers.¹⁴⁷ The consumers do not have to receive the fair share of the benefit immediately: it is sufficient that the benefit is received with a lag.¹⁴⁸

¹⁴¹ TFEU, art 101 (3) TFEU; Office of Fair Trading (n 102) paras A18-A23, 1.7, 5.1-5.16; Townley, 'Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.' (n 137) 580-590.

¹⁴² Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 43,87. See also the case law used to support this by Commission, *Compagnie Générale Maritime* (n 132) paras 343-345; Case C-360/92 *P Publishers Association v Commission* EU:C:1995:6, para 29; *Shaw* (n 132), para 163.

¹⁴³ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 43. See also the case law used to support this by Commission, *Compagnie Générale Maritime* (n 132) paras 343-345.

¹⁴⁴ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 89.

¹⁴⁵ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 89.

¹⁴⁶ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 89.

¹⁴⁷ Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 87-89.

¹⁴⁸ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 87.

Under the second condition the amount of lag is considered as factor that should be taken into account in the assessment that happens under the condition: this is because during the lag the consumers are suffering the negative effects from the agreement, possibly without any compensating effects.¹⁴⁹ Hence, in order to fulfil the condition, the benefits realized with a lag must be able to compensate for the time when the benefits were not yet materialised.¹⁵⁰ However, the commission also notes that the passing of time must be taken into account when assessing the gain for the consumers – the gain might have different value depending on the time.¹⁵¹ When assessing the value of the future gain, factors such inflation can be taken into account.¹⁵²

In the following section, questions related to future consumers and benefits will be first looked into. Then, the discussion will be divided here into two parts, to narrow and broad views on how fair share for consumers should be assessed: the distinction will be made on the basis on how much they differ from the commission’s view on the assessment of the second condition – broader referring to more divergence from the commission.¹⁵³

3.3.1 Future consumers and benefits

The commission’s approach to future benefits, briefly mentioned in section 3.3. shall be looked into here.¹⁵⁴ As has been noted by commission, value of certain amount of money is not the same in future as it is today, discounting hence ensuring that the consumers are adequately compensated

¹⁴⁹ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 87.

¹⁵⁰ Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 87-88.

¹⁵¹ Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 87-88.

¹⁵² Guidelines on the application of Article 81(3) of the Treaty (n 8) para 88.

¹⁵³ For somewhat similar approaches on dividing these questions to narrow/broad, and for some of these narrow or broad approaches, see Giorgio Monti, ‘Four Options for a Greener Competition Law’ (2020) 11 *Journal of European Competition Law & Practice* 124 124-129; Holmes (n 11) 354-405; Peepkorn (n 20) paras 17-36, fn25; Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 45-52; Gassler (n 11) 7-11.

¹⁵⁴ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 89.

for the negative effects to the extent required by the second condition.¹⁵⁵ This approach does not seem problematical from fairness point of view – instead, as can be seen, it ensures that the compensation amounts to a compensation that is considered as a fair share. There is however some debate about how the discounting should be done.¹⁵⁶ Without going more in depth into this, the discussion shall now move to considering situations where the benefits are received by future consumers.

There has been some discussion on considering whether benefits gained by consumers in the future (i.e. if they fall under consumer term in the assessment) could be considered under art. 101 (3) TFEU's second condition if the consumers change so much as time passes that they cannot be anymore considered to be substantially the same.¹⁵⁷ It has been argued that the commission's view is that when consumers who are not same as those initially suffering from the negative effects, then the benefits for these consumers are not considered in the assessment.¹⁵⁸ This could be considered to be fair for these original consumers, who would be secured an adequate compensation for the negative effects they have suffered.¹⁵⁹ The other side of this situation should be, however, noted: if it would not be possible to take into account benefits that are received by not the current, but the future consumers, this could have notable negative effects on e.g. innovation (as the R&D costs would be incurred now, but the benefits received later) and on certain agreements considered as socially beneficial.¹⁶⁰

This would not be the case where consumers, including future consumers would be considered as one group - recalling also that within the consumer group in the relevant market the assessment of the overall effect is what

¹⁵⁵ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 83-88.

¹⁵⁶ Office of Fair Trading (n 102) paras 5.10-5.16.

¹⁵⁷ Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 87-89; Office of Fair Trading (n 102) paras 5.1-5.16; Holmes (n 11) 377-378; Gassler (n 11) 3,9.

¹⁵⁸ Office of Fair Trading (n 102) paras 5.1, 5.6, fn 67.

¹⁵⁹ Office of Fair Trading (n 102) paras 5.1-5.16; Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 85-86.

¹⁶⁰ Office of Fair Trading (n 102) paras 5.1, 5.5-5.9; Townley, 'Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.' (n 137) 580-590.

matters.¹⁶¹ So in this approach, it could be viewed that the consumers of future would simply be included in the consumers term: here, there could be a situation where future consumers could receive the benefits, but the so called original consumers would not essentially receive any – raising the issue relating to distribution between these two groups.¹⁶² The pro's and cons, including from for example moral point of view have been discussed by authors, noting also the somewhat problematic nature for the so called original consumers.¹⁶³

How does this look from fairness point of view? Considering the above mentioned approach – that the group is considered as a whole – it seems indeed at first sight that there are problems connected to that consumers A only suffer negative effects while the benefits are compensated by benefits gained by consumers B. However, an argument in favour of an approach where benefits for consumer of the future are also considered has been brought.¹⁶⁴ In it, it is noted that in TEU importance is not only placed on gains that can be received in the short-term, based on article 3 TEU's contents, which for example names sustainable development as something that EU should pursue while also placing importance on cross-generation solidarity.¹⁶⁵

It has been stated that it is the interests of consumers on the relevant market that are to be protected, and by keeping in mind the cross-generational interests, there is room for the argument to include future consumers (and

¹⁶¹ *Shaw (n 132)*, para 163; *Asnef-Equifax (n 114)* paras 64-70; Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 43,87; Jones, Sufrin and Dunne (n 7) 686-689. See also Office of Fair Trading (n 102) paras 5.1-5.16; Holmes (n 11) 377-378; Gassler (n 11) 3,9.

