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Distinguishing Genuine Sustainability Agreements from Disguised Cartels under Article 101(3) TFEU

Insights from Welfare Economics and Cost-Benefit Analysis

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Preface:

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Table of Contents

Chapter 1

Introduction

Should sustainability play a role in EU competition law? And more importantly, how should these interests be integrated, and to what end? Much ink has been spilled answering these questions, and for the purpose of this thesis, the debate is dichotomized into two groups: proponents and opponents of green antitrust.[1]

What is green antitrust? It is not simply endorsing sustainable development. Instead, it questions whether there is friction between competition law and societal concerns.[2] Proponents answer this question in the affirmative by contending that a derogation from the competition rules may be necessary to realize particular sustainability objectives.[3] For example, firms may be discouraged from instituting a more costly green technology because it will decrease their short-term competitiveness and endanger their financial viability. This concept is termed the first mover disadvantage.[4] Proponents assert that undertakings can overcome this complication if competition authorities permit agreements that equally distribute risk amongst all competitors—even if prices increase to consumers.[5] Furthermore, these agreements may be indispensable to the attainment of sustainability objectives due to the concomitant economies of scale and opportunities for technology sharing.[6]

Green antitrust opponents dispute that private actors can effectively coordinate in the public interest.[7] Although they do not oppose the purpose and worth of sustainable development, opponents believe that environmental and social progress can best be achieved through public policy and fierce competition on the open market.[8] They support their claim by contending that increasing market power should not be used to correct negative externalities;[9] the first mover disadvantage cannot be ameliorated in the field of competition law;[10] and that consumers are

[1] Although 'green antitrust' arguably carries a negative connotation, for the purpose of this work it is neutral. See, for example, Cento Veljanovski, 'The case against green antitrust' European Competition Journal (2022) 18(3) 501, 507.
[2] For a more detailed account of the debate, see Susanna Kingston, *Greening EU Competition Law and Policy* (CUP 2011) 7-194; Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) 11(3-4) Journal of European Competition Law & Practice 124.
[3] Simon Holmes, 'Climate change, sustainability, and competition law' (2020) 8(2) Journal of Antitrust Enforcement 354, 368.
[4] Ibid 367.
[5] Maurits Dolmans, 'Sustainable Competition Policy' (2020) 5(4) Competition Law and Policy Debate 1, 22.
[6] Martijn Snoep, 'What is fair and efficient in the face of climate change?' (2023) Journal of Antitrust Enforcement 1, 2.
[7] Edith Loozen, 'Strict Competition Enforcement and Welfare: A Constitutional Perspective Based on Article 101 TFEU and Sustainability' (2019) Common Law Market Review 1265.
[8] Maarten Pieter Schinkel, Leonard Treuren, 'Green Antitrust: (More) Friendly Fire in the Fight against Climate Change' (2020) Amsterdam Law School Legal Studies Research Paper No. 2020-72, 19.
[9] Loozen (n 7) 1274.
[10] Edith Loozen, 'EU Antitrust in Support of the Green Deal. Why Good is Not Good Enough' (2022) Journal of Antitrust Enforcement 1, 17.

increasingly willing to pay for non-use value benefits.[11] Therefore, flexible antitrust enforcement is detrimental to sustainable development.

In response to complex and contested academic debate, diverging approaches from national competition authorities, and demand for clear guidance from the private sector, the European Commission has adopted active measures to find a middle ground. Executive Vice-President and Commissioner for Competition, Margrethe Vestager, explained in her 2021 keynote speech:

> Green policies like regulations, taxes, and investment are the key to the Green Deal. But with so much to do in such a short time, all of us – including competition enforcers – also need to make sure that we're doing what we can to help [...] The starting point here is that a green competition policy still has to be – well, a competition policy. We still need to carry out our fundamental task, of keeping markets open and competitive – not least, because competition helps to make our economy greener.[12]

Therefore, as an ideological starting point, the Commission accepts that sustainability is permitted within the competition regime. However, Commissioner Vestager emphasizes that regulation, taxes, and investment incentives are the primary instruments of the Green Deal.[13] Moreover, the notion of competition helping to make our economy greener reflects the perspective of green antitrust opponents who reject that competition may stand at odds with sustainable development.

On June 1st 2023, the Commission published the 2023 'Horizontal Guidelines on the applicability of Article 101 of the [TFEU] to horizontal cooperation agreements' (EU Horizontal Guidelines; HG).[14] Notably, the HG includes a section expressly dedicated to sustainability agreements.[15] As such, when an agreement between competitors appreciably impacts a competition parameter, the HG guides undertakings by addressing how the agreement may be exempted by virtue of the environmental and/or social benefits it brings about. This balancing assessment is conducted through the four exemption conditions laid down in Article 101(3) TFEU.[16]

When considering the green antitrust dichotomy, this thesis starts with the notion that there *are* situations where a derogation from antitrust provisions is the only way to institute a practice

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[11] Schinkel and Treuren (n 8).
[12] Margrethe Vestager, 'Competition policy in support of the Green Deal' (the 25th IBA Competition Conference, 10 September 2021), available at: Competition policy in support of the Green Deal | European Commission (europa.eu).
[13] Commission, 'The European Green Deal' COM (2019) 640 final.
[14] Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (text subject to linguistic revision check against authentic version to be published in the Official Journal) (hereinafter 2023 EU Horizontal Guidelines) unpublished (2023) , available at: <https://competition-policy.ec.europa.eu/document/fd641c1e-7415-4e60-ac21-7ab3e72045d2_en>.
[15] Ibid 146-262.
[16] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/01 (TFEU) art 101(3).

that delivers benefits that exceed its adverse effects.[17] In any case, sustainability interests have already entered EU competition law, for example, through the *CECED* washing machine decision in 1999, the Dutch NCA's Horizontal Guidelines, recent pronouncements by high-ranking officials such as that of Vestager above, and the 2023 Horizontal Guidelines.[18] Therefore, the question competition lawyers should ask is not whether competition helps or hurts sustainability per se but how we ought to balance these interests in practice and to what end.

