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Saving Sustainability Agreements

A CRITICAL ANALYSIS OF THE NEW SUSTAINABILITY CHAPTER IN THE EUROPEAN COMMISSION'S DRAFT GUIDELINES ON HORIZONTAL COOPERATION AGREEMENTS

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ABSTRACT

This thesis analyzes the European Commission's new draft revised Guidelines on Horizontal Cooperation Agreements, published 1 March 2022, from the perspective of sustainability agreements. The Draft Horizontal Guidelines have introduced a dedicated chapter on agreements pursuing sustainability objectives and how their compliance under Article 101 of the Treaty on the Functioning of the European Union should be assessed. The purpose of this thesis is to critically analyze the new guidance, attempting in particular to answer the question: *Do the revised Draft Horizontal Guidelines allow sufficient room for the conclusion of sustainability agreements, or to what extent should they be further revised?* Via an in-depth analysis of the Guidelines, both improvements and shortcomings are identified, ultimately leading to the conclusion that while the Draft Horizontal Guidelines introduce valuable guidance and promote the conclusion of sustainability agreements in some respects, they also excessively hinder beneficial cooperation in other aspects and thus require further revision.

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ABBREVIATIONS

ACM	The Netherlands Authority for Consumers & Markets
AIM	European Brands Association
CJEU	Court of Justice of the European Union
DHG	Draft Horizontal Guidelines
EU	European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
WTP	Willingness to Pay

1. INTRODUCTION

1.1. BACKGROUND

Over the past few years, the European Union has become increasingly committed to promoting sustainable development as one of its top priorities. In 2019, it introduced the European Green Deal, in which it announced its ambitions to become the first climate-neutral continent.[1] Pursuant to its objectives, numerous new initiatives are being launched, and old ones are being revised. One of the fields experiencing an overhaul is competition policy.

EU law generally bans agreements between companies that restrict competition, such as agreements between competitors to fix prices or limit output. Often titled ‘the cartel prohibition’, Article 101 of the Treaty on the Functioning of the European Union (TFEU) limits the agreements undertakings may conclude, with Article 101(1) prohibiting agreements restricting competition save for when they can be justified under Article 101(3). However, with the climate crisis being more urgent than ever, such agreements can be vital for reaching sustainability[2] goals and combatting climate change. One could thus argue that there is an inherent friction between competition law and sustainability.[3]

The topic of sustainability has certainly been receiving considerable attention lately within the field of competition law.[4] Awareness of the urgency of the climate crisis is increasing, making sustainable development a top priority globally. The EU has also jumped on this wagon not only with the announcement of the Green Deal, but also more recently with

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[1] Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal’ COM (2019) 640 final; Commission, ‘A European Green Deal’ (*European Commission Priorities 2019-2024*) <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en> accessed 23 May 2022

[2] The 2020 United Nations Agenda for Sustainable Development describes sustainability to consist of 17 distinct sustainability goals, ranging from the protection of the environment and climate to the protection of human rights, working conditions and animal welfare. The definition of sustainability used by the European Commission’s in its Draft Horizontal Guidelines is the same as the UN’s definition, and thus does not discriminate between the different sustainability objectives (para 543). While this thesis does not intentionally limit the notion of sustainability, it focuses on the effects the guidelines have particularly on environmental sustainability, given the urgency of the climate crisis. See <https://www.un.org/sustainabledevelopment/development-agenda/> accessed 23 May 2022

[3] The Netherlands Authority for Consumers & Markets (ACM), ‘Draft Guidelines on Sustainability Agreements’ (Dutch Draft Guidelines), para 3 <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf > accessed 23 May 2022

[4] See, for instance: Simon Holmes, ‘Climate change, sustainability, and competition law’ Journal of Antitrust Enforcement (2020); Julian Nowag, *Environmental Integration in Competition and Free Market Laws* (OUP 2016); Suzanne Kingston, *Greening EU Competition Law and Policy* (CUP 2012)

its Competition Policy Brief in 2021.[5] As the Commission acknowledges, "[i]n order to reach the goals set out in the European Green Deal, everyone, private and public, must play their part".[6] Indeed, the first step to solving the climate crisis requires recognizing that legislation alone is not enough because governments fail, competition alone is not enough because markets fail, and innovation, while having the potential to be enough, cannot be solely relied upon due to the future being unknown and because it cannot solve inherent market mechanisms generating negative externalities.[7] It is due to this that agreements between competitors pursuing sustainability objectives are needed.[8] As the Dutch Competition Authority (The Netherlands Authority for Consumers & Markets; ACM) correctly notes, it should no longer be attempted to establish whether legislation or voluntary private action should be in the primary role – both are necessary, and competition law should not hinder genuine private sustainability initiatives.[9]

With the importance of sustainability agreements having been established, the question arises to what extent the conclusion of such agreements is possible under current competition law and policy, specifically under the cartel prohibition laid down in Article 101 TFEU. In assessing this, of particular relevance is the guidance provided by the European Commission on how agreements between competitors should be assessed for their compliance with Article 101, namely the 2011 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ('current Guidelines').[10] The current Guidelines will expire on 31 December 2022, and thus the Commission launched a review in September 2019 to determine whether they should lapse, their duration should be prolonged, or whether they should be revised. Upon examination, it was found that the current Guidelines meet their objectives of (1) making it easier for companies to cooperate in economically desirable ways without adverse effects on competition, (2) promoting competition and offering legal certainty to companies in the

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[5] Commission, Directorate-General for Competition, 'Competition policy brief' (2021) 2021-01 Publications Office of the European Union <https://data.europa.eu/doi/10.2763/962262> accessed 23 May 2022
[6] Id 1
[7] Maurits Dolmans, 'The "Polluter Pays" Principle as a Basis for Sustaimable Competition Policy' 2-9 in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds), *Competition Law & Environmental Sustainability* (Concurrences 2021)
[8] Id 9
[9] ACM, 'Submission – Public consultation on the draft revised Horizontal Block Exemption regulations and Horizontal Guidelines – Response from the Netherlands Authority for Consumers & Markets' ('ACM Response') 18 March 2022 ACM/UITNZP/001351, 6 <www.acm.nl/sites/default/files/documents/respons-acm-public-consultation-horizontal-block-excemptions-and-guidelines.pdf> accessed 23 May 2022
[10] Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' ('Current Guidelines') (2011) OJ C11/1

conception and implementation of their horizontal cooperation agreements, and (3) simplifying administrative supervision by the Commission, the NCAs, and national courts. However, they were found to not be adapted to the latest economic and societal developments that have emerged since their implementation in 2010, such as digitalization, and more importantly for the purposes of this thesis, the pursuit of sustainability goals.[11]

Indeed, up until now, cooperation agreements pursuing sustainability objectives have not been given any special attention in the Guidelines.[12] In accordance with the reviewing of the current Guidelines being in progress, the Commission published the new draft revised Guidelines on Horizontal Cooperation Agreements (Draft Horizontal Guidelines; DHG) on 1 March 2022.[13] Simultaneously, it launched a public consultation, calling for comments from citizens, organizations, and public authorities.[14] While the new Draft Horizontal Guidelines include a variety of changes, the most notable addition from the perspective of sustainability is the introduction of a comprehensive dedicated chapter addressing agreements pursuing sustainability objectives. The addition of Chapter 9 on sustainability agreements is an effort worth applauding in itself, marking the importance of the topic and granting it the attention it deserves.

As the Commission's Executive Vice-President Margrethe Vestager stated, "the proposed revised rules aim to keep up with developments so that beneficial cooperation can take place".[15] This thesis aims to discuss whether that goal is fulfilled, and whether the Draft Horizontal Guidelines indeed provide adequate guidance on the assessment of sustainability agreements while simultaneously not excessively restricting beneficial cooperation.

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[11] Commission Explanatory Note, 'Revision of the Horizontal Block Exemption Regulations and Horizontal Guidelines – Overview of the Main Proposed Changes' (2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1371> accessed 23 May 2022; Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD (2021) 103 final

[12] A specific type of sustainability agreement, namely environmental standardization agreements, are briefly addressed in Chapter 7 of the Current Guidelines (n 10).

[13] Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements – DRAFT' ('Draft Horizontal Guidelines'; 'DHG') (Communication - Draft) [2022] <https://ec.europa.eu/competition-policy/public-consultations/2022-hbers_en> accessed 23 May 2022

[14] The period of consultation was from 1 March to 26 April 2022. See: Commission, Press Release, 'Antitrust: Commission invites comments on draft revised rules on horizontal cooperation agreements between companies' (*Commission Press Corner*, 1 March 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1371> and Commission Public Consultation, 'Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines' (*Commission Competition Policy – Public Consultations*, 2022) <https://ec.europa.eu/competition-policy/public-consultations/2022-hbers_en> both accessed 23 May 2022

[15] Commission Press Release (n 14)

1.2. PURPOSE AND RESEARCH QUESTION

The purpose of this thesis is to analyze the Commission's revised Draft Horizontal Guidelines from the perspective of sustainability, focusing particular attention on whether the proposed changes create sufficient room for beneficial sustainability agreements to be concluded, or whether the assessment excessively restricts such agreements due to competition concerns. Both improvements and issues will be discussed. This thesis aims to answer the question: *Do the revised Draft Horizontal Guidelines allow sufficient room for the conclusion of sustainability agreements, or to what extent should they be further revised?*

1.3. METHODOLOGY

In answering the above-mentioned research question, the methods used in this thesis is are the doctrinal legal research method and an interdisciplinary research method, more specifically the 'law reform' research method.

The doctrinal legal research method aims to analyze legal rules and clarify ambiguities in law. It may also describe and discuss the relationship between the law in question and other rules. It implies an interpretative and qualitative analysis, asking the question "what is the law?".[16] It answers this question by analyzing the wording of laws and legal texts to assess existing legal doctrines, and has therefore also been described as 'black-letter law'.[17] In this thesis, this method is used to analyze the Draft Horizontal Guidelines and what they entail for sustainability agreements between competitors. The relationship between the Draft Guidelines and other legal sources, including Treaty articles, case law and other guidelines, is discussed.

Interdisciplinary research methods involve for instance an evaluation of the effectiveness of a particular law or legal text in achieving particular social goals.[18] One such method is the 'law reform' research method, which has as its purpose the facilitation of future change. This method has also been referred to as the 'socio-legal research' method or 'law in context' method. It could also be described as asking the question "what should the law be?". This method is used in this thesis to analyze whether the Draft Horizontal Guidelines achieve the social goal of combatting climate, and to assess the issues that arise in relation to the

[16] Paul Chynoweth, 'Legal Research' 29-30 in Andrew Knight & Les Ruddock (eds), *Advanced Research Methods in the Build Environment* (Blackwell Publishing Ltd 2008)
[17] Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2007/2017)
[18] Chynoweth (n 16) 30-31

assessment of sustainability agreements under Article 101 TFEU. In accordance with this method, suggestions for improvement will be made.