¹⁶² Office of Fair Trading (n 102) paras 5.1-5.16; Holmes (n 11) 377-378; Gassler (n 11) 3,9.

¹⁶³ Office of Fair Trading (n 102) paras 5.1-5.16; Townley, 'Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.' (n 137) 580-590.

¹⁶⁴ Townley, 'Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.' (n 137) 580-585.

¹⁶⁵ Consolidated version of the Treaty on European Union [2016] OJ C202/13 (TEU), art 3; Townley, 'Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.' (n 137) 580-585.

hence place more importance on long-term benefits) in the definition.¹⁶⁶ Translating this into terms of fairness, it could therefore be stated that the short-term fairness considerations are not in the end as important (i.e. that the current consumers are subject to negative effects) as long-term fairness considerations in the second condition of article 101 (3) TFEU are. Fairness requires balancing, and without placing a specific interest in the short-term benefits, which, as seen, is not the case in at the moment, it seems difficult to not prefer the overall result that provides adequate benefits to the consumers in the end: hence, as some others have also argued, future consumers should be included within the consumers term also in my view.

¹⁶⁷

3.3.2 Broader approach

In this section the broader approach will be looked into. It has been argued by some based on case law that it is sufficient that the consumers in the relevant market are not left without any benefits (i.e that they receive at least some benefits) but otherwise the necessary amount of compensating benefits for article 101(3) TFEU can be reached by looking into benefits for also others: the *Compagnie Générale Maritime* and the *Mastercard* judgements, which have been discussed in this connection to this argument will be looked into below.¹⁶⁸

At this point in connection to the *Mastercard* judgement, it is time to go for short time back to the first condition of article 101 (3) TFEU: in the judgement, under the first condition of article 101 (3) TFEU and relating to

¹⁶⁶ *Asnef-Equifax* (n 114) para 70; K J Cseres (n 139) 121-173; Townley, ‘Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.’ (n 137) 580-585.

¹⁶⁷ Townley, ‘Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.’ (n 137) 580-590; Holmes (n 11) 377-378; Dolmans and Lin (n 1) 22-31; Kokott and Dittert (n 4) 16-18; Dunne, ‘Fairness and the Challenge of Making Markets Work Better’ (n 1) 239, 247-248.

¹⁶⁸ *Compagnie Générale Maritime* (n 132) paras 343-345; Case C-382/12 P *MasterCard and Others v Commission* EU:C:2014:2201 (*Mastercard*), paras 228,228-249; Monti, ‘Four Options for a Greener Competition Law’ (n 153) 128-129; Holmes (n 11) 354-405; Gassler (n 11) 7-11. For critical view, see Peeperkorn (n 20) paras 30-46.

two-sided system, it was found out that the benefits on one group (in different market) were not sufficient where there were no objective, appreciable benefits for the consumers affected by the agreement and located in the relevant market.¹⁶⁹ The general court, in its respective Mastercard judgement, explained that this above mentioned requirement arises from simply the fact that second condition of article 101(3) TFEU exists.¹⁷⁰ This displays the connection that exists between these two conditions.¹⁷¹ As will be discussed in the upcoming sections further, it has been stated that second condition of article 101 (3) TFEU contains fairness considerations towards consumers (to which I personally agree) due to requiring consumers to receive a share of the benefits that is fair.¹⁷² From fairness point of view, the first condition hence plays an part in ensuring fairness towards the consumers by requiring that those consumers affected by the agreement in the relevant market must receive benefits.¹⁷³

Coming back to the case, the court of justice also noted in the Mastercard judgement that in the hypothetical situation where the group that did not receive benefits would have done so, it would have been possible for the effects be compensated if the total amount of benefits, including benefits from both groups, would have amounted to sufficient compensation.¹⁷⁴

As noted above, the *Compagnie Générale Maritime* has also been brought up.¹⁷⁵ In *Compagnie Générale Maritime* it was stated that:

¹⁶⁹ *Mastercard* (n 168), paras 21, 168-180, 228-249; Giorgio Monti and Jotte Mulder, ‘Escaping the Clutches of EU Competition Law Pathways to Assess Private Sustainability Initiatives’ (2017) 42 *European Law Review* 635, 648-650; Monti, ‘Four Options for a Greener Competition Law’ (n 153) 128-129; Holmes (n 11); Gassler (n 11) 9-11. See also *Consten and Grundig* (n 94) 348.

¹⁷⁰ Case T-111/08 *MasterCard and Others v Commission* EU:T:2012:260 (Mastercard GC), para 228

¹⁷¹ See also Guidelines on the application of Article 81(3) of the Treaty (n 8) para 50; Gassler (n 11) 7-11.

¹⁷² Ducci and Trebilcock, ‘The Revival of Fairness Discourse in Competition Policy’ (n 1) 85-86.

¹⁷³ For similar view, see also Ellison (n 11) 8.

¹⁷⁴ *Mastercard* (n 168), para 241.

¹⁷⁵ *Compagnie Générale Maritime* (n 132); Gassler (n 11) 9-11.

regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market,...but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement...without requiring a specific link with the relevant market¹⁷⁶

It has been noted that the commission's 101(3) guidelines have specifically pointed to the statement in the judgement of *Compagnie Générale Maritime*, noting that in the case the consumers for who the benefits were considered were, despite not being in the relevant market, the same who suffered the harm in the relevant market (indicating that this does not mean a broader possibility to take into account benefits outside of the relevant market when considering whether consumers are appropriately compensated).¹⁷⁷ Gassler, discussing the statement, sees reading the statement, as obiter dictum - what commission seems to do – incorrect, suggesting instead a broader reading.¹⁷⁸

3.3.2.1 Analysing the broader approach

It should be first pointed out that the second condition when viewed in the traditional sense involves vertical fairness considerations that exists between the producer and the consumer: however, when considering the question of fair share from an approach where the benefits for the whole society are taken into account, the situation changes.¹⁷⁹ Here the fairness assessment is broader, the questions of fairness in relation to the society in general come into play, in addition to the remaining aspect of fairness between the consumer and the producer.¹⁸⁰

¹⁷⁶ *Compagnie Générale Maritime* (n 132), para 343. See also Gassler (n 11) 10.