1.1. Problem

Unfortunately, EU primary and secondary law does not provide a clear framework to balance competition and non-competition interests, as illustrated by the informative empirical research by Brook (2022).[19] In fact, the Commission has modified its approach to balancing non-competition interests across various enforcement periods to match the EU's general political, economic, and social advancements.[20] An unclear balancing approach is problematic for two reasons. First, it discourages firms from instituting genuine sustainable agreements because of the belief that competition law may be violated, namely the prohibition on anti-competitive agreements pursuant to Article 101(1) TFEU.[21] Second, the lack of a transparent analytical framework enables undertakings to institute disguised cartels in the name of sustainability. Of course, the respective concepts must be defined. As further explained in Chapter 2, this thesis argues that the distinction is most adequately understood using welfare economics: a genuine sustainable agreement creates net benefits to society while a disguised cartel does not. Recognizing that the distinction is therefore found at the margin looking at the costs and benefits of the agreement, all competition lawyers should favor a clear and precise balancing framework because it minimizes disguised cartels and maximizes genuine sustainable agreements.

1.2. Research Question

Notwithstanding abundant research on sustainable agreements in EU competition law, researchers have yet to explore the sustainability agreements section of the 2023 EU Horizontal Guidelines through a normative lens based on welfare economic theory. Recognizing the explanatory power of this interdisciplinary approach, this thesis questions: *To what extent does the Article 101(3) TFEU balancing approach in the 2023 EU Horizontal Guidelines effectively distinguish between genuine sustainability agreements and disguised cartels?*

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[17] For example, to avoid free-riding on initial investments in marketing a sustainable product. 2023 EU Horizontal Guidelines (n 14) para 566 at footnote 398.
[18] See Chapter 4 for more detail.
[19] Or Brook, *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU* (1st edn, CUP 2022) 99.
[20] Ibid.
[21] TFEU (n 16) art 101(1).

To this end, Chapter 2 explains how scholars and academics use the lens cost-benefit analysis and welfare economics to understand decision-making and gives grounds for why it is an appropriate theory to distinguish between disguised cartels and genuine sustainability agreements. Chapter 3 sets the stage by overviewing the modernization of EU competition law and outlines the general prohibition and exemption conditions under Article 101 TFEU—also evaluating to what extent the substantive architecture of Article 101(3) TFEU reflects an economic cost-benefit analysis. Chapter 4 builds upon these insights by examining historical and contemporary approaches to balance sustainability interests in antitrust enforcement, drawing on case law and guidance documents from the Commission, CJEU, and Dutch ACM. Chapter 5 evaluates these approaches in light of the theoretical framework, identifies shortcomings, presents policy recommendations for the EU Horizontal Guidelines, and addresses the research limitations. Chapter 6 concludes.

1.3. Delimitation

EU competition law and sustainable development are complex domains that underpin all facets of private and public sectors. Given the scope of this thesis, it is not possible to cover all avenues in which sustainable considerations can be integrated in EU competition law. Therefore, this thesis limits its scope to sustainability agreements between competitors that aim to 'use sustainability as a shield' from otherwise applicable antitrust provisions, namely cartel enforcement.[22] In other words, an agreement between competitors that negatively impacts a competition parameter—such as increasing price or decreasing quality, innovation, or choice—with the aim of realizing environmental or social benefits. For example, a sustainable agreement in this context may resemble an agreement between several German gas power plants to collectively implement a more costly production process that reduces emissions but increases consumer energy prices.[23] It may also resemble a collective of furniture producers agreeing to procure at least 30% of their wood from sustainable sources, even though it increases price and decreases choice for furniture purchasers.

Scholars have identified multiple legal avenues to use sustainability as a shield against cartel enforcement.[24] Without delving into the details of each route, there are five common approaches: (1) agreements that are unlikely to restrict competition; (2) sustainability agreements that fall outside of Article 101(1) TFEU entirely (based on the *Albany*[25] case); (3) sustainability agreements falling within the ancillary restraints/objective necessity doctrine;[26] (4) sustainability agreements falling under Article 101(3) TFEU; and (5) the use of

[22] Jurgita Malinauskaite, 'Competition Law and Sustainability: EU and National Perspectives' (2022) Journal of European Competition Law & Practice 13(5) 336, 337.
[23] See a similar example in Section 4.2.1.
[24] Holmes (n 3) 368; Monti (n 2) 126.
[25] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:430; The ECJ decided Article 101 TFEU did not apply to collective bargaining by using the constitutional provisions of the Treaty. It is unclear whether this reasoning could be applied to sustainability agreements.
[26] Case C-309/99 *Wouters* EU:C:2002:98.

standardization agreements.[27] As previously mentioned, this thesis limits the scope of analysis to the four exemption conditions provided under Article 101(3) TFEU.[28] This delimitation was selected because alternatives (1) and (5) only apply to cases where the benefits of the sustainability agreement clearly outweigh the negative effects, while alternatives (2) and (3) lack a reliable legal basis.[29] Second and importantly, the Commission and CJEU have indicated that balancing anti-competitive and pro-competitive effects is *to be conducted exclusively within the framework of Article 101(3) TFEU.*[30] Therefore, it is most fitting to answer the research question because, as discussed in Chapter 2, genuine sustainability agreements and disguised cartels are distinguished based on their benefits and costs.

From the onset, this thesis is predicated on three assumptions:

(1) We should not disregard the very purpose and objectives of European competition law by tasking the enforcement regime to weigh the costs and benefits of *all possible factors* impacting a given situation.
(2) Competition law does not occur in a vacuum: as legal scholars, we cannot ignore developments outside the field.
(3) We must do everything we can to combat climate change and promote the welfare of current and future generations.

Even though the scope of this thesis is limited to EU competition law, the findings related to the quantification and measurement of sustainability benefits and the consumer welfare standard apply to similar jurisdictions, such as the rule of reason approach found in U.S. antitrust enforcement.[31]

1.4. Methodology

Akin to the notion proffered by Mark Van Hoecke (2013), this thesis views legal doctrine as an empirical-hermeneutical discipline: empirical data gathered from statutes, case law, and various primary sources are necessarily combined with the interpretation thereof.[32] Beyond hermeneutics and empirics, legal research may be argumentative, explanatory, logical, and normative.[33] These typologies are not mutually exclusive but rather complementary. Once a

[27] For example, see Sustainability Standardization Agreements in the 2023 EU Horizontal Guidelines (n 14) para 537.
[28] TFEU (n 16) art 101 para 3.
[29]Holmes (n 3) 370-71.
[30] 2023 EU Horizontal Guidelines (n 14) para 18; T-65/98 *Van den Bergh Foods v Commission* EU:T:2003:28, para 107.
[31] Sustainability hold less importance in U.S. antitrust, but its significance is developing, for example, see a recent letter signed by seventeen state AGs arguing that mutual support of climate policies by investment fund managers does not violate the Sherman Act available at <https://oag.dc.gov/sites/default/files/2022-11/ESG%20Letter_Final_11.18.22.pdf>.
[32] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline? (*London Hart Publishing 2011) 3.
[33] Ibid 4-11.