1.4. DELIMITATIONS

This thesis has as its sole focus the analysis of the new Draft Horizontal Guidelines from the perspective of agreements pursuing sustainability objectives. As the Commission has introduced a dedicated Chapter on sustainability agreements, no attention will be paid to the other Chapters of the Draft Horizontal Guidelines. The discussion will be limited to what I personally consider the most significant advances and the most pressing issues in relation to the assessment of sustainability agreements under the Draft Horizontal Guidelines. While this thesis does not promote a limited notion of sustainability, it focuses on the effects the guidelines have particularly on environmental sustainability, given the urgency of the climate crisis.

1.5. OUTLINE

The discussion in this thesis will be structured as follows: First, the main elements of Chapter 9 of the Draft Horizontal Guidelines will be briefly introduced. The discussion will then be divided into three main parts following the assessment in the Draft Horizontal Guidelines, namely agreements not raising competition concerns (Part 2.1), the assessment of sustainability agreements under Article 101(1) (Part 2.2.), and the assessment of sustainability agreements under Article 101(3) (Part 2.3). Under each Part, improvements as well as issues will be identified and discussed. Under Part 2.3, the discussion will be lengthier due to the assessment under Article 101(3) being the most complex of the three, and correspondingly raising the highest number of issues. Finally, conclusions will be drawn (Part 3).

2. PROPOSED SUSTAINABILITY CHANGES

As mentioned in the introduction, the new draft revised Guidelines on Horizontal Cooperation have turned a fresh leaf in taking sustainability concerns seriously by dedicating the matter its own chapter. The new Chapter 9 of the Draft Horizontal Guidelines, titled 'Sustainability Agreements', goes into detail on how horizontal agreements pursuing sustainability objectives

should be assessed under Article 101 TFEU. The fact that agreements pursuing sustainability objectives are treated as a separate type of agreement deserving of its own chapter and assessment is already a significant improvement to the current Guidelines, and that effort is worthy of praise. The Chapter has introduced a plethora of great new additions, and will certainly encourage the conclusion of new sustainability agreements via the mere fact of clear guidance now being available to competitors wishing to cooperate on sustainability matters, as previously they may have been deterred from doing so due to the lack of transparent guidance and thus a fear of violating competition rules.[19]

Chapter 9 on sustainability agreements is divided into six main sections, namely (9.1) the introduction, (9.2) sustainability agreements not raising competition concerns, (9.3) how sustainability agreements should be assessed under Article 101(1), (9.4) how sustainability agreements should be assessed under Article 101(3), (9.5) what effect the involvement of public authorities in the conclusion of the agreement has, and (9.6) examples of cases and how they should be assessed. From the perspective of assessing the legality of sustainability agreements, it is Sections 9.2-9.4 that are most relevant, laying down the step-by-step procedure of assessing compliance of the agreement in question with Article 101 TFEU. Each of the three Sections is lengthier and more complex than the one before it, and this is also reflected in the length and complexity of the discussion dedicated to each Section in this thesis. In practice, this means that the discussion on Section 9.2 will be rather brief due to a lack of substance to discuss, while the discussion on Section 9.4 is comparatively much lengthier due to an abundance of issues present.

While the Commission's efforts to encourage sustainability agreements via the introduction of specific guidance should undoubtedly be praised, this is not to say that there is no room for improvement. Several issues arise in relation to the assessment of such agreements, and above all the assessment is rather restricted in several aspects. Where an excessively narrow assessment is adopted, undertakings will unfortunately be deterred from engaging in the conclusion of sustainability agreements, and agreements that are concluded will more often than not be found to violate competition rules. In general, it is my opinion that the Draft Horizontal Guidelines should adopt a broader interpretation of the conditions under the

[19] American Bar Association, Antitrust Law Section, 'Comments of the American Bar Association Antitrust Law Section and International Law Section on the European Commission's Consultation Document on the Revision of the EU Competition Rules in Relation to Horizontal Agreements Between Companies' 26 April 2022, 11 <www.americanbar.org/content/dam/aba/administrative/international_law/blanket-authorities/2022-04-26-eu-competition-rules-on-horizontal-agreements-between-companies.pdf> accessed 23 May 2022

assessment of sustainability agreements to allow for more beneficial cooperation in order to combat harmful environmental practices and ultimately climate change.

I now turn to analyze some of the main proposed changes relating to sustainability that have been included in the Draft Horizontal Guidelines. As from the perspective of sustainability, all of the relevant changes are laid down in Chapter 9 on Sustainability Agreements, the other parts of the Guidelines will not be considered. The focus of this thesis will be on assessing the different elements of the new sustainability chapter, particularly via (1) the identification of welcome additions that encourage sustainability agreements, as well as (2) raising issues that without further revision may result in an unnecessary discouragement of sustainability agreements. As mentioned, the relevant sections that will be discussed are Sections 9.2-9.4, and they will be discussed in respective order.

2.1. SUSTAINABILITY AGREEMENTS NOT RAISING COMPETITION CONCERNS

The Draft Horizontal Guidelines correctly recognize under Section 9.2 that not all sustainability agreements raise competition concerns. Where an agreement has no effect on price, quantity, quality, choice, innovation, or other parameters of competition, it is not capable of raising competition law concerns and will thus fall out of the scope of Article 101.[20] The Section provides a brief non-exhaustive list of three examples of sustainability agreements not raising competition concerns, namely agreements concerning internal corporate conduct, the creation of databases on sustainable suppliers, and the organization of awareness campaigns.[21] I welcome this introduction of this Section and the examples included, although it could perhaps be helpful to add more examples.[22] For instance, the Dutch Competition Authority (ACM) in its own Draft Guidelines on Sustainability Agreements has given further examples of agreements it considers to fall out of the scope of Article 101, such as agreements applying national or international legal standards.[23] Including more examples in the non-exhaustive list

[20] DHG (n 13) para 551
[21] Id paras 552-554
[22] Unilever, 'European Commission Consultation on Draft Horizontal Cooperation Guidelines: Unilever response on Sustainability Agreements' 2022, 2 <www.unilever.com/files/24af84a6-ac65-4097-ae19-64100ff61aa7/unilever-response-to-hgl-sustainability-chapter-consultation.pdf> accessed 23 May 2022; ACM Response (n 9) 7
[23] Dutch Draft Guidelines (n 3) paras 23-29

would provide improved legal certainty for undertakings wishing to conclude agreements pursuing sustainability objectives.

2.2. ASSESSMENT OF SUSTAINABILITY AGREEMENTS UNDER ARTICLE 101(1)

Where an agreement does raise competition concerns, it will need to be assessed under Article 101(1). The Draft Horizontal Guidelines provide guidance under Section 9.3 on how this assessment should be conducted. This Part discusses the assessment under Article 101(1), with particular focus on the new 'soft safe harbor' the Commission has introduced.

The Section introduces the concept of 'sustainability standardization agreements', which in essence are agreements between competitors to adopt and comply with a certain sustainability standard, such as phasing out non-sustainable products, harmonizing packaging of products, purchasing production inputs manufactured in a sustainable manner, or improving animal welfare.[24] Such agreements will be prohibited where they do not genuinely pursue sustainability objectives, but are instead used to disguise restrictions by object, such as price fixing or limitations of output.[25] 'By object' restrictions are seen as infringing Article 101(1), and will have to undergo a further analysis of justifiability under Article 101(3). The fact that an agreement genuinely pursues a sustainability objective may be taken into account in determining whether the restriction in question is a restriction by object or a restriction by effect within the meaning of Article 101(1).[26] Where it can be determined that the agreement genuinely pursues sustainability objectives, it will only infringe Article 101(1) if it produces an 'appreciable negative effect on competition'.[27] In this regard, I find the introduction of the new 'soft safe harbor' to be a very positive addition to the Draft Horizontal Guidelines, listing seven cumulative conditions, which, if met, entail that a sustainability standardization agreement does not produce appreciable negative effects on competition, and hence does not infringe Article 101(1).

The new 'soft safe harbor' in paragraph 572 of the Draft Horizontal Guidelines frees sustainability standardization agreements from further assessment where the following cumulative conditions are met: (1) the procedure for developing the sustainability standard is

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[24] DHG (n 13) para 561
[25] Id paras 570-571
[26] Id para 559
[27] Id para 572

transparent and all interested competitors can participate in the process leading to the selection of the standard; (2) the sustainability standard should not impose on undertakings that do not wish to participate in the standard an obligation - either directly or indirectly - to comply with the standard; (3) participating undertakings should remain free to adopt for themselves a higher sustainability standard than the one agreed with the other parties to the agreement (e.g. they may decide to use more sustainable ingredients in their final product than the standard may require); (4) the parties to the sustainability standard should not exchange commercially sensitive information that is not necessary for the development, the adoption, or the modification of the standard; (5) effective and non-discriminatory access to the outcome of the standardisation procedure should be ensured – this should include effective and non-discriminatory access to the requirements and the conditions for obtaining the agreed label or for the adoption of the standard at a later stage by undertakings that have not participated in the standard development process; (6) the sustainability standard should not lead to a significant increase in price or to a significant reduction in the choice of products available on the market; and (7) there should be a mechanism or a monitoring system in place to ensure that undertakings that adopt the sustainability standard indeed comply with the requirements of the standard.

In general, I find the introduction of a soft safe harbor a valuable addition to the Draft Horizontal Guidelines, and I believe it will encourage parties to engage in sustainability standardization agreements due to reduced fear of violating Article 101 where the conditions are fulfilled. Additionally, I welcome the statement that not fulfilling the conditions does not lead to a presumption of restricting competition, but rather merely to a need for assessment.[28] However, I believe the practical relevance of the safe harbor may be somewhat limited, as fulfilling all seven conditions may prove excessively difficult.[29] In particular, the sixth condition excluding from the safe harbor agreements leading to a significant price increase or significant reduction in choice could in my opinion benefit from further elaboration on what is considered significant. In the fourth example agreement (Example 4) under Section 9.6 of the Draft Horizontal Guidelines, the 12% price increase is considered significant without further explanation. Reference is made to the fact that consumers are willing to pay only 5% more for sustainable products. Does this entail that the concept of a significant price increase is tied to the consumers' willingness to pay? If this is the case, the sixth condition of the safe harbor is

[28] Id para 574
[29] Roman Inderst and Stefan Thomas, 'Sustainability Agreements in the European Commission's Draft Horizontal Guidelines' (2022) SSRN 4 <https://dx.doi.org/10.2139/ssrn.4069374> accessed 23 May 2022

unlikely to ever be met in practice[30], at least where the standardization agreement entails any price increase. Even so, I appreciate the soft safe harbor, as where the standardization agreement does not result in a price increase, the seven conditions can reasonably be fulfilled.

In conclusion, the introduction of the ‘soft safe harbor’ is a welcome effort, but the sixth condition could benefit from some further clarification.

2.3. ASSESSMENT OF SUSTAINABILITY AGREEMENTS UNDER ARTICLE 101(3)

Where an agreement between competitors pursuing sustainability objectives does not fall under the category of agreements not raising competition concerns, as discussed in Part 2.1, nor does it fall within the soft safe harbor and is thus held to infringe Article 101(1) as discussed under Part 2.2, it may still be exempted under Article 101(3). The guide to assessing sustainability agreements under Article 101(3) is found under Section 9.4 of the Draft Horizontal Guidelines, titled ‘Assessment of sustainability agreements under Article 101(3)’.