¹⁷⁷ *Compagnie Générale Maritime* (n 132) paras 343; Guidelines on the application of Article 81(3) of the Treaty (n 8) fn 57; Gassler (n 11) 10.

¹⁷⁸ Gassler (n 11) 9-10.

¹⁷⁹ Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 84-86; Ellison (n 11) 8-10,12-13.

¹⁸⁰ Ellison (n 11) 8-10,12-13. See also Gassler (n 11) 9-11.

Coming back to the case law discussed earlier, readings of it by certain authors can be summarised as follows: full compensation is not necessary when it comes to users that are located in the relevant market – they only need some (without other requirements relating to the amount) benefits: it is sufficient if total benefits, including benefits beyond the relevant markets are capable of fully compensating the anticompetitive effects.¹⁸¹ However, reading case law similarly to above leads according to Peeperkorn to a situation where the test of choice is total welfare, not consumer welfare: and if this is so, according to Peeperkorn, it would be not very logical to keep a consumer welfare condition (that at least some benefits must be received by the consumers in the relevant market who are subject to the negative effects) which could in certain situations prevent the achievement of the goal of total welfare regardless how notable the benefits for the society would be.¹⁸²

Peeperkorn makes in my view makes a solid point. The approach discussed is also unsatisfactory when viewed from fairness point of view. The fair share condition has been seen to reflect at least some kind of fairness towards consumers, and it has been noted that it is the interests of the consumers in the relevant market that are protected by EU competition law.¹⁸³ Article 101(3) TFEU when applied like this is prone to creating results that are unfair: instead of having a condition that ensures that consumer group in the relevant market receives a fair share of the benefits that compensate for the negative effects they are subject to, they can receive a share that is unfair from their point of view as the amount of benefits can be any.

¹⁸¹ *Mastercard* (n 168), paras 228-249; *Compagnie Générale Maritime* (n 132) paras 342-343; Monti and Mulder (n 169) 648-650; Monti, 'Four Options for a Greener Competition Law' (n 153) 128-129; Gassler (n 11) 9-11. See also Holmes (n 11) , which has been referred to in the critical view presented by Peeperkorn (n 20) paras 30-36, fn25.

¹⁸² Peeperkorn (n 20) paras 30-36.

¹⁸³ *Asnef-Equifax* (n 114) para 70; K J Cseres (n 139) 121-173; Townley, 'Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.' (n 137) 580-585; Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 85-86.

Such approach seems to be only somewhat seemingly concerned with interests/fairness of these consumers in the relevant markets who are subject to the negative effects. At the same time, granting so much importance on these consumers receiving at least some benefits (without placing importance on amount), described by Peeperkorn as illogical would – indeed - be hardly logical.¹⁸⁴ Benefits for them are important, and at the same time, they are not. This “important” part, as has been noted, could potentially prevent society from gaining notable benefits.¹⁸⁵ This could lead to unfair results when viewed from the point of e.g. other citizens.¹⁸⁶ However, at the same time, it should be pointed that there could be cases where these consumers in the relevant market (when there are e.g. no other beneficiaries) receive full compensation for the negative effects that they are subject to, leading to a situation that could be viewed fair from the point of view of these consumers (this situation matches the one that commission considers as a fair share)¹⁸⁷ alleviating the unfairness of this condition when approached like this.

The overall result is not however satisfactory from fairness point of view. The consumers in the relevant market may receive shares that are unfair and/or the society could be deprived of benefits for no appropriate reason as noted. There is balancing missing between these two parts of assessment (i.e. in first part consumer interests are important when they are not on the second), contributing towards these extreme outcomes. The balancing should be used here to reach justified outcomes and to make fairness important to adequate extend in the second part, instead of not having a

¹⁸⁴ Peeperkorn (n 20) paras 30-36.

¹⁸⁵ Peeperkorn (n 20) paras 30-36.

¹⁸⁶ Ellison (n 11) 8-16; Peeperkorn (n 20) paras 30-36; Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 7-9, 45-52,60; Gassler (n 11) 9-11.

¹⁸⁷ Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 33, 43, 50, 83-86,89, fn 57. See also cases to which the commission refers to support its view, *Consten and Grundig* (n 94); Case C-26/76, *Metro* (n 124), para 48; *Compagnie Générale Maritime* (n 132) paras 343-345; *Shaw* (n 132), para 163. See in addition Ducci and Trebilcock, ‘The Revival of Fairness Discourse in Competition Policy’ (n 1) 85-86.

proper requirement of minimum amount: if the interests, and fairness of these consumers is to be protected, it should be done properly.¹⁸⁸

There's then, of course the question of what should be taken into account when assessing the fairness for consumers in the relevant markets who should be compensated for the negative effects, and how the interests of these consumers are taken into account in appropriate way.¹⁸⁹ The arguably appropriate way of doing this is discussed in sections below, but it should be briefly noted here that this approach requires certain amount of benefits for the consumers in the relevant market, which is assessed by utilizing certain variables – ensuring that fairness for consumers is truly ensured without unduly hindering fairness for others.¹⁹⁰

3.3.3 Narrower approach

There are also those who do not suggest diverting from the commission's view as radically, i.e., suggesting that there would be also still certain cases where the consumers in relevant markets would have to be fully compensated.¹⁹¹