legal research question is broken down into sub-questions, specific typologies will emerge more prominently.[34]

This thesis understands the nature of law from a normative perspective. Law is 'an answer to the question what to do, and more in particular what to do by means of rules(...).'[35] Along those lines, there is principally no difference between the law as it currently stands and what it ought to be.[36]

To answer the main research question, it is necessary to understand the empirical legal data, namely contemporary antitrust enforcement balancing methods, in light of sustainable development. Recognizing that the latter encompasses elements beyond pure legal doctrine, the thesis adopts a law and economics methodology. Of course, interdisciplinary legal research should not be undertaken because it is fashionable; it should be selected because it sufficiently answers the research question.[37] Economics is a fitting conceptual basis for three reasons: (1) social and environmental problems that sparked the theory of sustainable development can be viewed as a market failure, which the field of economics aims to address, (2) competition law and especially contemporary antitrust has recently moved towards a more 'economic' approach to facilitate its desired outcomes, and (3) decision-making through balancing interests is adequately understood through economic cost benefit analysis theory.[38] Out of the various law and economics methodological approaches, the thesis takes a normative law and economics perspective by evaluating policy using welfare economics as a canon of interpretation to assess regulatory interpretive practice and identify policy recommendations.[39]

Previous research on the topic has predominantly focused on the internal effectiveness of the European legal system, that is, concerning the consistency and coherency of the various legal norms within the system. For example, scholars have reconciled constitutional EU environmental protection obligations with competition-specific provisions.[40] This research aims to assess the external effectiveness of the regulatory approach and how law achieves its goals in operation within society.[41] Therefore, sustainability and economics are viewed independently, not as functions of the legal sphere.

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[34] Ibid 17-18.
[35] Jaap Hage, 'The Method of a Truly Normative Legal Science' in Mark Van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline? (*London Hart Publishing 2011) 27.
[36] Ibid.
[37] Wendy Schrama, 'How to carry out interdisciplinary legal research: some experiences with an interdisciplinary research method' (2011) 7(1) Utrecht Law Review 147, 149.
[38] OECD, 'Environmental cost-benefit analysis: Foundations, stages and evolving issues' in *Cost Benefit Analysis and the Environment: Further Developments and Policy Use* (OECD Publishing Paris, 2018).
[39] Alessio Pacces and Louis Visscher, 'Methodology of Law and Economics' in Bart van Klink and Sanne Taekema (eds), *Law and Method. Interdisciplinary Research info Law* (Tübingen: Mohr Siebeck 2011).
[40] TFEU (n 16) art 11; see, for example, Julian Nowag and Alexandra Teorell, 'Beyond Balancing: Sustainability and Competition' (2020) 4 Concurrences 34.
[41] Schrama (n 37) 148.

The select case examples do not comprehensively represent all sustainability decisions adopted by these authorities. In selecting relevant primary sources to inform the findings, this thesis prioritizes the cases that have regularly emerged in the literature review and explicitly balance sustainability interests. Secondary sources are selected from reputable peer-reviewed journals, aiming to provide a comprehensive and holistic perspective of the topic at hand.

Chapter 2

Cost-Benefit Analysis and Welfare Economics

Why are genuine sustainability agreements and disguised cartels distinguished by welfare? Why is welfare economics and cost-benefit analysis theory useful to understand EU competition authorities' balancing approach for sustainability agreements?

The purpose of EU competition authorities' weighing method under Article 101(3) TFEU is to distinguish between genuine sustainability agreements and disguised cartels. The literature generally refers to these concepts to dichotomize preferable and unpreferable agreements. However, it is not entirely clear what specifically differentiates the terms: what is preferable? Section 1 contends that the nature of a sustainable agreement necessitates that it results in a welfare gain to society and that a disguised cartel does not. Therefore, to understand the distinction, regulators must be able to understand an agreement's impact on net welfare—at least to the greatest extent possible—as discussed in Section 2. In terms of deciding welfare-maximizing outcomes, regulators employ cost-benefit analysis to guide decision- making. However, Section 3 explains how not all cost-benefit analysis approaches are equal. After outlining the different factors that impact the formality of a cost-benefit analysis, it is concluded that the economic approach is the most preferable benchmark because (1) it has sufficient explanatory power to account for the intrinsic difficulties associated with the costs and benefits of sustainable agreements, and (2) it enhances undertakings legal certainty by ensuring a replicable and transparent assessment. However, enforcement agencies' resource constraints may limit the approach's efficacy.

2.1. What Distinguishes a Genuine Sustainable Agreement and a Disguised Cartel?

2.1.1. EU Commission

At the broadest level, the EU Commission describes a cartel as 'a group of similar, independent companies which agree (expressly or tacitly) together to fix prices, to limit production, or development, to share markets or customers between them or other similar type of restriction to competition.'[42] A disguised cartel in the context of green antitrust is an agreement that uses sustainability benefits to obfuscate its anti-competitive object.[43] Although it is clear that the definition pertains to the relationship between sustainability benefits and anticompetitive behavior, the exact contours of the relationship are not explicitly defined. In the 2023 EU Horizontal Guidelines (HG), the Commission made clear that what does and does not constitute a cartel is determined by the decisional practice of the Commission and case-law of the Court of Justice of the European Union.[44]

[42] Commission, 'Cartels Overview' available at <https://competition-policy.ec.europa.eu/cartels/cartels-overview_en#:~:text=A%20cartel%20is%20a%20group,specific%20type%20of%20antitrust%20enforcement.>.
[43] Veljanovski (n 1) 508.
[44] 2023 EU Horizontal Guidelines (n 14) para 45.

In Section 9 of the HG, the Commission explains that a sustainability agreement 'refers to any horizontal cooperation agreement that pursues a sustainability objective, irrespective of the form of the cooperation.'[45] A sustainability agreement is not its own type of cooperation agreement but rather falls under the existing categories.[46] Interestingly, an earlier version of the HG defined a sustainability agreement as 'any type of horizontal cooperation agreement that *genuinely* pursues one or more sustainability objectives, irrespective of the form of cooperation.'[47] In that earlier draft, the Commission later revealed that an agreement with a genuine sustainable objective should be analyzed as an effects based restriction.[48] Even though the wording changed with the updated draft, it is clear that the Commission does not have a clear notion of what opposes a 'disguised cartel' other than essentially stating: if there are sustainability benefits that may exceed the costs to competition, an effects based approach is warranted.[49] Thus it can be reasonably concluded that the distinction between the concepts is found in the balancing approach under Article 101(3) TFEU.