Regardless of the objectives of the agreement, for it to qualify for an exemption under Article 101(3), four cumulative conditions must be fulfilled: the agreement must (1) contribute to improving the production or distribution of goods or to promoting technical or economic progress; (2) allow consumers a fair share of the resulting benefit, (3) impose only restrictions that are indispensable to the attainment of the objectives; and (4) not eliminate competition in respect of a substantial part of the products in question.

The first condition, often referred to as ‘efficiency gains’ as in Section 9.4.1 of the Draft Horizontal Guidelines, requires the agreement to contribute to objective efficiencies such as reductions in production and distribution costs, increases in product variety, quality and innovation, or improvements in processes of production or distribution.[31] This condition has been the subject of discussion in the past, as there has been debate concerning what can or should constitute an efficiency fulfilling the condition.[32] However, in relation to sustainability

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[30] Cefic, ‘Cefic Response to the European Commission call for comments on the draft revised rules on horizontal cooperation agreements between companies (“Draft Horizontal Guidelines”)’ (Position Paper) 2022, 2 <https://cefic.org/app/uploads/2022/04/Cefic-Comments-on-the-Draft-Horizontal-Guidelines.pdf> accessed 23 May 2022

[31] DHG (n 13) para 577

[32] See, for instance: Julian Nowag, ‘Competition Law’s Sustainability Gap? Tools for an exemption and Brief Overview’ (2019) Lund University Legal Research Paper Series, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484964> accessed 23 May 2022; Kingston (n 4); Gianni de Stefano, ’Measurable Environmental Protection as a Necessity for Competition Law’ (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3533499> accessed 23 May 2022

agreements, this condition is the easier one to fulfill and does not raise any issues in my view. This is due to the fact that the Draft Horizontal Guidelines recognize a broad spectrum of sustainability benefits that can be considered efficiency gains, including cleaner technologies, less pollution, better quality of products, and better working conditions.[33] Almost all agreements pursuing sustainability objectives will produce such efficiencies, and the condition is thus largely unproblematic in its assessment.

The third condition on indispensability is traditionally assessed before the second one, and this is the case with the Draft Horizontal Guidelines as well. This is because any agreement imposing restrictions that cannot be considered indispensable for the attainment of their objectives is uncapable of producing effects that can be taken into account in the analysis of consumer fair share.[34] To fulfil the condition of indispensability, the parties of the agreements must demonstrate that both their agreement and each of the restrictions it entails on competition are "reasonably necessary for the claimed benefits to materialize and that there are no other economically practicable and less restrictive means of achieving them".[35] The guide to the assessment of the condition of indispensability can be found under Section 9.4.2 of the Draft Horizontal Guidelines.

The second condition requires the agreement to allow consumers a fair share of the benefits, or efficiencies, that the agreement generates. The guide to assessing this condition is found under Section 9.4.3 of the Draft Horizontal Guidelines. The consumers must be compensated for any actual or likely negative impact caused to them by the restriction of competition. This entails that the net effect of the agreement can be no less than neutral for the consumers affected by the agreement.[36] This condition has over time been subject to lively debate due to many academics and practitioners considering the requirement too stringent and thus excessively hindering beneficial cooperation.[37]

The final requirement to not eliminate all competition entails that there must always remain at least some degree of residual competition, and the guide to assessing this is under Section 9.4.4 of the Draft Horizontal Guidelines. The existence of rivalry between competitors is a value that drives economic efficiency and innovation, and is thus prioritized over any

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[33] DHG (n 13) para 578
[34] Id para 580
[35] Id para 581; Commission Notice, Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty ('Article 101(3) Guidelines') OJ 2004 C101/97, paras 73-82.
[36] Article 101(3) Guidelines (n 35) para 85
[37] For an insight into this debate, see for instance: Niamh Dunne, 'Fairness and the Challenge of Making Markets Work Better' (2020) 84(2) The Modern Law Review <https://doi.org/10.1111/1468-2230.12579>; Atte S Ouninkorpi, 'Fairness in article 101(3) TFEU' (Master's Thesis, Lund University 2021) <https://lup.lub.lu.se/student-papers/search/publication/9048315> both accessed 23 May 2022

benefits the agreement may produce regardless of their extent.[38] Temporary elimination of competition is accepted.[39] Considering that the objective of Article 101 is to protect the competitive process[40], and that the condition allows for restrictions in competition, this condition indeed is coherent with the Article's purpose, and hence has not been subject to much controversy.

While traditionally, debate has revolved around the first two conditions with conditions three and four having been considered largely uncontroversial, I would argue that in light of sustainability agreements and the new draft guidance to assessing them, in addition to condition two on allowing consumers a fair share, it is condition number three on indispensability that presents issues instead of condition number one on efficiency gains. Considering that all the issues I have identified in the new sustainability chapter of the draft guidelines relate either to providing consumers with a fair share or to the requirement of indispensability, the focus of this contribution will be on those two conditions and analyzing the problems they entail. Due to this, the first and last conditions on efficiency gains and residual competition will not be discussed further in this contribution. Out of the conditions that will be analyzed more in depth, the clearly more problematic of the two is the requirement to allow consumers a fair share of the efficiencies generated. Significant attention will therefore be dedicated to this condition and the issues arising in relation to it. The discussion on indispensability will be comparatively briefer.

This section will begin with discussing the condition of fair share for consumers and all the issues arising in relation to the requirement (Part 2.3.1). The issues arising in relation to the condition of indispensability will be subsequently analyzed (Part 2.3.2.).

2.3.1. FAIR SHARE FOR CONSUMERS

One of the main limitations narrowing down the scope of which sustainability agreements can be exempted pursuant to Article 101(3) is the requirement that consumers must receive a fair share of the resulting benefit. Essentially, the restrictions an agreement imposes on competition are seen as a harm that can only be justified if consumers are sufficiently compensated for it. This requirement raises complex issues, such as what can be considered a 'fair share', who

[38] Article 101(3) Guidelines (n 35) para 105; DHG (n 13) para 610
[39] DHG (n 13) para 614
[40] Article 101(3) Guidelines (n 35) para 105

qualifies as a 'consumer', what constitutes a 'harm', and which 'benefits' can be taken into account in the assessment and how they should be quantified.

The requirement of fair share for consumers has traditionally been interpreted in a rather strict manner by the Commission, and regrettably, this seems to be the case in the Draft Horizontal Guidelines as well. While the requirement is undoubtedly an invaluable condition ensuring that consumers are not taken advantage of in the form of greenwashing[41], an issue arises with the high level of stringency in the interpretation of the requirement in the Draft Horizontal Guidelines. An excessively strict interpretation can lead to agreements otherwise meeting all the conditions to fall short, and thus not qualifying for an exemption under Article 101(3) that in reality they should be eligible for. This can hinder truly beneficial cooperation, and thus, to maximize sustainability benefits, the interpretation of what constitutes a fair share should be relaxed. In relation to greenwashing, I believe paragraph 560 of the Draft Horizontal Guidelines appropriately addresses this issue by requiring parties to the agreement to bring forwards all facts and evidence to prove that the agreement genuinely pursues sustainability objectives and that it is not used to disguise a 'by object' restriction of competition.[42]

The discussion in this Part will be structured as follows: First, the interpretation in the Draft Horizontal Guidelines of the meaning of 'fair share' will be analyzed, and I will argue that the Commission interpreting it to be synonymous with 'full compensation' is too narrow and not in line with case law from the Court of Justice of the European Union (CJEU) (Part 2.3.1.1.). Second, I will maintain that certain effects on competition, such as an increase in price, should not always be seen as harm, and that a guide to assessing what constitutes harm should be included in the Guidelines (Part 2.3.1.2.). Third, I will discuss the concept of 'consumers', and argue that the interpretation is too limited, particularly in respect to a lack of sufficient consideration towards future generations of consumers (Part 2.3.1.3.). Fourth, an assessment of which benefits can be taken into account will be made. In particular, I will criticize the excessive weight placed on consumer opinion, as well as the inadequate degree to which benefits arising outside of the relevant market can be taken into account (Part 2.3.1.4.). Finally, I will discuss the issues arising in relation to the quantification of what constitutes a

[41] Greenwashing refers to the attempt to mask cartels with claimed sustainability objectives. On this, see: ClientEarth, 'Horizontal agreements between companies – revision of EU competition rules – ClientEarth and Simon Holmes' contribution to the Commission's consultation' (October 2021) 10-11 <www.clientearth.org/media/3c4lsaex/clientearth-and-s-holmes-contribution-horizontal-agreements-04-10-2021.pdf> accessed 23 May 2022

[42] Fair Wear, ISEAL, AIM and the Fair Trade Advocacy Office, 'Joint Response to the European Commission's public consultation on the draft revised Horizontal Block Exemption Regulations and Guidelines" 3 May 2022, 1-2 (forthcoming)

fair share, particularly questioning whether the 'willingness to pay' test can truly be considered the best measure of quantifying benefits (Part 2.3.1.5.). Part 2.3.1.6. will conclude the discussion on the fair share requirement.

2.3.1.1. FAIR SHARE OR FULL COMPENSATION?

Central to the condition of allowing consumers a fair share of benefits resulting from the agreement is naturally the issue of how the concept of 'fair share' can be defined and what it entails. The Draft Horizontal Guidelines explain that a fair share is deemed to have been received by consumers when "the benefits deriving from the agreement outweigh the harm caused by the same agreement, so that the overall effect on consumers in the relevant market is at least neutral".[43] This wording can be interpreted to imply that full compensation of consumers is necessary for it to be held that consumers have received a fair share. While it arguably is quite a stringent requirement, it comes as no surprise that the Commission took this stance – in fact, the Commission has remained consistent in this regard, with its interpretation being the same in the Article 101(3) Guidelines, as well as more recently in its Competition Policy Brief.[44] However, I do believe the Commission's interpretation takes quite the leap from the actual wording of Article 101(3), which requires a fair share, not a full one.[45] Additionally, the case law of the Court of Justice of the European Union (CJEU) seems to point to the opposite direction – it has repeatedly interpreted the wording of Article 101(3) to not require full compensation, instead only requiring that an appreciable objective advantage must be received in the relevant market. Finally, it can be argued that requiring full compensation goes against the 'polluter pays' principle, as it is the consumer demand that drives pollution. Due to these three inconsistencies, I am opposed to the Commission's requirement for a full compensation. The three issues will be discussed in respective order, after which suggestions for improvement will be put forward.

When looking at the wording of Article 101(3), there is no mention of consumers needing to be compensated fully. So why did the Commission early on decide to advocate for full compensation, and to this day maintains that interpretation? In many ways, I understand why full compensation is required. Where the restriction of competition imposed by the agreement in question results in a negative impact on the consumers, such as a price increase

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[43] DHG (n 13) para 588
[44] Article 101(3) Guidelines (n 35) para 85; Competition Policy Brief (n 5)
[45] "Fair share, not a full share", is a choice of wording used by Dolmans (n 7) 18.

or a decrease in selection, it does at first glance seem fair that the consumers be at least compensated for the harm so that they are not worse off following the agreement.[46] If the positive benefits are modest, but instead there are significant disadvantages to consumers, the consumer undoubtedly does not receive a fair share. It therefore seems reasonable that a balancing exercise must be conducted in respect of all the advantages and disadvantages of the agreement, with the outcome being no less than neutral from the consumers' perspective.