¹⁸⁸ It should be noted that in *Mastercard*, appreciable objective benefits are required for consumers under the first condition, which has been stated by GC to be necessary due to the second condition. Appreciable – non-negligible, notable. See *Mastercard* (n 168) paras 240-243; *Mastercard GC* (n 170), para 228. An interesting approach from the merger and consumer welfare context shall be brought up also here: in this so-called balancing weights approach if distributional effects are harsh for certain groups on the losing side, an extra weight could be placed on their losses (protecting hence in a way their interests), leading to a higher overall amount of negative effects that need to be compensated. For this approach, see *Commissioner of Competition v. Superior Propane, Inc.*, 2003 FCA 53 at paras 20-25; K J Cseres (n 139) 139-141; Commissioner of Competition, 'Submission to the Competition Policy Review Panel' (11 January 2008) <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02555.html> accessed 15 May 2021.

¹⁸⁹ See for example Ellison (n 11) 8-10, 12-13; Netherlands Authority for Consumers and Markets, 'Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law' (n 13) para 45-52,60.

¹⁹⁰ For views that are used as such or as inspiration, see for example Ellison (n 11) 8-10, 12-13; Holmes (n 11) 354-405; Netherlands Authority for Consumers and Markets, 'Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law' (n 13) para 45-52,60. For rest, see section 3.4.

¹⁹¹ Ellison (n 11) 8-10, 12-13; Netherlands Authority for Consumers and Markets, 'Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law' (n 13) paras 45-52,60.

Jordan Ellison, in his paper about “carbon defence” has suggested changes to the second condition.¹⁹² In his paper, he suggests that in cases where the agreement in question reduces greenhouse gas emissions, no full compensation would be required for the consumers.¹⁹³ According to him, the no worse off- condition should not be used in such cases.¹⁹⁴ The wording of article 101 (3) TFEU only requires a fair share for the consumer, which could be seen as a broader choice of term when compared to the no worse off- condition.¹⁹⁵ In addition, according to Ellison, the no worse off- condition does not have a strong support from the case law that is referred to in relevant guidelines: it seems that the condition relies as a base heavily on the previous usage of the condition in the decisions of competition authorities and the guidance provided by them.¹⁹⁶ Hence, according to Ellison, there is nothing in the factors mentioned above that would prevent the competition authorities from adapting a different approach.¹⁹⁷ He however agrees that the no worse off-condition may work well for some cases, but this is not so in cases relating to greenhouse gas emissions.¹⁹⁸

In his view, the appropriate way of viewing the distribution of benefits between different parties in cases relating to greenhouse gas emissions is not one focusing at the undertaking(s) in question and consumers: instead, focus should be on consumers and other citizens.¹⁹⁹ According to him in cases where emissions related to greenhouse gasses are reduced, there is no room for the question of whether the undertaking enjoys an unproportionate share

¹⁹² Ellison (n 11) 8-10.

¹⁹³ Ellison (n 11) 1,8-10.

¹⁹⁴ Ellison (n 11) 8-10; Guidelines on the application of Article 81(3) of the Treaty (n 8) para 85.

¹⁹⁵ TFEU, art 101(3); Ellison (n 11) 9-10.

¹⁹⁶ Ellison (n 11) 9. See also some of the sources discussed by Ellison in connection *Consten and Grundig* (n 94) 301, 348; *Mastercard* (n 168) paras 230-247; Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 83-104; Commission, ‘Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements’ [2001] OJ C 3/02; Commission, ‘Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements’ [2011] OJ C 11/01.

¹⁹⁷ Ellison (n 11) 8-10.

¹⁹⁸ Ellison (n 11) 9-10.

¹⁹⁹ Ellison (n 11) 9-10.

of the benefits as the benefits are received equally by everyone.²⁰⁰ Here there is a question of whether the situation is fair in the consumer v. citizen relationship according to Ellison – and Ellison thinks that the share in these situations can be fair for the consumers even in the absence of full compensation.²⁰¹ When it comes to Ellison’s arguments why this is fair, he notes that benefits relating to reduction in GHG emissions are same for consumers in question and for other citizens.²⁰² Ellison also states consumers being often the biggest winner (benefits-wise) from the emissions, and them also being in a position where it is possible to control the consumption(=emissions), contributes towards finding the share as fair.²⁰³ In their draft guidelines relating to sustainability agreements Netherlands Authority for Consumers and Markets has provided to some extend similar reasoning relating to the consideration whether it would be fair or not to deviate from the full compensation required.²⁰⁴

3.3.3.1 Netherlands Authority for Consumers and Markets’ suggestion

Netherlands Authority for Consumers and Markets suggests in its draft version of guidelines for sustainability agreements that full compensation would not be required in all situations under the second condition.²⁰⁵ According to the draft guidelines, in the case of so called environmental-damage agreements it would not be necessary for the users to receive a full compensation.²⁰⁶ Additional condition is also placed for these

²⁰⁰ Ellison (n 11) 9-10.

²⁰¹ Ellison (n 11) 9-10, 12-13.

²⁰² Ellison (n 11) 8-10.

²⁰³ Ellison (n 11) 9-10.

²⁰⁴ Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 45-52,60.

²⁰⁵ Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13), paras 45-52; Gassler (n 11) 11.