In order to establish a normative framework to evaluate whether these concepts are effectively distinguished from one another, the research must understand sustainable development in the EU.

2.1.2. Sustainable Development: Definition and Policy Agendas

In 1987, The Brundtland Commission defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'[50] Sustainable development necessarily embeds economic growth within the broader environmental and social context in which it operates.[51] As such, the theory accounts for externalities that are absent from a market economy's determination of price and quantity.[52]

The 2015 Rio Convention published 17 Sustainable Development Goals, including poverty eradication, climate action, and affordable and clean energy—along with 169 measurable targets.[53] More recently, the European Green Deal aims to transform the EU economy for a sustainable future through policy reform aimed at climate neutrality coupled with social

[45] Ibid para 521.
[46] Ibid para 523.
[47] Commission, 'Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements' (2022) OJ C 164/01, para 54 (emphasis added).
[48]Ibid para 559, 560.
[49] 2023 EU Horizontal Guidelines (n 14) para 536.
[50] World Commission on Environment and Development, *Our Common Future,* (OUP 1987).
[51] See generally Kate Raworth *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist* (1st edn Chelsea Green Publishing 2017) 53–81.
[52] For more information on externalities and market failures, see Nick Hanley, Jason Shogren, Ben White, *Introduction to Environmental Economics* (2nd edn OUP 2013) 15-23.
[53] UN, 'Sustainable Development Goals' (2015) available at <https://sdgs.un.org/goals>.

initiatives to ensure that 'no one is left behind.'[54] Further, the EU aims to lead international efforts on this front because environmental ambition cannot be achieved by the EU acting in isolation.[55]

2.1.3. Theoretical Considerations

A sustainable agreement, as defined by the 2023 HG, may well be narrowly defined as an agreement that purses a sustainable object; however, recognizing the aforementioned nature of sustainable development, the only worthwhile distinction to be made between a '*genuine* sustainability agreement' vis a vis 'disguised cartel' is through the lens of welfare because it would otherwise undermine the very meaning of sustainability. Therefore, this thesis builds its analysis on two points: (1) a genuine sustainability agreement pursues a sustainability objective and produces a net welfare gain to society, and (2) competition authorities ought to promote genuine sustainability agreements and distinguish them precisely from disguised cartels. Intuitively, these definitions are logical: how could an agreement constitute a 'disguised cartel' or 'greenwashing'[56] if it pursues a sustainability objective and produces net benefits to society?[57]

2.2. Welfare Economics: Goals, Measurements, and Challenges

As the previous section established that a genuine sustainability agreement increases net welfare for society, it is crucial to conceptualize a notion of welfare that aligns with this object and relates to competition law.

Welfare can be generally understood as a reflection of individual preferences, satisfaction, or levels of happiness.[58] It is generally construed as a normative field of economics derived from utilitarianism.[59] Nineteenth-century social scientist Vilfred Pareto developed the Pareto principle: a decision is a 'Pareto improvement' when at least one person is made better off without anyone else being made worse off. However, in terms of decision-making in practice, such as a regulator, no alternative will improve the lives of at least one person without making someone else worse off. To overcome this, economists created the theory of Kaldor-Hicks efficiency which determines whether a decision is efficient if 'those who stand to benefit from the regulation could fully compensate those who stand to lose from it and still be better off.'[60] It overcomes the Pareto principle shortcoming by establishing that not all individuals must be

[54] 'The Green Deal is an integral part of this Commission's strategy to implement the United Nation's 2030 Agenda and the sustainable development goals [...]' in Commission, 'The European Green Deal' COM (2019) 640 final.
[55] Ibid.
[56] Greenwashing is also used as a synonym to disguised cartel. For example, Schinkel and Treuren (n 1) 6.
[57] Although this definition has no legal basis in EU law, there is considerable room to account for environmental interests through the constitutional provisions of the Treaty, for example, Article 11 TFEU (n 16) provides that, 'Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.' Holmes (n 3) 361.
[58] John Richard Hicks, 'The Foundations of Welfare Economics', (1939) 49(196) The Economic Journal 696.
[59] Economists use the term 'utility' as a synonym for welfare, for instance in the expression utility maximizing in Richard A. Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8 J Legal Stud 103, 105.
[60]Ibid.

better off—only in terms of respective classes. Even though scholars have criticized the theory as a basis for decision-making because it unequally distributes wealth across consumer classes,[61] it is an adequate theory of second best for the purpose of this research.[62]

A 2023 OECD Report on competition enforcement standards defined three welfare economic antitrust enforcement approaches: the consumer welfare standard, the total welfare standard, and the citizen welfare standard.[63] The consumer welfare standard is the predominant standard in most jurisdictions. It seeks to maximize consumer welfare through low prices and greater quality, innovation, and choice, and prioritizes consumers in the relevant market over consumers of other products.[64] The total welfare standard considers an agreement's effects on consumers and producers, even if the latter does not pass the gains to consumers.[65] Both of these theories generally exclude distributional and non-economic concepts of welfare. To address this problem, the OECD Report describes the citizen welfare standard which extends beyond consumers and producers to consider the impact of competition on outcomes of all citizens.[66] On the positive side, this standard ranks the highest concerning environmental and social effects.[67] Yet as a drawback, it is the most difficult to administer.[68] This is primarily due to the intrinsic difficulties of quantifying and monetizing environmental and social benefits.

Economists have developed quantification methods to measure discrepancies in welfare between groups. For example, decision-makers can account for intergenerational equity by incorporating discount rates to account for future generations, albeit at a reduced value.[69] To account for intergenerational effects, it is possible to account for the decreasing marginal utility of income.[70] For example, economists recognize that the marginal utility of 42 euro to the average citizen of a poor country may have greater welfare implications in terms of health, education, and life expectancy, compared to a loss of 150 euro to a rich country citizen.[71] Furthermore, decision-makers can use welfare economics to account for environmental degradation using evaluation techniques such as measuring prevention or damage costs.[72]