However, the requirement can be very hard to fulfill especially with regard to sustainability agreements, as these kinds of agreements are more likely to produce benefits to society as a whole that often cannot be taken into account in the assessment of allowing consumers a fair share as we will see later on in Part 2.3.1.4. Naturally, where there is limited scope to take benefits into account, full compensation will be more difficult to attain as well, resulting in even agreements producing significant positive environmental benefits potentially falling short of fulfilling the full compensation interpretation. It is of utmost importance that agreements addressing the most critical environmental externalities be allowed, and unfortunately the requirement of full compensation is one of many interpretations that may result in their downfall. I find the strict interpretation unnecessary, as in my opinion a fair share can be reached even without full compensation – in fact, parting from the Commission's interpretation, the CJEU has repeatedly held that only an 'appreciable objective advantage' is necessary for the condition of fair share to be fulfilled, with no mention of a requirement of full compensation.

As one of the leaders in greening competition law[47], the Dutch Competition Authority (ACM) has in its Legal Memo[48] conducted a thorough analysis of the CJEU's case law on the meaning of fair share specifically in the sustainability context, and I find it hard to disagree with their assessment. Following the Court's wording in relevant cases including *Consten and Grundig* (1966)[49], *Compagnie Générale Maritime* (2002)[50], *GlaxoSmithKline* (2006)[51], and

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[46] Paragraph 85 of the Article 101(3) Guidelines (n 35) explains this quite well.

[47] Edith Loozen, 'EU antitrust in support of the Greem Deal. Why good is not good enough' (2022), 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4094169#> accessed 23 May 2022

[48] ACM, 'ACM Legal Memo' 27 September 2021 <www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf> accessed 23 may 2022

[49] Joined cases 56 and 58-64 *Consten and Grundig v Commission*, Judgment of the Court of 13 July 1966, ECLI:EU:C:1966:41

[50] Case T-86/95, *Compagnie Générale Maritime and others*, Judgment of 28 February 2002, ECLI:EU:T:2002:50

[51] Case T-168/01, *GlaxoSmithKline*, Judgment of 27 September 2006, ECLI:EU:T:2006:265, para 248. Confirmed on appeal in Joined cases C501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services and Others v Commission and Others*, Judgment of 6 October 2009, ECLI:EU:C:2009:409

more recently *MasterCard* (2014)[52], the Court has never once mentioned that full compensation would be necessary for a fair share to be established. However, the Commission has derived its full compensation interpretation from the Court's statements such as that the "improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition".[53] It does appear to me that the Commission's interpretation is not entirely in line with the Court's findings, and one could go as far as to say that the two views are borderline conflicting.[54] Indeed, it makes a significant difference whether what is required is some level of compensation or full compensation. This discrepancy leads to legal uncertainty, and it would undoubtably be beneficial from the perspective of undertakings wishing to engage in sustainability agreements if the guidelines were fully in line with both the wording of Article 101(3) and the Court's jurisprudence. Considering that the Commission uses the Court's case law as its authority to justify requiring full compensation, this issue undeniably merits all the attention it has received over the years from both academics and practitioners.

Finally, it should be noted that requiring full compensation can undermine the 'polluter pays' principle laid out in Article 191(2) TFEU[55] – or, as Maurits Dolmans argues, the requirement is in direct violation of the Article.[56] As Article 191(2) TFEU states, EU policy shall be based on the principle that "environmental damage should as a priority be rectified at the source and that the polluter should pay". Environmental damage occurs because producing and consuming create unwanted side effects which are not accounted for in the price of the product, but which have an adverse effect on third parties including the environment and other (future) citizens of the world. These unwanted side effects are called 'negative externalities'.[57] As it is the consumer demand causing the negative externalities and thus being the source of the problem, it can be argued that it is fair that consumers are not fully compensated where the agreement makes an attempt to fix the problem.[58] Fixing the problem often entails

[52] Case C-382/12 P, *MasterCard Inc*, Judgment of 11 September 2014, ECLI:EU:C:2014:220
[53] *Consten and Grundig* (n 49) English special edition 348
[54] ACM Legal Memo (n 48)
[55] Martin Gassler, 'The new sustainability chapter in the draft revised Horizontal Guidelines of the European Commission' (Analysis Competition & State Aid, *EU Law Live*, 4 March 2022) <https://eulawlive.com/analysis-the-new-sustainability-chapter-in-the-draft-revised-horizontal-guidelines-of-the-european-commission-by-martin-gassler/> accessed 23 May 2022
[56] Dolmans (n 7) 9
[57] DHG (n 13) para 545; Dutch Draft Guidelines (n 3) para 8; Frontier Economics, 'The European Commission's Draft Revised Guidelines on Horizontal Agreements – Sustainability Agreements – A submission by Frontier Economics' 26 April 2022, para 11 <www.frontier-economics.com/media/5170/ec-draft-revised-guidelines-on-horizontal-agreements-section-9-sustainability-agreements.pdf> accessed 23 may 2022; Dolmans (n 7) 2
[58] Dutch Draft Guidelines (n 3) para 48

'internalizing externalities', i.e. bringing the market prices closer to the true costs of the consumption.[59] I fully agree with this approach – requiring full compensation for such a price increase would essentially undermine the 'polluter pays' principle, as the consumers should bear at least part of the true costs of their consumption, instead of being compensated for it.[60]

It should also be noted that sustainability is one of the core objectives listed in Article 3 of the Treaty on the European Union, whereas competition policy no longer is.[61] This should entail that sustainability is prioritized over competition policy, especially considering the wording of Article 191(2) TFEU, which mentions the precautionary principle, essentially implying that where there is doubt, protecting the environment should be prioritized over economic interests.[62] Article 11 TFEU also holds that environmental protection must be integrated into the Union's policies and activities. Adopting a narrow interpretation of fair share would go against the mentioned Treaty articles, and would also be contrary to the political, economic, and moral imperative to do everything possible to combat climate change.[63]

Due to the issues discussed above, I believe the Draft Horizontal Guidelines go beyond what is required by law in ensuring consumers receive sufficient benefits, and unfortunately this is to the detriment of potentially vital agreements pursuing highly beneficial environmental goals. My critical view on the Commission's full compensation interpretation is all but unique – the issue has been subject to intense debate long before the Guidelines were published[64], seeing as it is not the first time the Commission has indicated it believes full compensation is necessary. This does not make the issue any less topical now. On the contrary, it is with these Draft Guidelines the Commission could finally bring its preferred interpretation to be in line with not only the actual wording of Article 101(3), but also the case law on the matter, the 'polluter pays' principle, and what is necessary to solve the climate emergency. The strict interpretation of 'full compensation' has also been criticized by various commentators in their responses to the Draft Guidelines during the public consultation.[65] The Commission can, and

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[59] Dolmans (n 7) 9

[60] Unilever (n 22) 6; Dolmans (n 7) 19

[61] This changed in the Treaty of Lisbon, which relegated the text of 3(1)(g) EC (protection of competition as an EU objective) to a mere recital to Protocol (No 27) "on the Internal Market and Competition".

[62] Dolmans (n 7) 14; For more on the precautionary principle, see Joined Cases T-74/00, *Artegodan* EU:T:2002:283, para 184

[63] Holmes (n 4) 375

[64] See, for instance: ACM Legal Memo (n 48); ClientEarth (n 41); Dolmans (n 7) 18

[65] ACM Response (n 9); Cefic (n 30); ClientEarth (n 41); Unilever (n 22) 1; AIM, 'AIM's Comments on the draft Horizontal Cooperation Guidelines and R&D Block Exemption Regulation of 1st March 2022' (EU Consultation Response, 10 May 2022), para 3.7.14 (forthcoming)

should, adopt the interpretation that is most favorable from the perspective of the urgency of the climate crisis.

One suggestion for improvement is the stance taken by ACM in the Dutch Draft Guidelines on Sustainability Agreements, where it suggests that full compensation should not be necessary if two conditions are met: (1) the agreement is an 'environmental-damage agreement', and (2) the agreement helps to comply with an international or national standard, or helps realize a concrete policy goal to prevent damage.[66] ACM thus distinguishes between 'environmental-damage agreements' and other sustainability agreements, explaining that environmental-damage agreements concern the reduction of negative externalities, while other sustainability agreements may concern for instance sustainability objectives unrelated to the environment, as well as objectives related to the environment but that do not fulfil the second condition.[67] This suggestion is based on the 'polluter pays' principle, as ACM agrees that it can be fair to not allow consumers full compensation as they cause the pollution.[68]

While I will not in this thesis address whether agreements pursuing non-environmental sustainability goals merit the full compensation rule[69], I do agree with ACM that full compensation should not be required for agreements aiming to reduce negative externalities. Whether or not such agreements can be considered necessary to achieve a standard or concrete policy objective should be considered under the assessment of indispensability. I believe the Commission's approach could be improved by eliminating the requirement of full compensation, instead accepting that an appreciable objective advantage is enough. The Guidelines should embrace that the overall effect of the agreement need not be neutral for consumers, as they should take part in covering the costs of their consumption.

2.3.1.2. THE CONCEPT OF 'HARM'

Another interesting debate revolves around the notion of harm. What can be seen as harm typically ranges from an increase in price or a decrease in quality to a reduction in selection.[70]

[66] Dutch Draft Guidelines (n 3) para 45
[67] Id paras 46-49
[68] Id para 48
[69] It should, however, be noted that the various notions of environmental sustainability and social sustainability are inherently intertwined, and social sustainability goals should thus not by any means be ranked lower in importance than environmental ones. For an interesting analysis on this, see Fair Wear, ISEAL, AIM and the Fair Trade Advocacy Office (n 42)
[70] Price, quantity, quality, choice, and innovation are listed as examples of parameters of competition, and a negative effect on any of these is often considered harm requiring compensation in the form of benefits. DHG (n 13) para 551; Frontier economics (n 57) para 10

These are the anticompetitive effects that the Draft Horizontal Guidelines require compensation for pursuant to the 'pass on to consumers' requirement under Article 101(3). But particularly in respect to price increases resulting from sustainability agreements, a thought-provoking question arises: should every increase in price be considered a harm?

As briefly already touched upon, one of the main reasons why a sustainability agreement often leads to a price increase is the objective of that agreement to internalize negative externalities, or in other words to bring the price closer to the 'true cost' of the production and consumption. Frontier Economics argues that where an agreement raises prices, but only insofar as to bring the prices closer to the true costs of the consumption, the effect of the agreement should not be considered a harm that needs to be compensated.[71] Effective competition requires that prices reflect costs, and it can thus be seen as economically inefficient for consumers to be able to engage in environmentally harmful consumption without paying the full cost of it.[72] A core objective of protecting effective competition is ensuring that prices reflect costs, and thus some price increases can improve competition. Therefore, not every increase in price should be considered a harm requiring compensation.[73] Instead, the price increase should be seen as being the price necessary to prevent consumption from inflicting harm on others and the environment.[74]

Apart from this economic approach, the idea that not every price increase should be considered a harm can partly be tied to the 'polluter pays' principle discussed in the previous Part. I agree with the suggestion of the European Brands Association (AIM): the full social cost of production and consumption should be internalized in transactions with the consumer before any assessment on fair share is made.[75] After all, the producers and consumers should not be allowed to impose such significant costs on society in the first place, and compensating them for causing damage would undoubtedly be unfair.[76] This approach seems to arrive at the same conclusion as the approach based on economic theory endorsed by Frontier Economics, namely that a price increase resulting from the internalization of externalities should not be considered a harm requiring compensation.