²⁰⁶ Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 45-46; Gassler (n 11) 11.

environmental-damage agreements: it is required that ‘the agreement helps, in an efficient manner, comply with an international or national standard, or it helps realize a concrete policy goal (to prevent such damage)’.²⁰⁷

When the term environmental damage is used in the draft guidelines, it refers to matters where the damage arises as a result of for example greenhouse gas emissions, leading potentially to e.g. atmospheric heating.²⁰⁸ The guidelines refers to these negative effects (that are not part of the production price) suffered by the society as negative externalities.²⁰⁹ Environmental-damage agreements referred to in the guidelines are sustainability agreements that are capable of reducing these aforementioned environmental damages / negative externalities, resulting in benefits for the whole society.²¹⁰ This leads to a situation where the efficiency of using natural resources is increased – and these natural resources are common to all of us.²¹¹ These benefits for the society in combination with the benefits for the users must then be at least equal when compared to the negative effects suffered by the users.²¹²

The arguments why the Netherlands Authority for Consumers and Markets views the share as fair for the consumers in these cases, even in the absent of full compensation for the consumers, is based on the users contribution

²⁰⁷ Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) para 45; Gassler (n 11) 11.

²⁰⁸ Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) para 8.

²⁰⁹ Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) para 8.

²¹⁰ Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 8, 36, 46, 50.

²¹¹ Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 8, 36, 50.

²¹² Netherlands Authority for Consumers and Markets, ‘Draft guidelines ‘Sustainability Agreements’ (9 July 2020) <https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements> accessed 17 April 2021. Although this website concerns the first draft, nothing in the second draft indicates that this is not so anymore regarding how the benefits are calculated and that at least neutral effect is required; Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) 17-18, paras 8, 45-52, 60; See also Ellison (n 11) 1-16.

via their demand for the products to the problems, e.g. atmospheric heating.²¹³ These problems are ones which the society is trying to resolve.²¹⁴ Another factor contributing towards why the Netherlands Authority for Consumers and Markets views the share is fair is that the consumers are able to receive the benefits to same extent as the whole society.²¹⁵ When it comes to other sustainability agreements, the Netherlands Authority for Consumers and Markets views that there should be still be the requirement of full compensation, as in these cases there is a lack of the negative externalities factor.²¹⁶

Gassler has criticized the Netherlands Authority for Consumers and Markets approach, stating that such distinction between different sustainability agreements is not the most helpful way to go forward: Instead, Gassler states ‘that it would be more helpful to provide general guidance based on the analytical framework laid down in Mastercard and Compagnie Générale Maritime’.²¹⁷

3.3.3.2 Analysing the narrower approach

Under these above mentioned suggestions in certain cases benefits outside the relevant market could be considered and a full compensation would not be required for the consumers in the relevant market that are subject to negative effects, based on e.g. the responsibility of the consumer for the

²¹³ Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 8, 36, 45-52,60.

²¹⁴ Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 8, 36, 45-52,60.

²¹⁵ Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 8, 36, 45-52,60.

²¹⁶ Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 8, 36, 46-50.

²¹⁷ Gassler (n 11) 11.

problem to which the benefits arising relate to.²¹⁸ From fairness points of view, some of their arguments seem indeed valid. As noted earlier, it is possible to see fairness meaning that X and Y should not be given same treatment if X and Y are not equal²¹⁹. Looking from this point of view, there is therefore indeed a possibility to argue that it is unfair to require full compensation in all cases under 101(3) TFEU for the consumers in the relevant market. For example, the approach suggested above on taking consumers own role in causing the environmental damage into account treats certain consumers differently based on their actions.²²⁰

The appropriateness of these proposed approaches can however be questioned when it comes to cases that would not fall under this new approach. There might be benefits flowing from agreements for others than the consumers in the relevant market,²²¹ but despite of e.g. consumers own contribution to the negative effects arising from the products that these benefits then would attempt to fix, full compensation would be still required.²²² It should be noted that consumers are able to make choices about buying for example fair trade products instead of other products.²²³ This makes it questionable to not take into account opportunities to decide otherwise in these other cases.

²¹⁸Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 45-52,60; Ellison (n 11) 8-10, 12-13.

²¹⁹ Aristotle (n 3) 81ff; Akman (n 1) 105-107,114-118; Dolmans and Lin (n 1) 24-27.

²²⁰Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 45-52; Ellison (n 11) 8-10, 12-13.

²²¹ Ducci, ‘Out-of-Market Efficiencies, Two-Sided Platforms and Consumer Welfare: A Legal and Economic Analysis’ (n 84) 611-616, 618, 622; Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 45-52,60. See also Office of Fair Trading (n 102) paras 3.3-3.5, 3.10-3.13, fn 27.

²²²Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 45-52,60; Ellison (n 11) 8-10, 12-13.

²²³ Keith Brown, ‘Ethical Consumption’ in Frederick F. Wherry and Ian Woodward (eds), *The Oxford Handbook of Consumption* (Oxford University Press 2019) 544-546. See also Tim Hunt, ‘Why shop ethically?’ (Ethical Consumer, 6 April 2021) <https://www.ethicalconsumer.org/why-shop-ethically> accessed 20 April 2021.

As could be seen from the suggestions, this “blame” variable can affect the assessment of what is considered to be fair – and failing to take it into account could result in shares that are not really fair.²²⁴ Assessing fairness based on different variables (even though the same variable could be also available) in other cases simply because the matter in hand does not fall within the category discussed above seems hence questionable. The differential treatment could make the application of the condition unfair. As the “blame” variable could affect the fairness assessment, I do not see reason why it would not affect it in other cases: it should be also there in other cases to affect the assessment of fair share in order to ensure that the share is fair. The most fair solution seems to be taking into account the responsibility of consumers in all cases where the benefits compensate for the negative effects to which the consumers also contribute to.

In these narrow suggestions, the consumers enjoy the benefits originating from the agreement to some extent as others and they name it as one factor contributing towards fairness, as seen above. I agree that this is one factor that can contribute towards determining that the share is fair - also in cases outside of the areas that the suggestions discussed above focus on. It is, however, only a factor that can potentially contribute towards this finding in certain cases, and the absence of this in cases in general does not mean that the share could not be fair. The factor that benefits for consumers should not be reduced to amount where the fairness for consumers would be protected only seemingly should be also kept in mind.