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[61] Matthew D. Adler and Eric A. Posner, 'Rethinking Cost-Benefit Analysis' (1999) 109 Yale LJ 165, 190.
[62] Richard Lipsey and Kevin Lancaster, 'The General Theory of Second Best' (1956) 24(1) The Review of Economic Studies 11.
[63] OECD, 'Consumer Welfare Standard: Advantages and Disadvantages Compared to Alternative Standards' (2023) OECD Competition Policy Roundtable Background Note available at <https://www.oecd.org/daf/competition/consumer-welfare-standard-advantages-and-disadvantages-to-alternative-standards-2023.pdf>.
[64] Ibid 12; For more on the consumer welfare standard, see Section 2.1.2.
[65] Ibid 13,14.
[66] Ibid 16,17.
[67] Ibid 33.
[68] Ibid 35.
[69] OECD, 'Discounting' in *Cost-Benefit Analysis and the Environment: Further Developments and Policy Use* (OECD Publishing Paris 2018).
[70] See generally, Bruce Russett, 'The Marginal Utility of Income Transfers to the Third World' (1978) 32(4) Industrial Organization 913.
[71] Put differently, recognizing that a decision inevitably creates winners and losers, whether to adopt the decision depends not only on the money each group gets, but also how much each group values the money they receive: Richard S. Markovits, *Welfare Economics and Antitrust Policy Vol. I Economic, Moral, and Legal Concepts and Oligopolistic and Predatory Conduct* (1st edn Springer Cham 2021) 34.
[72] See, for example, ACM Guidelines *infra* (nx) para 58.

Moreover, in cases where quantification is difficult or impossible, welfare economics can determine non-use value benefits through stated preference surveys.[73] This method is often employed in the consumer welfare paradigm to account for the value consumers attribute to intangible non-price improvements of a product by asking what they are willing to pay for it. Even though this approach has its limitations, scholars have identified progressive approaches to align stated preference approaches with sustainability.[74]

The efficacy of these quantification methods depends on how the regulator applies these tools in practice. For example, an environmental protection agency might employ a discount rate that is too low, resulting in the acceptance of a decision that generates substantial long-term costs that outweigh the benefits.[75] Regulators may also make questionable judgments when considering distributional concerns, such as assigning a value of $0.5 to the distributional 'cost' of a wealth transfer from consumers to producers, for every $1 gained by producers.[76] Furthermore, consumers' willingness to pay surveys may be subject to behavioral biases, such as hyperbolic discounting of future events, lack of information, and status quo bias.[77]

Notwithstanding the complexity of these tools, a complete understanding of the various fields of welfare economics, such as the citizen welfare standard, enables competition regulators to employ a comprehensive decision-making approach when a potential conflict arises between competition and sustainability.

In practice, a competition authority does not explicitly select one welfare economic theory over another. Rather, the approaches implicitly emerge based on how the regulator measures the costs and benefits of a given decision. Therefore, to understand the Commission's approach to decide welfare-maximizing outcomes, it is useful to understand cost-benefit analysis theory.

2.3. What is a Welfare Maximizing Cost-Benefit Analysis?

2.3.1. General Meaning

Cost benefit analysis (CBA) is often used without qualifiers as though it were a monolithic concept.[78] In reality, however, it can be used to describe many different practices. At its broadest level, a CBA is systematic thinking about decision-making and generally involves

[73] Hanley, Shogren and White (n 52) 59–78: Techniques can be divided into revealed preferences, stated preferences, and benefits transfer.
[74]Roman Inderst and Stefan Thomas, 'Prospective Welfare Analysis—Extending Willingness-To-Pay Assessment to Embrace Sustainability' (2022) 18(3) Journal of Competition Law and Economics 551.
[75] See how the efficacy of discount rates depends on the actual rate and time frame imposed in Richard L. Revesz, 'Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives' (1999) 99 Colum L Rev 941, 951–955.
[76] This example was taken from regulators' decision to remove price controls for oil prices in the U.S. in the 1970's as a result of economic analysis that included 'equity cost' in William Kip Viscusi, Joseph Harrington Jr. and David Sappington, *Economics of Regulation and Antitrust* (Fourth edn, MIT Press 2005), 84-85.
[77] Christina Volpin, 'Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)' (2020) Competition Policy International Antitrust Chronicle, 3–4.
[78] Amy Sinden, 'Formality and Informality in Cost-Benefit Analysis' (2015) Utah Law Review 93.

comparison between alternatives.[79] Eminent economist Viscusi (1996) describes CBA as straightforward and intuitively appealing: the only alternative is for regulators to 'abandon rational thought about policy impacts and rely on their instincts.'[80]

Nevertheless, the work of Sinden (2015) makes clear that the actual comparison can vary across a spectrum of formality.[81] On the informal end, inspired by Ben Franklin's qualitative pros and cons list, decisions are intuitively compared using qualitative descriptions.[82] Conversely, the formal end of the spectrum consists of the 'highly technical and theorized branch of welfare economics that attempts to monetize all social costs and benefits for a whole range of alternatives using formal techniques.'[83] Informal and formal approaches have different use cases: the informal should be used as a secondary check or litmus test applied after a decision has been made by other means.[84] A formal economic CBA should be used as a decision-making tool that sets a standard and selects the efficient regulatory alternative from various possibilities.[85]

As a correctly implemented formal CBA informs welfare maximizing outcomes, the extent to which the Commission's Article 101(3) TFEU balancing approach reflects a formal CBA determines whether it effectively distinguishes between genuine sustainability agreements and disguised cartels. A formal CBA is also preferable because it emphasizes the quantification and monetization of all benefits, thereby supporting the transparency and replicability of the enforcement approach—enhancing undertakings' legal certainty.

2.3.2. Theoretical Framework

This thesis will apply Sinden's (2015) typologies of CBA to the balancing approaches described in later Chapters. Axis 1 describes how a formal CBA requires quantification and monetization.

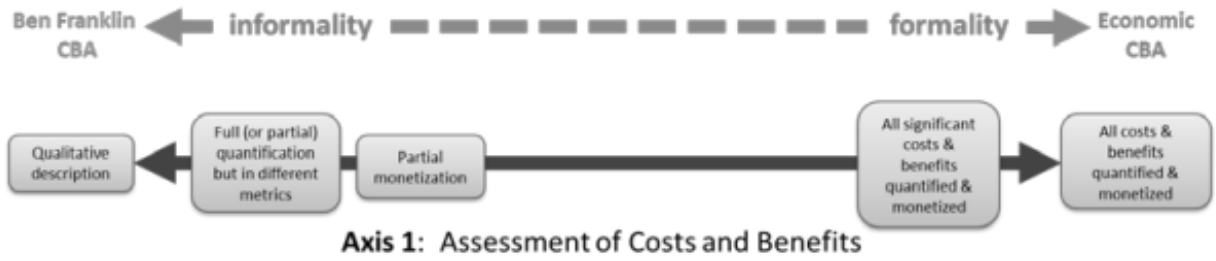

Figure 1: Assessment of Costs and Benefits as illustrated in Sinden (2015)[86]

[79] Steven Kelman, 'Cost-Benefit Analysis: An Ethical Critique' (1981) 5(1) Regulation 33, 33.
[80] William Kip Viscusi, 'Regulating the Regulators', (1996) 63(4) University of Chicago Law Review 1423, 1439 found in Amy Sinden, 'Formality and Informality in Cost-Benefit Analysis' (2015) Utah Law Review 93, 125.
[81] Sinden (n 78).
[82] Ibid 96.
[83] Ibid 99.
[84] Ibid 118.
[85] Ibid.
[86] Ibid 108.