In principle, I agree with this view, and believe that an increase in price resulting from the internalization of externalities should not be seen as harm in the Draft Horizontal

[71] Frontier Economics (n 57) para 23
[72] Id paras 21-23
[73] Ibid
[74] Frontier Economics (n 57) para 20
[75] AIM (n 65) para 3.7.14
[76] Ibid

Guidelines. Similar to price increases resulting from an increase in quality, which competition law in principle is not concerned with,[77] price increases resulting from the internalization of externalities and bringing the market price closer to the 'true price' should not raise competition law concerns. Assessing fair share only after the true cost has been reached would be a significant improvement from the perspective of sustainability. However, I identify one fundamental flaw present in the view: I do not believe all externalities should be internalized solely by consumers. Apart from the demand, it is also the undertakings' hunger for profit that has led us to where we are currently at in terms of environmental damage. While undoubtedly a complex matter from the perspective of competition, I believe the fairest option would be for competitors to be forced to lower their own margins and absorb a certain portion of the costs.[78] This way, both the producers and the consumers take part in fixing the environmental damage they together cause.

2.3.1.3. THE CONCEPT OF 'CONSUMERS'

Another issue that arises in the new Sustainability Chapter is the limited definition of 'consumers'. Under the Draft Horizontal Guidelines, the concept of 'consumers' is said to include all direct or indirect users of the products covered by the agreement.[79] "Consumers receive a fair share of benefits when the benefits deriving from the agreement outweigh the harm caused by the same agreement, so that the overall effect on consumers in the relevant market is at least neutral."[80] The guidelines explain that it is due to this phrasing that the benefits following from the agreement must be related to the consumers of the products covered by the agreement.[81] The Commission is thus adamant that benefits can only account towards a fair share where the beneficiaries of the advantages are the same consumers that also bear the harm.[82] In this Part, I will criticize the requirement that the consumers must be the same, mainly because all sustainability improvements should be seen as desirable no matter who they benefit,

[77] DHG (n 13) text of footnote 325
[78] My view differs here from that of Maurits Dolmans, who suggests in relation to his 'polluter pays agreement' model that undertakings may decide whether to absorb some costs or whether to pass all of them on their consumers (Dolmans (n 7) 11). Where some decide to pass on all costs to consumers while others absorb some of the costs, consumers will naturally favor the products that are cheaper as a result of the producer absorbing a part of the costs. The flaw in this model is that event that all producers decide not to absorb any costs, in which case the entire cost of internalizing externalities is unjustly imposed on consumers.
[79] DHG (n 13) para 588
[80] Article 101(3) Guidelines (n 35) para 85; reiterated in DHG (n 13) para 588.
[81] DHG (n 13) para 588
[82] Id para 602

and because by definition, sustainability is a forward-looking concept, yet the Draft Horizontal Guidelines gives no consideration to future generations of consumers.

In general, I understand the reasoning behind requiring the benefits to be received by the same consumers that bear the harm in cases where the harm is for instance increased price, and the benefit is increased quality. Naturally, it does not make sense for one group of consumers to pay a higher price for another group of consumers to receive higher quality products. However, I find the situation to be very different in relation to sustainability benefits, which by their very nature contribute to making the world a better place. Sustainability benefits in the form of reducing negative externalities are merely rectifying the damage that has been caused by consumption by, amongst others, European consumers. This as an objective should be seen as desirable in my opinion, and rectifying the damage should not be made impossible due to a limited notion of who is allowed to benefit from sustainability agreements. The restrictive approach to considering sustainability benefits occurring out of market will be further discussed under Part 2.3.1.4 on the benefits that may be taken into account.

In addition to sustainability benefits often materializing across the globe, they also by their very nature often materialize in the future. Accordingly, perhaps one of the most significant shortcomings in the Draft Horizontal Guidelines is the lack of consideration towards future generations. I would argue that especially in relation to agreements pursuing sustainability objectives, future consumers should be in quite a central role in the assessment of a fair share, as it can be assumed desirable that our world is preserved for future generations. However, this objective is severely overlooked by the Commission in the text of the Draft Horizontal Guidelines. There is only one instance in which future generations are mentioned in the assessment of sustainability agreements, and even here it seems like an afterthought: benefits accruing to future generations are only relevant where current consumers are altruistically willing to pay a higher price for a sustainable product or limit their consumption of non-sustainable products "in order for society or future generations to benefit".[83] Essentially, the Commission is assigning little to no value to the fact that the sustainability benefits materializing now will presumably be vital for the survival of future generations. Indeed, the need to consider future consumers is central to the very concept of sustainability.[84] Ironically, the Commission seems to have no issue in acknowledging this in the Draft Horizontal Guidelines, noting that "sustainable development refers to the ability of society to consume

[83] Id para 596
[84] Holmes (n 4) 377-378

and use the available resources without compromising the ability of future generations to meet their own needs"[85] – however, this is not reflected in the assessment of pass on to consumers. Additionally, under Article 3(3) TEU, the EU lists "solidarity between generations" as one of its goals, and this should be reflected in its laws and policies as well.[86]

I believe the role of future generations should be much more prominent, and it should be incorporated into the assessment of every benefit under the fair share assessment. While the Article 101(3) Guidelines state that future gains are in principle of lesser value to consumers, the exact opposite is true in the case of sustainability agreements, as it is precisely the future generations who will bear the exponential cost of today's inaction.[87] The requirement of consumers being substantially the same is in need of revision, particularly to accommodate for the future generations and accept that the fair share requirement may be fulfilled even where the benefits will only be felt by future consumers.

As Article 101(3) only mentions "allowing consumers a fair share of the resulting benefit", a literal interpretation would seem to imply that there is no need for those consumers to be within the relevant market, or even substantially the same ones.[88] In general, I believe this requirement should be revised to allow both sustainability benefits occurring locally elsewhere in the world and sustainability benefits expected to materialize in the future to account towards a fair share for consumers.

2.3.1.4. THE CONCEPT OF 'BENEFITS'

As mentioned in the previous Part on consumers, a significant limitation in the assessment of fair share is that the consumers affected by the restriction on competition and the ones benefiting from the advantages have to be substantially the same. This rule is closely tied to which benefits can be taken into account in assessing fair share, as essentially it often means that the benefits must occur 'in-market', i.e. in relation to the relevant product and within a relevant geographic sphere. However, oftentimes sustainability agreements pursue more general environmental benefits, such as fewer emissions or less deforestation. Such benefits can, depending on the agreement, occur anywhere in the world, unrelated to the product in question and far away geographically. Such benefits are referred to as 'out-of-market benefits'.

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[85] DHG (n 13) para 543
[86] Chris Townley, 'Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born' (2011) 32 European Competition Law Review 580, 581 <https://dx.doi.org/10.2139/ssrn.1894816> accessed 23 May 2022
[87] Unilever (n 22) 7
[88] Dolmans (n 7) 16

For the first time, the Commission in the Draft Horizontal Guidelines has recognized that such benefits can, in some cases, be taken into account in the fair share assessment. However, the requirement that the benefiting consumers must be the same as, or at least substantially overlap with, the consumers bearing the harm significantly narrows down the possibility of taking out-of-market benefits into account. This Part will begin with analyzing the three types of benefits that pursuant to the Draft Horizontal Guidelines can be taken into account in the fair share assessment. After the main issues have been identified, the more complex issues arising in the identification of out-of-market benefits will be discussed. Finally, ideas for improvement will be suggested.

2.3.1.4.1. TYPES OF BENEFITS

The Draft Horizontal Guidelines distinguish between three categories of benefits that may be taken into account in assessing whether consumers are receiving a fair share, namely individual use value benefits, individual non-use value benefits, and collective benefits.

Individual use value benefits are perhaps the most traditional form of recognized benefits, consisting of benefits relating to the use of the product in question. Benefits such as increases in quality or selection as well as decreases in price fall under this category, as they directly improve the consumers' experience with the product.[89] For instance, a sustainability agreement between competitors to phase out non-organic fertilizers and instead only use organic ones on produce may lead to better tasting and healthier vegetables for consumers.[90] I consider these benefits largely unproblematic in their assessment.

Individual non-use value benefits are indirect benefits resulting from the consumers' appreciation of the impact their sustainable consumption has on others.[91] As explained by the Draft Horizontal Guidelines, a consumer may purchase a particular detergent not because it cleans better, but because it causes less water contamination, regardless of whether the detergent is priced higher than more polluting variants.[92] Non-use value benefits thus only arise where the consumer values sustainability, and therefore, the existence of these benefits is completely dependent on the consumers' altruistic moral views. This is precisely what I consider the flaw with this category of benefits – while I am pleased that the moral compass of eco-conscious consumers can account towards proving a fair share, there are simply not enough

[89] DHG (n 13) para 590
[90] Id para 591
[91] Id para 594
[92] Id para 595

of such eco-conscious consumers in existence. It is unlikely that a very large percentage of consumers are concerned with sustainability factors to the extent that they would let those factors influence their buying choices, particularly where the more sustainable product comes at a higher price than its less ecological counterparts.[93] If this were the case, then the demand for sustainable products would be much higher, perhaps even obviating the need for a sustainability agreement in the first place.[94] Although not explicitly stated in the Draft Horizontal Guidelines, I believe it is safe to assume that where only a small fraction of the relevant consumers would value the indirect sustainability benefits and would be willing to pay for them, it would be considered that the general consensus of the group of consumers being assessed is that they do not value the sustainability benefit enough to pay a higher price for it. It thus seems that in practice, the impact of recognizing this category of benefits will be minor. I will, however, admit that recognizing this category is undoubtedly much better than not assigning any value to the altruistic appreciation consumers have towards sustainability. But I do agree with Fair Wear, ISEAL, AIM and the Fair Trade Advocacy Office that the reliance on consumers' opinions is excessive.[95] The effectiveness of this category could be broadened by accepting other forms of quantifying how much consumers value individual non-use value benefits than just whether they are willing to pay a higher price. However, willingness to pay a higher price for sustainable products is the only method suggested in the Draft Horizontal Guidelines, and this issue merits its own in-depth discussion under Part 2.3.1.5.

One of the significant advances the Commission has made in respect to the fair share assessment is the recognition of collective benefits as the third category of benefits that can be taken into account when determining whether consumers are receiving a fair share. In practice, the Commission recognized collective benefits already in 1999 in its *CECED*[96] case, but confusingly enough, they are not mentioned afterwards in the Article 101(3) Guidelines, nor in

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[93] Fair Wear, ISEAL, AIM and the Fair Trade Advocacy Office (n 42) 3 note that 47% of respondents in the European Consumer Payment Report 2020 by Intrum state that their interest in sustainability has been motivating their spending in 2020, with 35% of respondents willing to pay 25% more than the original price. Here, the unreliability of consumer surveys must be kept in mind, as discussed under Part 2.3.1.5. of this thesis. Intrum, 'European Consumer Payment Report 2020' (2021) <https://www.intrum.com/press/news-stories/one-in-two-europeans-say-sustainability-motivates-them-to-limit-their-spending/> accessed 23 May 2022

[94] Where the consumer is willing to pay for more sustainable products, can the sustainability agreement in question truly be considered necessary, as required under the third condition of Article 101(3)? This fascinating issue will be further discussed under Part 2.3.2 on the condition of indispensability.