In addition, unlike the Netherlands authority for Consumers and Markets has suggested in the environmental context, I see no need to limit the cases where full compensation would not be required (including in other areas outside environment) to cases where the agreement assists with complying

²²⁴Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 45-52,60; Ellison (n 11) 8-10, 12-13.

standards or contributes towards achieving policy goals.²²⁵ The second condition requires that the consumers receive a fair share: it seems untrue that the share would not amount to a fair share, absent of full compensation²²⁶, in any other cases than in cases where the agreement assists with complying standards or contributes towards achieving policy goals.

3.4 The fair approach to fair share

A suggestion, which is based on my own and other's views, will be discussed in this section. This suggestion focuses on providing a way for determining what is a fair share and how it should be assessed whether the share is in a specific situation fair.

The starting point for what is a fair share should be full compensation to the consumers, located in the relevant market and who are subject to the negative effects by the agreement – which is in essence the commission's approach.²²⁷ However, this does not mean that this is the only situation where the share can be fair.²²⁸

As has been suggested by some in environmental context, assessment of the amount of benefits needed by consumers should take into account the consumer's own actions and how they have affected the situation negatively

²²⁵ For also an critical approach to Netherlands Authority for Consumers and Markets approach see Gassler (n 11) 10-11. See also Holmes (n 11) 374-381, discussing in more general about factors that could be considered in the assessment

²²⁶ For a view where full compensation is not needed for fair share, see for example Ellison (n 11) 8-10, 12-13; Netherlands Authority for Consumers and Markets, 'Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ' (n 13) paras 45-52,60.

²²⁷ Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 39, 73-85. See also Ellison (n 11) 8-10; Netherlands Authority for Consumers and Markets, 'Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ' (n 13) paras 45-52,60

²²⁸ For approaches in environmental context that deviate from viewing the share only fair in the case of full compensation for consumers, see Ellison (n 11) 8-16M Netherlands Authority for Consumers and Markets, 'Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ' (n 13) paras 45-52. See also 'Which goals count in article 101 TFEU?: Public policy and its discontents' (n 114) 444-446.

towards which the benefits then positively contribute to.²²⁹ This should affect amount of benefits that consumers need to receive, i.e. the benefits do not need to amount to an full compensation in order to be considered as a fair share.²³⁰ This should, as stated already in previous section, also apply outside the environmental context. The equal enjoyment of the benefits across all beneficiaries(including others than consumers in the relevant market) can contribute in certain cases towards finding that the share is fair even though the consumers do not receive full compensation (as suggested by e.g. Netherlands Authority for Consumers and Markets in relation to environmental-damage agreements)²³¹, but the absence of such factor should not prevent the share from being considered as fair as has been stated earlier on in this thesis.

The fact that benefits flow from the agreement to others should also be taken into account more generally under certain conditions when assessing whether the share is fair or not.²³² Courts case law goes to the correct way by keeping open the possibility to considering benefits outside the relevant market in the assessment– but unlike the case law has been read by some, it is not sufficient from fairness point of view that the consumers receive at least some of benefits (irrespective of the amount).²³³ This would just lead

²²⁹ Ellison (n 11) 8-16; Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 45-52.

²³⁰ Ellison (n 11) 8-16; Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 45-52.

²³¹ Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) para 48

²³²For views considering benefits for others and affecting the assessment what is fair share, see e.g Ellison (n 11) 8-16; Holmes (n 11) 374-381; Gassler (n 11) 9-11. See also Townley, ‘Which goals count in article 101 TFEU?: Public policy and its discontents’ (n 114) 444-446.

²³³ For the cases, see *Mastercard* (n 168), paras 228-249; *Compagnie Générale Maritime* (n 132) paras 342-343. It should be noted that in *Mastercard*, appreciable objective benefits are required for consumers under the first condition, which has been stated by GC to be necessary due the second condition. Appreciable – non-negligible, notable. See in addition to Court of Justice’s *Mastercard* judgement referred to the GC’s judgement in *Mastercard*, *Mastercard GC* (n 170), para 228. For the interpretations on case law, see Monti and Mulder (n 169) 648-650; Monti, ‘Four Options for a Greener Competition Law’ (n 153) 128-129; Gassler (n 11) 9-11; Holmes (n 11). For critical view, see Peeperkorn (n 20) paras 30-36, fn25.

to extreme outcomes where excessive amount of importance could be placed on consumers receiving benefits, without it really guaranteeing a share for the consumers that is fair – and without adequately fulfilling the aim of fairness towards these consumers.²³⁴ In overall, in all cases, regardless of the variables applied that lower the amount of benefits that consumers should receive, the share should never be negligible.

Keeping this in mind, and also that the requirement is a fair share: not full compensation, there should indeed be room for flexibility regarding the amount of benefits received by consumers where the benefits received by others are notable.²³⁵ Fairness can be protected even without the consumers receiving full compensation.²³⁶ However, as has been discussed, the share should not be negligible as in such cases fairness will not be adequately protected for the consumers in the relevant market: keeping this in mind, it shall be noted that balancing is inherent in fairness – and even if more weight is placed on the consumers interests, this balancing exercise should leave room for considering benefits for others as affecting the assessment of what is fair.²³⁷ An example of situation where the share could be fair is one where total amount of benefits is e.g. 1000, negative effects for consumers are 200, and benefits for consumers are 195, and the benefits also contribute towards EU's goals (this last part not being mandatory, but still contributing towards fairness of the share).²³⁸

²³⁴ See also Peepkorn (n 20) paras 30-36. For second condition of article 101(3) TFEU and fairness, see Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 85-86.

²³⁵ TFEU, art 101(3); Townley, 'Which goals count in article 101 TFEU?: Public policy and its discontents' (n 114) 444-446. In environmental context, see for example Ellison (n 11) 1-16. See also Gassler (n 11) 9-11.