Of course, it is not possible for a regulator to identify and quantify *all* costs and benefits for present and future generations.[87] Concerning environmental sustainability, it is challenging to reach a formal CBA because benefits and costs are often long-lasting and suffer from scientific uncertainty.[88] Social sustainability benefits are also difficult to accurately quantify and monetize because human welfare is largely subjective.[89] If significant costs and benefits are unknown and incapable of even qualitative description, then Sinden (2015) suggests that a meaningful comparison becomes impossible.[90] This issue is the basis for some authors' contention that most CBA approaches are anti-environmental in theory—recognizing that most of the time, CBA is not deferential to environmental costs and benefits.[91]

Axis 2 relates to the precision of the balancing test, ranging from rough 'apples to oranges' comparison to the exact point where marginal benefits equal marginal costs, thereby moving towards Kaldor-Hicks efficiency.[92]

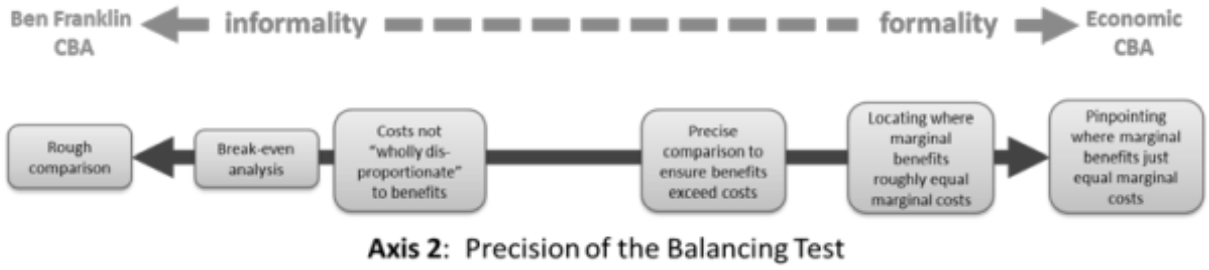

Figure 2: Precision of the Balancing Test in Sinden (2015)[93]

Sinden (2015) clarifies that there are two elements to this axis. On the one hand, it maps the degree to which the benefits and costs are compared: whether it's a 'rough comparison' or whether it is 'pinpointed at the margin'. On the other hand, the distinction between 'costs not wholly disproportionate to benefits' and 'precise comparison to ensure benefits exceeds costs' relates to the fulcrum or 'tipping point' where the proportion of benefits to costs is sufficient to tip the scale. For 'wholly disproportionate', the regulator may accept that the benefits are sufficient to outweigh the costs even if the costs are greater than the benefits.[94] For the 'precise comparison to ensure benefits exceed costs', the benefits must exceed the costs in a measurable fashion.

There is a relationship between Axis 2 and Axis 1. One cannot conduct a formal, precise balancing test if the costs and benefits are measured qualitatively or in different metrics. For example, if a regulator decides to weigh the costs and benefits of an agreement to phase out

[87] See generally, Hanley, Shogren and White (n 52).
[88] Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (The New Press 2004).
[89] See, for example, the challenges of stated preference surveys in Volpin (n 77) 2.
[90] Sinden (n 78) 116.
[91] David M. Driesen, 'Is Cost-Benefit Analysis Neutral' (2006) 77 U Colo L Rev 335.
[92] Sinden (n 78) 109.
[93] Ibid 109.
[94] Ibid 109 –110.

CO2 intensive production processes that raise prices for consumers, then a simple qualitative description of the benefits of pollution abatement will not result in a precise and accurate CBA.[95]

Figure 3: Number of Alternatives in Sinden (2015)[96]

Axis 3 illustrates the number of alternatives for which the respective costs and benefits are compared. This varies from a single alternative to numerous incrementally different alternatives. In order to find the option that maximizes net benefits, the decision must be made at the margin—where marginal benefit equals marginal cost. However, this can only be accomplished when there are many different alternatives. Therefore, it is not possible to have the most precise balancing test on Axis 2 if you only have a handful of alternatives under consideration.[97]

2.4. Conclusion

Genuine sustainable agreements and disguised cartels must be understood through the lens of net welfare. Using the normative field of welfare economics, namely the citizen welfare standard, it is possible to consider distributional and environmental concerns in a measured and quantified manner—although, in practice, it may be difficult to apply accurately. Nevertheless, these underlying theories and measurement techniques provide depth to a regulators' analysis by affecting the extent to which relevant costs and benefits are (1) quantified and monetized, (2) precisely compared at the margin, and (3) included at all. Moreover, the number of alternatives affects the formality of a CBA. Through the application of this theoretical framework, it is possible to identify areas where the balancing approach is formal but is missing a salient component, or informal at the expense of precision. A formal CBA is preferable insofar as it is executed properly.

[95] See Figure 7 in Sinden (n 78) 113.

[96] Ibid 110.

[97] Ibid 113.

Chapter 3

Balancing in European Antitrust Enforcement: Modernization and Article 101(3) TFEU Exemption Conditions

How can modernization impact Article 101(3) TFEU enforcement? How does the wording of Article 101(3) TFEU impact a welfare maximizing assessment?

This thesis has so far demonstrated that it is necessary to compare EU competition authorities' balancing approach under Article 101(3) TFEU to a formal cost-benefit analysis (CBA) derived from welfare economics to find the extent to which genuine sustainability agreements are precisely distinguished from disguised cartels. However, it is also worth observing that EU competition authorities' balancing approach has varied across enforcement eras. Starting in 1999 and ultimately culminating in 2004 with Regulation 1/2003, the modernization of EU competition law has significantly impacted the integration of sustainability interests in antitrust enforcement. Section 3.1 explains this ideological shift and addresses who is now enforcing Article 101(3) TFEU and how. Section 3.2 looks toward the wording of Article 101(3) TFEU and evaluates the Commission's interpretation of the four exemption conditions post-modernization. Section 3.3 concludes.