[95] Fair Wear, ISEAL, AIM and the Fair Trade Advocacy Office (n 42) 1

[96] The *CECED* case concerned an agreement between most of the washing machine producers to phase out the energy inefficient models, which was exempted as "environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers" Commission, case IV.F.1/36.178 *CECED*, OJ (2000) L 187/47

the 2011 Guidelines on Article 101[97] which under Example 5 discuss a hypothetical case visibly similar to *CECED*. Thus, the Draft Horizontal Guidelines provide an important clarification on the extent to which they can account towards a fair share.

Differing from non-use value benefits, collective benefits can arise irrespective of whether the consumers value the sustainability improvements or not.[98] For instance, lower emission levels contribute to preventing climate change, which benefits society as a whole. Recognizing collective benefits allows such efficiencies affecting the society in general to be taken into account. This is an important step towards the right direction, because as the Commission acknowledges, not all negative externalities can be cured via voluntary, individual actions of consumers.[99] Instead, "collective action, such as a cooperation agreement, may be needed to internalize negative externalities and bring about sustainability benefits to a larger group of the society".[100] I applaud the Commission's recognition of this category of benefits, and it undoubtedly provides the parties of sustainability agreements a new, broader route to proving a fair share for consumers.

2.3.1.4.2. OUT-OF-MARKET BENEFITS

An issue that has long been subject to debate is to what extent 'out-of-market' benefits can and should count towards the fair share.[101] The Commission has remained consistent in its stance on this, holding that while benefits should in principle be sought within the relevant market, out-of-market benefits can be taken into account so long as the consumers affected by the restriction and the ones benefiting from the advantages are at least substantially the same.[102] It thus comes as no surprise that the Commission adopts the same stand in the Draft Horizontal Guidelines.[103] The Commission's stance remains slightly in conflict with the Court's case law on the matter, as the Court has never expressly required benefits to be sought in principle in the relevant market.[104] The practical relevance of this conflict is minor, as either way, both the

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[97] Current Guidelines (n 10)
[98] DHG (n 13) para 601
[99] Ibid
[100] Ibid
[101] See, for instance Martin Gassler, 'Sustainability, the Green Deal and Art 101 TFEU: Where We Are and Where We Could Go' (2021) 12 Journal of European Competition Law & Practice 430
[102] The Commission has repeatedly, most notably in para 43 of the Article 101(3) Guidelines (n 35) and para 329 of the Current Guidelines (n 10), expressed its preference of benefits being primarily sought in the relevant market, citing Case T-131/99, *Michael Hamilton Shaw and Timothy John Falla v Commission* ('*Shaw*') (Judgment of 21 March 2002, ECLI:EU:T:2002:83) as the authority for this in the Article 101(3) Guidelines.
[103] DHG (n 13) paras 602-603
[104] As ACM explains on page 2 of its Legal Memo (n 48), it is unclear whether *Shaw* (n 102) should have ever been interpreted as requiring benefits to be sought only in the relevant market. While the Court did state that

Commission and the Court agree that the consumers affected by the restriction and the ones benefiting from the advantages must at least be substantially the same.

The possibility to take collective and out-of-market benefits into account is potentially groundbreaking, enabling for instance agreements that reduce CO2 levels globally to fulfil the fair share requirement. From the perspective of sustainability, this is a vital improvement, as climate change indeed affects society as a whole, and therefore agreements aiming to combat it benefit us all. While many sustainability benefits such as the reduction of emissions can now be taken into account under collective benefits, the extent to which out-of-market benefits can be considered unfortunately remains significantly limited by the requirement that the consumers must be substantially the same.[105] More often than not, the ones benefiting most from sustainability measures are located outside of the affected market. This is the undeniable nature of sustainability challenges – consumption within a certain market can produce negative externalities all over the globe.[106] Consumption in Europe undeniably causes environmental damage outside of Europe, but where the efficiencies created by a sustainability agreement are seen by the Commission as only benefiting locals somewhere else, the fair share requirement will not be fulfilled. The example given in paragraph 604 of the Draft Horizontal Guideline on an agreement aiming to make the cotton industry more sustainable is particularly alarming, as prohibiting agreements reducing serious environmental damage in third world countries gives the impression that environmental harm is acceptable so long as it does not affect EU consumers.[107] It almost seems like the EU only cares about clean air for Europeans[108], and this is hugely problematic because not only is climate change occurring due to an accumulation of environmentally harmful practices around the globe, but also because it is precisely consumption by developed western states, such as those within the EU, that causes environmental destruction elsewhere in the world. Fortunately for us in the EU, we are not yet experiencing the worst of the negative consequences of climate change – it is the poorer

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benefits have to be assessed "within the same analytical framework, that of the effect of the notified agreements in the functioning of the market, and hence on the situation of the tied lessees as a whole", it did not, as such, require the benefits to arise in the same market as the harm. To add to this, the Court held in *Compagnie Générale Maritime* (n 50) that Article 101(3) does not require that the benefits taken into account are linked to a specific market (para 343). The subsequent cases, including *MasterCard* (n 52), supported the view that benefits occurring out of market could count towards a fair share. For an in-depth discussion on the case law on this matter, see: ACM Legal Memo (n 48) and Dolmans (n 7) 16ff

[105] DHG (n 13) paras 602-603

[106] Frontier Economics (n 57) para 3

[107] AIM (n 65) 18

[108] Jan Blockx, 'Should European competition law only care about clean air for Europeans? – A comment on paragraph 604 of the European Commission's draft Guidelines on horizontal co-operation agreements' (Kluwer Competition Law Blog, 1 April 2022) <http://competitionlawblog.kluwercompetitionlaw.com/should-european-competition-law-only-care-about-clean-air-for-europeans> accessed 23 May 2022

developing countries that are most vulnerable. However, if the true goal of the EU and its policies, including the Draft Horizontal Guidelines, was to drive sustainability and fight climate change, then I believe it should not play a role where in the world the environmental benefits are seen. Additionally, the need for the benefits arising from sustainability agreements is arguably much more needed outside of the EU, where government regulations are likely to be less stringent.[109]

2.3.1.4.3. FURTHER ISSUES AND SOLUTIONS

What follows is that while in principle the correction of negative externalities affecting society as a whole can be taken into account in the fair share assessment, the possibility in practice is negligible[110], and still requires further clarification. For instance, it is clear that European consumption contributes to deforestation in for instance the Amazon, but would the Commission see reducing that deforestation as a collective benefit or a local one? I believe it would be beneficial to provide more examples of collective benefits in the Draft Horizontal Guidelines.

An additional issue arising in relation to collective benefits is the presumption that for collective benefits to arise, the parties involved in the agreement should have a significant market coverage.[111] I disagree with this notion, as in my opinion every effort to reduce negative externalities should be celebrated, no matter how small the effect. The importance of the effect that a number of smaller agreements will accumulate should not be ignored. Of course, where the harm is exponential in comparison to the benefits, a balancing exercise will be necessary. However, market coverage does not seem to relate to this issue, as even the Commission admits that where the benefits of an agreement are limited due to a small market coverage, the negative effect on competition will be likewise limited.[112]

In my opinion, out-of-market benefits where there is no substantial overlap between the benefiting and the disadvantaged consumers should still account towards a fair share for consumers under collective benefits[113], and the allocation of a fair share of collective benefits should not be limited to EU consumers. An interesting and forward-looking approach is that

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[109] Ibid
[110] Frontier economics (n 57) 2
[111] DHG (n 13) para 605
[112] Id text of footnote 342
[113] Such benefits can still be taken into account under the assessment of individual non-use value benefits, but only to the extent that consumers value them enough to pay for them as explained in the analysis of that category.

taken by §2(1) of the Austrian Cartel Act, which up until September 2021 was identical to the wording of Article 101(3) TFEU. However, in a recent amendment, a new exemption was added: "Consumers shall also be considered to be allowed a fair share of the resulting benefit if the improvement of the production or distribution of goods or the promotion of technical or economic progress substantially contributes to an ecologically sustainable or climate-neutral economy."[114] I believe the EU should strive to adopt a similar approach to sustainability agreements, forgetting the current focus on whether European consumers benefit from Indian cotton fields experiencing less water contamination, and instead accepting that the creation of a sustainable economy is a worthy pursuit that benefits everyone.

2.3.1.5. METHODS OF QUANTIFICATION

The final issue I have identified in relation to the assessment of the fair share requirement in the Sustainability Chapter of the Draft Horizontal Guidelines is how a 'fair share' should be quantified. Quantification is only discussed under the section on non-use value benefits – here, the consumer 'willingness to pay' is suggested as the most appropriate manner of quantifying the value of a specific sustainability benefit. In relation to non-use value benefits, I believe it would be helpful to discuss different methods of quantification in addition to 'willingness to pay', which in my opinion is not always the most appropriate choice. Adding other methods of quantification would provide further guidance for parties wishing to engage in sustainability agreements. Apart from the section on non-use value benefits, I believe the Chapter in general would benefit from a dedicated section on how environmental benefits can be quantified, as presumably balancing environmental benefits against monetary values can be difficult also with regard to other types of benefits, not just non-use-value benefits. In this Part, I will begin by discussing why quantification in relation to environmental benefits can be problematic. Then, I will analyze the 'willingness to pay' method and its limitations, as well as shadow pricing as an alternative method of quantification that could perhaps be more appropriate in some situations. Finally, I will touch upon the idea of a dedicated section on the quantification of sustainability benefits.