²³⁶ Townley, 'Which goals count in article 101 TFEU?: Public policy and its discontents' (n 114) 444-446; Ellison (n 11) 8-16; Holmes (n 11) 374-381; Netherlands Authority for Consumers and Markets, 'Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law' (n 13) paras 45-52.

²³⁷ Townley, 'Which goals count in article 101 TFEU?: Public policy and its discontents' (n 114) 444-446; Kokott and Dittert (n 4) 16-18; Peepkorn (n 20) paras 30-36; Dunne, 'Fairness and the Challenge of Making Markets Work Better' (n 1) 239, 247-248. See also n 188 where an interesting approach in merger context is explained on placing more weight on certain interests.

²³⁸ For discussion how these goals can affect in the context of EU competition law and also in article 101(3) TFEU, see TFEU, arts 9,11; TEU, art 3; Witt, 'Public policy goals under EU competition law – now is the time to set the house in order' (n 114) 464-466; Holmes (n

By utilizing these factors in appropriate manner depending on the nature of the case, a share that is fair can be determined. Naturally, not all of these factors matter in all cases – this could for example be the situation where there does blame on the consumer side. For clarity, it should also be noted that the intent of this approach where more flexibility could exists regarding the compansation for the consumers in the relevant market is not to allow agreements where the negative effects would not be completely compensated - the overall benefits(incl. benefits for others) must be at least equal to the negative effecs for consumers.²³⁹

3.5 The two other conditions of article 101(3) TFEU

3.5.1 Third condition

As already discussed earlier, the third condition requires from the agreement in question that the restrictions resulting from it are not considered dispensable – i.e. unnecessary - for achieving the efficiencies that arise from the agreement.²⁴⁰ According to the commission, the following test, consisting from two parts, must be passed successfully in order for the condition to be satisfied:

First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of

11) 359-362,374-381. For approaches relating to the second condition of article 101(3) TFEU motivated by environmental/sustainability matters/goals leading to more flexible approach to the condition, see e.g. Ellison (n 11) 1-16;Netherlands Authority for Consumers and Markets, ‘Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) paras 1-9, 45-52,60.

²³⁹ For same view, see Netherlands Authority for Consumers and Markets, ‘Draft guidelines ‘Sustainability Agreements’ (n 212).

²⁴⁰ TFEU, art 101 (3); Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 39, 73-82.

competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.²⁴¹

Hence, by imposing these conditions, it is ensured that the means that are not necessary for achieving the benefits are not used, and that unnecessary restrictions of competition do not exist.²⁴² It's possible to identify elements of horizontal fairness in this condition: it shall be first noted that the agreement and its contents can lead to negative effects for competitors, and that fair opportunity for undertakings to be successful on their merits falls within fairness.²⁴³ While the primary concern here under this condition is not the competitors, there exists a certain amount of fairness towards them when competition is protected.²⁴⁴ Hence, this condition could be seen as positively affecting fairness for those producers/competitors that are not part of the agreement in horizontal fairness relationship between competitors, as no unnecessary restrictions for competition are in place.

This condition can be also seen to support vertical fairness for the consumers. This is because this condition ensures that unnecessary negative effects for competition are avoided.²⁴⁵ As has been stated by commissioner Vestager, ensuring that the markets are competitive ensures also fair results for the consumers.²⁴⁶

²⁴¹ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 73.

²⁴² Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 73-85.

²⁴³ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (n 196) paras 32-38; Margrethe Vestager 'Perspectives on Europe' (London School of Economics, 20 November 2015) https://wayback.archive-it.org/12090/20191129203223/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/perspectives-europe_en accessed 8 April 2021; Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 93-98; Dunne, 'Public Interest and EU Competition Law' (n 108) 276.

²⁴⁴ *Asnef-Equifax* (n 114) para 70; K J Cseres (n 139) 121-173; Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 13, 33, 69-71, 200, 272; Townley, 'Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.' (n 137) 580-585; Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 93-98.

²⁴⁵ Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 73-82.

²⁴⁶ Vestager, 'Fairness and competition' (n 1). See also Laitenberger, 'EU competition law in innovation and digital markets: fairness and the consumer welfare perspective' (n 63) 3-6; Ezrachi (n 1) 13-17; Netherlands Authority for Consumers and Markets, 'Second draft

It could also be possible to consider a situation where the agreements itself would lead to fairness (or other) benefits, but due to this condition, the agreement would not be able to successfully satisfy the criteria of article 101(3) TFEU: however, considering how there would be better ways to achieve these benefits if the agreement fails to fulfil the third condition, it is hard to think how the end result of prohibiting such agreements would not be preferred.²⁴⁷

It should be also noted that this condition must be first satisfied in order to move on assessing whether the consumers have received a share of the benefits flowing from the agreement.²⁴⁸ So, even before the agreement moves to the second condition, fairness in the above mentioned sense can be promoted. In addition, it shall be recalled here that there is also connection between the third condition and the first condition, the first condition assesses what benefits can be taken into account, which are then used in this third condition.²⁴⁹

3.5.2 Fourth condition

The fourth condition, as shall be recalled, requires that the undertakings concerned must not have due to the agreement ‘the possibility of eliminating competition in respect of a substantial part of the products in question’.²⁵⁰ Even though some pro-competitive efficiencies could arise from the agreement that are assessed under article 101(3) TFEU, protection of certain matters is according to the commission prioritized: these are competitive

version: Guidelines on Sustainability Agreements – Opportunities within competition law ‘ (n 13) 16.

²⁴⁷ Peepkorn (n 20) para 66.

²⁴⁸ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 39; Jones, Sufrin and Dunne (n 7) 267-269.

²⁴⁹ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 50.