3.1. Modernizations' Impact on Sustainability Interests in Article 101 TFEU

3.1.1. Pre-Modernization

Article 101(3) TFEU was originally drafted during this period. Therefore, to gain a comprehensive understanding of contemporary antitrust developments, it is necessary to appreciate the underlying antitrust philosophy at the time. While the designation of pre- and post-modernization may resemble the facile lens of BC/AD, additional division was deemed unnecessary due to the relatively late emergence of environmental and social interests in EU antitrust. This section will predominantly focus on the sectoral approach guided by the workable competition standard from 1978-2004.[98]

The pre-modernization era was marked by an underlying ordoliberal philosophy that aims to guarantee individual economic freedom and a competitive market economy through active state intervention.[99] Economic efficiency was not a goal in itself but merely an end result derived from a competitive market structure.[100] Wessling asserts that the pre-modernization competition rules were a normative socio-political decision to prioritize the use of a

[98] See enforcement eras in Table 1 in Section 3.1.3 *infra*; Brook (n 19) 95.
[99] Active state intervention means preserving the prerequisites of the competitive system, not direct intervention such as price setting; Conor Talbot, 'Ordoliberalism and Balancing Competition Goals in the Development of the European Union' (2016) 61(2) The Antitrust Bulletin 264, 267.
[100] Ibid.

competition framework, as opposed to regulation, as the primary mechanism for integrating disparate economies into the common market.[101]

How were sustainability interests balanced under (now) Article 101(3)?

The wording of Article 101(3) TFEU is rooted in ordoliberalism. The drafters flexibly formulated the exemption conditions to provide regulation sufficient discretion.[102] For example, terms like 'substantial' part of the market, ensuring a 'fair' share of benefits for consumers, promoting 'technical or economic progress', and requiring restrictions to be 'indispensable' are subject to interpretation. However, this latitude did not impact market integration because the Commission enforced EU competition law through a centralized *ex-ante* regime.[103] Therefore, the only way to receive an exemption to an anticompetitive agreement was to receive prior authorization from the Commission.[104]

Following economic downturn in the 1970s, the EU Commission partially departed from pure Ordoliberal philosophy in *Metro* by tailoring its enforcement approach based on the 'degree of competition necessary' in each sector to achieve the objectives of the Treaty.[105] The principle is termed the workable competition standard. It affected balancing non-competition interests in three ways. First, it broadened the type of benefits and beneficiaries the Commission examined under Article 101(3) TFEU. As indicated by empirical research by Brook (2022), the first two exemption conditions—efficiency improvement and fair share—were broadly interpreted during this period.[106] Second, the workable competition standard introduced a sectoral approach to balancing whereby the Commission tailored the stringency of the four conditions depending on the degree of competition necessary in the sector.[107] Third, the workable competition standard was used as a market-building mechanism: Article 101(3) TFEU was used to foster industrial policy, shelter industries from foreign competition, and promote social goals.[108]

The workable competition standard does not indicate that the Commission departed from the ordoliberal objectives of promoting undistorted competition on the market; however, one may view this transition as a shift from using competition policy purely as a tool to achieve market integration into one that also contributes towards the EU's overarching social policy objectives.[109]

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[101] Rein Wesseling, *The Modernisation of EC Antitrust Law* (Hart Publishing 2000).
[102] Talbot (n 99) 271.
[103] Council Regulation (EEC) 17/62 First Regulation implementing Articles 85 and 86 of the Treaty (Reg 17/62) [1962] OJ 13/204, art 2.
[104] Ibid art 8(1); Brook (n 19) 124.
[105] C-26/76 *Metro v Commission* EU:C:1977:167, para 20.
[106] Brook (n 19) 124.
[107] Ibid.
[108] Ibid.
[109] Talbot (n 99) 286.

3.1.2. Modernization

Beginning in the 1990s, rapid U.S. economic growth and concurrent European stagnation increased the allure of American *laissez-faire* economics in the EU capitalist economy.[110] As a result, in 1997, a group of officials from the EU Commission termed the 'Modernization Group' drafted the first steps of modernization in secret—even within the Commission itself.[111] Two years later, the Modernization Group produced the Modernisation White Paper, which laid the foundation for significant changes in EU competition law.[112] Modernization ultimately culminated in the decentralization of the enforcement regime by virtue of Regulation 1/2003[113] and the reinterpretation of Article 101(3) TFEU exemption conditions.[114] The effect of these changes can be conceptually divided into two pillars: institutional and substantive.[115]

3.1.2.1. Institutional Pillar

Regulation 1/2003 decentralized the enforcement regime for Article 101(3) TFEU. Even though the Commission retained the exclusive right to adopt a positive exemption decision, NCAs may declare that there are no grounds for action on their part if, based on the information in their possession, the conditions for establishing an Article 101 TFEU infringement are not met.[116]

The decentralization of cartel enforcement produced several benefits. First, authorizing NCAs to apply Article 101(3) TFEU rebalanced the administrative workload away from the Commission.[117] This addressed a growing practical challenge in antitrust enforcement following EU enlargement. Second, decentralization brought decision-making closer to citizens, as provided by the Modernization White Paper.[118] Finally, NCA's diverging interpretations of the vague wording of Article 101(3) TFEU have encouraged innovation and experimentation within the EU enforcement regime.[119]

However, decentralization also introduced risks and drawbacks. According to Brook (2022), the flexible wording of the exemption conditions coupled with decentralization has endangered the effectiveness, uniformity, and legal certainty of EU antitrust.[120]

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[110] Ibid 285-86.
[111] Brook (n 19) 50-51.
[112] Commission, 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty (Modernization White Paper)' [1999] OJ C132/01.
[113] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty (Reg 1/2003) [2003] OJ L1/1.
[114] Commission, 'Guidelines on the application of Article 81(3) of the Treaty' COM (2004) OJ C 101/97 (hereinafter Article 101(3) Guidelines for the sake of consistency).
[115] A procedural pillar can be included; for example, Brook (n 19) 70.
[116] Reg 1/2003 (n 113) art 5.
[117] Brook (n 19) 68.
[118] Modernization White Paper (n 112) para 99; ibid 68.
[119] See, for example, Brook (n 19) 269.
[120] Ibid 68-69.

3.1.2.2. Substantive Pillar

Modernization brought about a shift towards an effects-based, economic approach to competition policy. This change was motivated by both practical and ideological reasons. From a practical standpoint, emphasizing measurable economic efficiencies over non-competition interests was seen as necessary to maintain the integrity of the decentralized competition regime because, unlike DG COMP, not all NCAs uphold the same level of political independence.[121] Hence, the Modernization White Paper framed Article 101(3) as an objective tool to facilitate economic assessment and avoid undue political influence.[122]

From an ideological perspective, modernization's increasing emphasis on economic analysis was coupled with consumer welfare.[123] While it is ostensibly worthwhile to improve the welfare of consumers, the actual meaning of the standard is unclear.