In general, the Draft Horizontal Guidelines seem to promote quantification of sustainability benefits. There has been significant development in methods of quantifying

[114] For an insightful discussion on the Austrian amendment, see Viktoria HSE Robertson, 'Sustainability: A World-First Green Exemption in Austrian Competition Law' (2022) Journal of European Competition Law & Practice <https://doi.org/10.1093/jeclap/lpab092> accessed 23 May 2022

environmental effects and benefits in the recent years, and indeed when methods of quantification exist, it may be beneficial for undertakings to use them to quantify the sustainability benefits of their agreement.[115] However, quantification, while often possible, can be difficult and costly for the parties of the agreement.[116] Quantitative analyses should thus be avoided where possible,[117] instead giving more space for a qualitative assessment based on value judgments including the character of the benefits.[118]

When it comes to non-use value benefits, as explained under Part 2.3.1.4, a fair share is reached when the consumers value the sustainability benefit in question more than they disvalue the associated harm. The way that the Draft Horizontal Guidelines suggest quantifying how much consumers value a sustainability benefit is the so-called 'willingness to pay' (WTP) test: consumers receive a fair share of the benefits when the amount they are willing to pay for the sustainability benefit compensates or exceeds any harm arising from the agreement.[119] While I have already expressed my concerns on this category of benefits in general, I also find there to be a fundamental issue with the WTP test: if consumers truly were willing to pay for improved sustainability, would this not mean that there would be no negative externalities in the first place? This is clearly not the case, as one of the main parameters of competition is usually competition on price. As the majority of consumers prefer the cheaper product over the more expensive yet sustainable one, the need for sustainability agreements between competitors is once again confirmed. But suppose the opposite were true, and that consumers truly were willing to pay for improved sustainability – the fair share requirement would indeed be fulfilled, but would the need for cooperation between competitors not be obviated simultaneously? As we know, for an agreement to be exempted under Article 101(3), the agreement must only impose restrictions that are indispensable to the attainment of the objectives.[120] The Draft Horizontal Guidelines themselves even state "where there is demand for sustainable products, cooperation agreements are not indispensable".[121] Frontier Economics describes this as the 'Catch 22' of the fair share requirement, which can only be circumvented where a market failure can be proven.[122]

[115] Client Earth (n 41) 3
[116] ACM Response (n 9) 9
[117] Ibid
[118] As is recognized by the Commission in the Article 101(3) Guidelines (n 35) paras 94, 102-104
[119] Frontier economics (n 57) para 10
[120] DHG (n 13) para 580
[121] Id para 582. This issue will be further discussed under Part 2.3.2 on the indispensability requirement.
[122] Frontier Economics explains that for the condition of indispensability to be fulfilled, it must be demonstrated that there is a market failure preventing the delivery of sustainability benefits even when consumers are willing

In addition to this complex issue, there are other concerns I have with WTP, namely that I do not believe it to always be the most appropriate method to quantify sustainability benefits. As recognized in the Draft Horizontal Guidelines, WTP studies can be unreliable and do not always reflect what the consumer preferences truly are.[123] WTP is often investigated through consumer surveys, and consumers are highly susceptible to both over and under-estimating how much they would be willing to pay.[124] Various factors affect consumer willingness to pay, including the purchasing behavior of other consumers[125], concern that the producer may pocket the additional payment instead of using it to reduce externalities[126], and lack of knowledge on the impact of the relevant products on sustainability, amongst others. The Draft Horizontal Guidelines hold that such biases can be mitigated by providing sufficient context in surveys, and by formulating the questions to take into account societal norms, consumer knowledge and habits, as well as expectations about the behavior of others.[127] However, I am not convinced that the aforementioned considerations will fully remedy the biases associated with WTP.[128]

Apart from the aforementioned biases, it must also be taken into account that not everyone can have the *willingness* to pay because they may not have the *ability* to pay. As Maurits Dolmans notes, environmental sustainability objectives can therefore not ignore the social justice element including the payment of a living wage to workers.[129] It should also be noted that many consumers support sustainability objectives, but when faced with choosing between a lower and higher price, will still opt for the lower one.[130] As mentioned before, I find the consumers' opinion to be given excessive weight under the non-use value benefits category. Many consumers underestimate the future cost of climate change[131], and thus do not accord sufficient value to sustainability benefits. It should not be left up to them to decide the appropriate price for products. Naturally, consumers have grown accustomed to the lower priced not reflecting the true cost of production and consumption, and thus price increases even to the extent of bringing the price closer to the true cost, seem unfair to consumers.[132] In reality,

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to pay. Such market failures are for instance information asymmetries, economies of scale, the free rider problem, and consumer behavioral biases. For more on this, see Frontier Economics (n 57) paras 12 and 13.

[123] DHG (n 13) para 598

[124] Ibid

[125] Ibid

[126] Dolmans (n 7) text of footnote 14

[127] DHG (n 13) para 598

[128] Fair Wear, ISEAL, AIM and the Fair Trade Advocacy Office (n 42) 9 agree on this point

[129] Dolmans (n 7) text of footnote 14

[130] Fair Wear, ISEAL, AIM and the Fair Trade Advocacy Office (n 42) 1; ClientEarth (n 41) 9

[131] Dolmans (n 7) 10

[132] Id 4

the consumers should never have been paying such low prices in the first place, while allowing negative externalities to materialize. Consumers are simply too egoistic, and assigning so much value to what consumers are willing to pay will likely result in the exacerbation of inequalities – the affluent are typically the heaviest polluters, yet they will be largely shielded from responsibility for the consequences of consumption if they are unwilling to pay for it.[133] Finally, it should be noted that just because consumers are not willing to pay more for improved sustainability, this should not automatically be seen as a reason to not increase prices to reflect the true cost. On the contrary, where all prices are made reflective of the product's true cost, a consumer not willing to pay the higher price would then instead decrease their consumption, which can only be seen as desirable from the perspective of sustainability.[134]

In the Dutch Draft Guidelines, ACM discusses the possibility of using shadow prices based on prevention costs as an alternative to WTP. A shadow price is an estimated monetary value for something not sold on the market. In the case of environmental sustainability, shadow pricing refers to assigning a value to environmental costs and benefits that reflects the value society places on the harm or the benefit. These are also referred to as environmental prices.[135] The Dutch Draft Guidelines provide a helpful insight on the application of shadow prices.[136] Shadow pricing allows for it to be determined what value should be placed on the environmental sustainability benefits the agreement is claiming to produce.[137]Additionally, shadow pricing often inherently takes into consideration the needs and benefits of future generations as well[138], which currently is a major shortcoming in the Draft Horizontal Guidelines as was discussed in Part 2.3.1.4.1. In my opinion, shadow pricing is a better and more objective method of quantification than WTP, and would allow the valuation of benefits to reflect more the true cost of the product, instead of what consumers would like to pay while disregarding the true costs of consumption passed on to the third parties of today and tomorrow.

Finally, I find that the Draft Horizontal Guidelines could benefit from a section dedicated to quantification, as currently it is only discussed under the section on individual

[133] Fair Wear, ISEAL, AIM and the Fair Trade Advocacy Office (n 42) 11; Unilever (n 22) 6; United Nations Environment Programme, 'Emissions Gap Report 2020' (2020) <https://www.unep.org/emissions-gap-report-2020> accessed 23 May 2022. According to this report, there is a "highly unequal global distribution of consumption emissions", with studies estimating that "the emissions share of the top 10 per cent of income earners is around 36-49 per cent of the global total, whereas the lowest 50 per cent of income earners account for around 7-15 per cent of all emissions"
[134] Frontier Economics (n 57) 7-8
[135] For a comprehensive guide on environmental prices, see the CE Environmental Prices Handbook 2017 (CE Delft 2018), <https://cedelft.eu/publications/environmental-prices-handbook-2017/> accessed 23 May 2022
[136] Dutch Draft Guidelines (n 3), para 58 Example 5
[137] Id para 59
[138] ACM Response (n 9) 9

non-use value benefits.[139] Here, the basic concepts of assigning value to environmental benefits could be discussed, and more detail could be provided on how they should be balanced against restrictions on competition.

2.3.1.6. CONCLUSIONS ON FAIR SHARE

The assessment of whether consumers receive a fair share is complex and not without its issues. I have discussed several issues that arise in the assessment of sustainability agreements, namely (1) fair share is interpreted in a very restricted manner to mean full compensation; (2) the concept of harm that needs to be compensated to consumers should exclude a price increase that merely makes consumers finally pay for the true cost of their consumption; (3) who can be considered a consumer is interpreted too restrictively, particularly in relation to sufficiently taking future generations into account; (4) consumer opinion is given excessive weight in the assessment of individual non-use value benefits, and out-of-market benefits should be valued more, as society as a whole benefits from sustainability improvements regardless of where in the world the immediate benefits are seen; and (5) the preferred method of quantification, namely the willingness to pay test, is not always the best method to quantify benefits.

2.3.2. INDISPENSABILITY

Moving on from the requirement to allow consumers a fair share, the third condition under Article 101(3) that must be fulfilled for an agreement to qualify for an exemption is that of indispensability. This entails that the restrictions on competition imposed by the agreement must be deemed reasonably necessary for the benefits to materialize, and that no other economically feasible and less restrictive means of achieving the benefits exists.[140] In the Draft Horizontal Guidelines, the suggested assessment of this condition rules out two situations in which an agreement cannot be deemed necessary: (1) where there is demand for sustainable products, and (2) where there is legislation in place. I will discuss the issues I have identified in relation to these two limitations in respective order. Thereafter, I will criticize the lack of value assigned to reaching sustainability objectives time-efficiently.

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[139] DHG (n 13) paras 597-600

[140] Id para 581; Article 101(3) Guidelines (n 35) paras 73-82

Paragraph 582 of the Draft Horizontal Guidelines states that "where there is demand for sustainable products, cooperation agreements are not indispensable for the attainment of sustainability benefits themselves". I find there to be two issues with this statement. First, I do not think it can be assumed that demand for sustainable products always provides undertakings with sufficient incentive and the ability to pursue the relevant sustainability objectives.[141] While this may be the case most of the times, market failures may exist that prevent there from being sufficient incentive, including first mover disadvantages and free rider concerns.[142] Additionally, not every undertaking necessarily has the ability, due to economic reasons, lack of expertise or insufficient scale, to individually realize the needed changes to its production or distribution that result in a more efficient usage of resources.[143] Second, as already discussed in Part 2.3.1.5 on methods of quantification, there is a conflict present between this statement and the fair share condition: on the one hand, consumers must be willing to pay for individual non-use value benefits in order for them to count towards allowing consumers a fair share – on the other hand, willingness to pay is an expression of demand, resulting in the agreement often failing the indispensability condition.[144] As the four conditions listed in Article 101(3) are cumulative and thus all need to be fulfilled for the agreement to be exempted, it does not seem appropriate to me that the fulfillment of one condition would, save for in very exceptional circumstances, result in the failure to fulfill another condition.