²⁵⁰ TFEU, art 101(3); Guidelines on the application of Article 81(3) of the Treaty (n 8) paras 105-116.

process and rivalry.²⁵¹ The agreement could potentially lead for example to a situation where the competitors could not be successful by competing on their merits.²⁵² As noted in the section about the third condition – it has been stated that the existence of fair possibility for undertakings to achieve success on their merits could be considered as an element of fairness.²⁵³

Hence, this condition could be seen to have the effect of increasing fairness in horizontal fairness relationship for those producers/competitors who are not part of the agreement in relation to the undertakings that are parties to agreement, as competitors are protected from the negative effects caused to them by the agreement.²⁵⁴ This condition can also have positive effects for the fairness of consumers: instead of allowing the undertakings to eliminate competition, competitive markets are ensured, which, as also noted by commissioner Vestager, ensures also fair results for the consumers.²⁵⁵ It should be also noted that this condition by protecting the competitive process in essence favors long-term benefits over short-term benefits.²⁵⁶ In the horizontal relationship between consumers the fairness considerations seem to be again, at least partly, towards the future consumers as the long-term benefits might not be felt by the current consumers: the word again is used here because of the discussion about future consumers in section 3.3.1, where a view in which future consumers could be considered within the

²⁵¹ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 59-72,105; Kingston (n 108) 287-292.

²⁵² Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (n 196) para 264; Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 96-97.

²⁵³ Dunne, 'Public Interest and EU Competition Law' (n 108) 276; Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 93-98; Vestager, 'Perspectives on Europe' (n 243).

²⁵⁴ Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 93-98.

²⁵⁵ Vestager, 'Fairness and competition' (n 1). See also Laitenberger, 'EU competition law in innovation and digital markets: fairness and the consumer welfare perspective' (n 63) 3-6; Ezrachi (n 1) 13-17; Netherlands Authority for Consumers and Markets, 'Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law' (n 13) 16.

²⁵⁶ Guidelines on the application of Article 81(3) of the Treaty (n 8) para 105; Townley, 'Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.' (n 137); Johannes Laitenberger, 'EU competition law in innovation and digital markets: fairness and the consumer welfare perspective' (n 63) 3-6,11; Vestager, 'Fairness and competition' (n 1); 580-590. See also Kingston (n 108) 287-292.

consumer term (leading potentially to situations where current consumers suffer negative effects, but future consumers enjoy the benefits) was agreed to.²⁵⁷

²⁵⁷ Townley, 'Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.' (n 137) 580-590; Ducci and Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (n 1) 85-86. See also Office of Fair Trading (n 102) paras 5.1-5.16; Kingston (n 108) 287-292.

4 Conclusion

This thesis embarked on a journey to explore article 101 (3) TFEU in order to assess certain fairness aspects in it. While the second condition of article 101 (3) TFEU is the only one of the four conditions that refers directly to fairness, it was found that actually all of the conditions of article 101 (3) TFEU can contribute towards fairness.

Firstly, the first two conditions shall be discussed. Here, in these conditions fairness for the consumers in the relevant markets is quite directly considered.²⁵⁸ The first condition defines the benefits that can be taken into account e.g. in the second condition while also ensuring that consumers receive benefits.²⁵⁹ The benefits for consumers can themselves protect and promote fairness for the consumers in the relevant market. However, the benefits can also lead to essentially protection and promotion of fairness for those who benefit e.g from consumers considering fairness as quality, leading hence to potentially e.g fairer wages for workers.²⁶⁰ It is also important to note that arguably consumers of future should also be considered within the term of consumers when it is assessed whether the share is fair, indicating in this sense a preference for long-term fairness.²⁶¹

It is perhaps no surprise that the fairness of the consumers is protected in article 101 (3) TFEUs second condition as fairness and consumers are directly mentioned in it. However, the current situation relating to this condition is not completely clear or satisfactory. The approach, adopted by the commission where generally full compensation is required for the

²⁵⁸ See also Ducci and Trebilcock, ‘The Revival of Fairness Discourse in Competition Policy’ (n 1) 85-86.

²⁵⁹ *Mastercard GC* (n 170), para 228; *Mastercard* (n 168), paras 21, 168-180, 228-249; Guidelines on the application of Article 81(3) of the Treaty (n 8) para 50; Ellison (n 11) 8.

²⁶⁰ European Parliament resolution on Fair Trade and development (n 49) 867-868; Office of Fair Trading (n 102) para 3.4-3.5, 3.40-3.60, fn 27,28.

²⁶¹ See also Office of Fair Trading (n 102) paras 5.1-5.16; Townley, ‘Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born.’ (n 137) 580-590.

consumers in the relevant market is not fully satisfactory in my view, which is also the view of some other parties, such as Ellison and the Netherlands Authority for Consumers and Markets who suggest in certain environmental cases that full compensation for consumers would not be necessary, while also taking interests of the society into account. The interpretation where in all cases only some, undefined amount of benefits would be required for the consumers in the relevant market was found to only seemingly protect fairness, being hence unsatisfactory from fairness point of view while also in some cases affecting negatively interests of others unnecessarily as the interests and fairness of the consumers in the relevant market are not really protected.²⁶²

While some parts of the approaches discussed seemed appropriate, none of them appeared to be fully satisfactory from fairness point of view and hence the suggestion made in section 3.4 seems necessary to ensure fairness for the consumers and to also secure interests and fairness of others. The third and fourth condition of article 101 (3) TFEU can also indeed protect fairness. In these conditions, fairness for competitors(while in somewhat indirect manner) and consumers can be protected.

Hence, in article 101(3) TFEU a priority seems to be placed on fairness considerations for the consumers in the relevant market, whereas there seems to be also elements of fairness for competitors. There should also be to certain extend considerations for fairness and interests of others, e.g. society. Fairness in article 101 (3) TFEU isn't fully neutral, and pure balancing exercises without placing specific interest on one side isn't exercised. However, in overall, it seems that article 101 (3) TFEU is indeed concerned with fairness.

²⁶² See also Peeperkorn (n 20) paras 30-36.

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