Another situation in which sustainability agreements between competitors cannot be deemed indispensable is where there is EU or national legislation in place requiring undertakings to comply with concrete sustainability goals, as explained in paragraph 583 of the Draft Horizontal Guidelines. This statement is based on the assumption that "[p]ublic policy and regulations often taken care of negative externalities".[145] In my opinion, this is an incorrect assumption – if public policy and regulations sufficiently took care of negative externalities, then we would be in a much less urgent climate situation than which we currently are. Additionally, regulation within the EU only has a limited effect on externalities occurring outside of the EU, and it can safely be assumed that private action is more effective in

[141] American Bar Association (n 19) 12-13 holds a similar view
[142] Holmes (n 4) 367 explains the first mover disadvantage and how sustainability agreements remedy the situation as follows: "Where an individual company seeks to internalize a so-called 'external cost' (such as pollution of the air or using a more sustainable input) it is likely to incur an extra cost and it may suffer a significant competitive (or 'first mover') disadvantage if it is the first, or only, competitor to do this. Agreement amongst competitors is a way of 'levelling the playing field' on the basis of costs that reflect the true costs of production"; AIM (n 65) 10
[143] Dutch Draft Guidelines (n 3) para 65; Unilever (n 22) 4
[144] Unilever (n 22); Frontier Economics (n 57) para 12
[145] DHG (n 13) para 583

addressing such externalities. I believe it is high time to leave the 'either-or' mentality in the past and accept that both regulation and private action are desperately needed to solve the climate emergency. Here, agreements seeking to exceed or accelerate public targets should be seen as highly desirable, and such agreements should not be excluded under the condition of indispensability merely because regulation exists.[146]

Finally, I would like to point to the wording of the last sentences of both the aforementioned paragraphs of the Draft Horizontal Guidelines. Where there is demand for sustainable products or legislation in place, the agreement cannot be deemed indispensable for the goal to be achieved – the agreement may, however, be indispensable for reaching the sustainability goal in a more cost-efficient way. I find this to be a helpful and beneficial addition, allowing a greater number of agreements to fulfill the indispensability requirement. However, apart from cost-efficiency, I believe the same value should be assigned to time-efficiency. In my opinion, it is paramount that reaching the benefits faster is also accorded the appropriate value – after all, there is no time to waste with the climate crisis, and the fastest manner of producing sustainability benefits should always be opted for when possible. As AIM suggests, Articles 582 and 583 of the Draft Horizontal Guidelines should hence read that an agreement may be indispensable for reaching the goal more quickly or in a more cost-efficient way.[147]

In conclusion, I believe the Draft Horizontal Guidelines unnecessarily discourage impactful initiatives by assuming that collaborating is always unnecessary where regulation is in place or where some companies have already acted individually. Additionally, the conflict between requiring willingness to pay for individual non-use value benefits to arise under the fair share condition on the one hand, and the fact that willingness to pay often results in the agreement failing the indispensability condition on the other hand, necessitates addressing. Finally, apart from cost-efficiency, it should be accepted that agreements may be indispensable where they result in a quicker materialization of sustainability benefits.

[146] ACM Response (n 9) 2, 9 agrees; AIM (n 65) 15
[147] AIM (n 65) 15; Unilever (n 22) 4; Dutch Draft Guidelines (n 3) para 65

3. CONCLUSIONS

In the light of the climate emergency our world is facing, public and private action must come together in taking all the steps necessary to combat climate change. While regulation is undoubtedly an integral part of the solution, it unfortunately is often too limited in its scope of application, too slow in coming, and far from ambitious enough.[148] While I acknowledge that competition policy neither can nor should be seen as the principal route to solve the climate cricis, it must be seen as a vital part of the solution.[149] On the one hand, undistorted competition undeniably pushes sustainable innovation and a more efficient usage of natural resources.[150] On the other hand, due to market failures such as first mover disadvantages and the collective action problem[151] in general, horizontal cooperation on sustainability initiatives may sometimes be the only, and often the most time- and cost-efficient, way to pursue certain sustainability objectives.

With the introduction of the new revised Draft Horizontal Guidelines on 1 March 2022, the Commission has acknowledged the importance of sustainability agreements by dedicating such agreements their own chapter and assessment. The addition of a distinct chapter on sustainability agreements is more than welcome in itself, as it goes to show how important the topic is.[152] In particular, additions such as the recognition that not all sustainability agreements raise competition concerns, the introduction of the soft safe harbor in the form of seven cumulative conditions which, when fulfilled, allow agreements to fall outside Article 101(1) even where competition is concerned, as well as the recognition of collective benefits as counting towards a fair share for consumers, are all significant advancements in competition policy that merit appreciation. However, I firmly believe further steps could still be taken and that the Draft Horizontal Guidelines could have room for more leniency towards agreements pursuing sustainability objectives. The Commission can, and must, go further if it is to enable businesses to cooperate on sustainability issues to the extent necessary to fight climate change and put our economy on a sustainable basis in line with Article 3(3) TEU, Article 11 TFEU, the Green Deal, and the Commission's call for a "green revolution."[153]

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[148] ClientEarth (n 41)
[149] The Commission acknowledges this in its Competition Policy Brief (n 5) 7
[150] DHG (n 13) para 544
[151] On collective action problems, see for instance Dolmans (n 7) 3
[152] ACM Response (n 9) 6
[153] ClientEarth (n 41) 1

In general, it is my opinion that the Draft Horizontal Guidelines lack ambition from the green perspective, and should adopt a more lenient interpretation of the conditions under the assessment of sustainability agreements to allow for more beneficial cooperation in order to combat climate change and harmful environmental practices. While Sections 9.2 and 9.3 of the Draft Horizontal Guidelines on sustainability agreements not raising competition concerns and not infringing Article 101(1) are for the most part unproblematic, the assessment under Article 101(3) to me seems excessively narrow in many aspects. The two conditions under Article 101(3) raising a considerable number of issues are the requirements that consumers must be allowed a fair share of the benefits resulting from the agreement, and the restrictions imposed by the agreement on competition must be indispensable for the attainment of the sustainability objectives it pursues.

The assessment of whether consumers are allowed a fair share of the benefits is problematic in many regards, and overall, I believe the Commission has adopted an excessively narrow interpretation of what is needed for the condition to be fulfilled. First, what the Commission considers as 'fair' is that consumers must be fully compensated for any negative effects the agreement entails on competition. Such a narrow interpretation is not supported neither by the wording of Article 101(3) nor the CJEU's case law on the matter. An 'appreciable objective advantage' should be sufficient to compensate consumers for any harm imposed by the agreement. Second, the concept of harm encompasses, amongst other effects, almost every price increase and reduction in choice, and is not adjusted to the fact that current market prices do not reflect the true costs of production and consumption. The current pricing of products is precisely what has led to the creation of negative externalities in the form of environmental damage all over the globe. Similar to price increases resulting from an increase in quality, which in principle do not raise competition concerns, price increases resulting from the internalization of externalities should not be seen as a harm that needs to be compensated. After all, such a 'polluter-must-benefit' requirement seems all but fair, and blatantly ignores the protection of those who must pay the cost of unsustainable consumption.[154] In my opinion, both producers and consumers should be seen as the polluter who must pay pursuant to Article 191(2) TFEU, and accordingly, producers should be required to reduce their profit margin to partly internalize the cost of reducing negative externalities, and the remaining increase in market price for consumers should not be seen as a harm for the purposes of Article 101 TFEU.

[154] Fair Wear, ISEAL, AIM and the Fair Trade Advocacy Office (n 42) 11; Unilever (n 22) 6

Third, who can be considered a consumer under the Draft Horizontal Guidelines is limited by the requirement that the consumers feeling the benefits and the harm must be substantially the same. This interpretation is particularly problematic in relation to sustainability agreements, as often the beneficiaries of sustainability initiatives are not the consumers themselves, but rather people and the environment all around the world that have been exploited for far too long in the name of consumption by developed western countries, including those within the EU. Allowing benefits to accrue to others than the relevant consumers should be seen as desirable from a policy perspective, and should not be seen as the reason why a sustainability agreements fails the fair share to consumers requirement, particularly when considering that the wording of Article 101(3) does not specify who those consumers should be. Another major shortcoming that cannot be ignored is the lack of consideration towards future generations in the assessment of the fair share condition. Presumably because of the requirement that the consumers must be the same, benefits collected by future generations are not listed as ones that account towards the fair share condition. However, considering the very core of sustainable development, future generations should be in a central role in the assessment of allowing consumers a fair share.

Fourth, what may be considered as benefits for the purposes of allowing consumers a fair share could benefit from further revision, as currently the assessment relies heavily on consumer opinion under individual non-use value benefits, and on where the benefits occur under collective benefits. While the recognition of consumers' altruistic appreciation of sustainability improvements under individual non-use value benefits is in principle a good addition, the category relies excessively on what consumers consider as desirable benefits. Additionally, while many consumers do in fact value certain sustainability benefits, they can only be taken into consideration under this category where the consumer is willing to pay more for them. This is a limited notion of what consumers value, as whether a consumer is willing to pay for certain benefits often depends on whether they have the ability to do so and whether they believe other consumers will also be willing to pay. Moreover, while the recognition of collective benefits is a highly welcome improvement enabling benefits such as the global reduction of emissions to account toward a fair share, the category is significantly limited by the requirement that such benefits must occur 'in-market', or that the consumers must at least be substantially the same. This prevents sustainability benefits such as the reduction of contamination of ground waters outside of the EU to be taken into account,[155] even though it

[155] DHG (n 13) para 604

is often European consumption partly causing such externalities. The view adopted in the Draft Horizontal Guidelines to me seems excessively Eurocentric, giving the impression that pursuing sustainability initiatives is only desirable where European consumers reap the benefits.

The fifth and final issue in the assessment of fair share is the quantification of benefits and what methods should be used in this respect. The only method discussed under the fair share assessment is analyzing whether consumers are willing to pay for the sustainability benefit. However, this is only relevant in relation to individual non-use value benefits, which by definition require it to be assessed what the consumer subjectively values. The Draft Horizontal Guidelines lack general guidance on how objective sustainability benefits should be balanced against the anticompetitive effects that may follow, and it could be helpful to provide a dedicated section on this topic. In relation to WTP, a fundamental flaw can be identified, namely that consumers willing to pay for sustainable products translates into existing demand for such products, which according to the Draft Horizontal Guidelines results in the agreement failing the indispensability condition. Apart from this conflict, measuring WTP via consumer surveys is unreliable due to several consumer biases. Therefore, shadow pricing can be seen as a better suited method of quantifying the value that should be assigned to environmental sustainability benefits.

Apart from the fair share condition, the other condition with significant issues in its assessment is the condition of indispensability. The Draft Horizontal Guidelines state that where there is demand for sustainable products, or where there is legislation in place, sustainability agreements cannot be deemed indispensable in themselves unless they can produce the sustainability benefit in a more cost-efficient way than competition and legislation could. In both of these cases, I believe sustainability agreements may be considered indispensable irrespective of the cost-efficiency of the agreement. In particular, demand may not be sufficient to incentivize the pursuit of sustainability objectives due to first mover disadvantage and free rider concerns, and not all undertakings have the means to individually pursue sustainability objectives. Legislation should not prevent a sustainability agreement from being seen as indispensable, as it often lacks both ambition and jurisdictional scope to have an impact outside of the EU. Agreements seeking to exceed what is required by law should be encouraged. An additional issue that necessitates addressing in the forthcoming final version of the Draft Horizontal Guidelines is the conflict in recognizing individual non-use value benefits under the fair share condition, which due to there being a willingness to pay will result in the agreement often failing the indispensability condition. Finally, apart from cost-

efficiency, it should be accepted that agreements may be indispensable where they reach the sustainability goals faster.

In conclusion, and to answer the research question "*do the revised Draft Horizontal Guidelines allow sufficient room for the conclusion of sustainability agreements, or to what extent should they be further revised?*", the Draft Horizontal Guidelines have significantly improved the possibility of sustainability agreements to be concluded in compliance with Article 101 TFEU, in particular by the mere fact of clear guidance now being available, as well as by (1) excluding certain types of agreements completely from the scope of Article 101, (2) introducing a soft safe harbor in the form of seven cumulative conditions which, when fulfilled, allow agreements to fall outside Article 101(1) even where competition is concerned, and (3) recognizing collective benefits as counting towards a fair share for consumers. However, further revision is needed especially in relation to the assessment of sustainability agreements under Article 101(3), particularly on the assessment of the fair share and indispensability conditions which I find to be interpreted too restrictively.

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