First, it needs to be clarified to what extent dynamic efficiencies play within the consumer welfare paradigm and their relationship to allocative and productive efficiency.[124] Law and economics scholar Robert Bork introduced the notion of consumer welfare and equated it with maximizing efficiency, which would only be valid if dynamic efficiency was absent.[125] However, this understanding has been perpetuated in the competition law literature, resulting in the use of various terms or 'proxies' such as efficiency, allocative efficiency, and economic welfare.[126] Thus, a competition authority may discuss increasing efficiency or economic welfare without considering dynamic efficiencies, such as quality, innovation and, choice. Sustainability benefits often constitute the latter because they manifest across longer timeframes and cost more in the short run.[127]

Second, it is evident that the notion of consumer welfare is not equivalent to 'end-user welfare' because consumer is defined to encompass 'all direct or indirect users of the products covered by the agreement, including producers that use the products as input, wholesalers, retailers, and final consumers[...]'[128] Discussing consumer welfare could therefore entail the maximization of allocative efficiency for producers that use the product as an input, not end-users.[129]

Unfortunately, the CJEU has not clarified the role of the standard, ruling in *T-Mobile* (2009) that Article 101 TFEU, 'like the other competition rules of the Treaty, is designed to protect

[121] Ibid 68.
[122] Modernization White Paper (n 112) para 57; Brook (n 19) 69.
[123] Article 101(3) Guidelines (n 114) para 33.
[124] Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) 11(1) The Competition Law Review 133.
[125] See generally Robert Bork, *The Antitrust Paradox: A Policy At War With Itself* (The Free Press NY 1978) found in ibid 142-143.
[126] Daskalova (n 124) 143.
[127] OECD, 'Environmental cost-benefit analysis: Foundations, stages and evolving issues' (n 38) 35-36.
[128] Article 101(3) Guidelines (n 114) para 84.
[129] The ACM Guidelines *infra* (nx) employ the term 'users' opposed to 'consumers'.

not only the immediate interests of individual competitors or consumers *but also to protect the structure of the market and thus competition as such.*'[130] An echo of ordoliberalism? It is not clear.

What is evident, however, is that Article 101(3) TFEU enforcement is impacted by the consumer welfare standard, given that a condition to grant exemption stipulates that consumers must receive a fair share of the agreement's benefits.

3.1.3. Theoretical Considerations: Modernization and Economic Cost-Benefit Analysis

How has modernization impacted where the Article 101(3) TFEU balancing approach falls on the formality CBA spectrum? As illustrated by the informative research by Brook (2022), the EU Commission has brought about an economic balancing approach that prioritizes consumer welfare, economic efficiency, and excludes non-economic interests.[131] Interestingly, the EU Commission has never accepted an Article 101(3) TFEU exemption request following modernization. This is not to say that Article 101(3) TFEU is a dead article. Instead, it is illustrative of the procedural and institutional changes resulting from modernization.[132]

[130] Case C-8/08 *T-mobile Netherlands and Others* EU:C:2009:343, para 38 (emphasis added).
[131] Brook (n 19) 51.
[132] The Commission shifted to focus on hardcore restrictions while NCAs have adopted implicit national balancing tools such as no-action letters; Brook (n 19) 139, 308.

TABLE 3.1. *Trends in Article 101(3) TFEU balancing*

Enforcement period/ jurisdiction	Types of benefits	Balancing method	Intensity of control	Frequency (%)	
				Invoked	Accepted
		Commission			
First enforcement period (1962–1977)	Industrial policy	Legal balancing, impact on market integration	Focus on 1st condition, flexible application	72	31
Second enforcement period (1978–1987)	Economic and non-economic benefits	Legal balancing, workable competition standard	Focus on 1st and 3rd conditions, sectoral approach	76	31
Third enforcement period (1988–April 2004)	Economic and non-economic benefits	Legal balancing, workable competition standard	Focus on 1st and 3rd conditions, sectoral approach	45	27
Fourth enforcement period (May 2004–2017)	Only narrow economic benefits	Economic balancing, short-term narrow consumer welfare	Focus on 1st condition, strict application	25	0

Table 1: Trends in Article 101(3) TFEU balancing as depicted in Brook (2022)[133]

According to Axis 1 of the CBA formality spectrum, an economic CBA quantifies and monetizes all costs and benefits.[134] Post-modernization, the Commission's adoption of measurable, objective efficiency gains could arguably represent a rightwards shift towards a more formal balancing approach. At the same time, however, strict quantification and monetization requirements may be problematic for sustainability agreements. For one, benefits derived from sustainability agreements are challenging to quantify in monetary terms. In addition, a more 'economic' approach, meaning short-term economic efficiency, excludes non-competition interests from the balancing approach. Sinden (2015) suggests that the CBA could fail entirely in that case.[135] Before modernization, the EU Commission was more open to accepting non-competition interests, such as pollution abatement, as a part of its analysis. Therefore, it is also possible to prefer the balancing approach before modernization from a welfare economics perspective.

Axis 3 of the CBA formality spectrum describes the number of alternatives under consideration. Before modernization, the EU Commission arguably considered more

[133] Ibid 95.
[134] Sinden (n 78) 108.
[135] Sinden (n 78) 116.

alternatives, for example, by attaching conditions to an exemption—ultimately creating a different 'alternative' from that which was proposed.[136] Second, the EU Commission also placed greater emphasis on the indispensability criterion which envisions cost-effective alternatives. As a result, the balancing approach pre-modernization may have been more aligned with a formal CBA for Axis 3.

3.2. Substantive Architecture of Article 101 TFEU

To understand how the shift towards economic efficiency and consumer welfare has impacted Article 101(3) TFEU balancing, it is crucial to delve into the text of the provision itself. The Section begins by discussing the general prohibition of anti-competitive agreements followed by the four exemption conditions. Thereafter, the findings are evaluated in light of the theoretical framework.

3.2.1. The Prohibition of Anti-Competitive Agreements

Article 101(1) TFEU prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the internal market.[137] There are two alternative categories of restrictions. By-object restrictions, such as horizontal price fixing or market sharing, are presumed to be anticompetitive by their very nature and are prohibited *per se.*[138] Alternatively, agreements with different objectives can still have the 'effect' of preventing, restricting, or distorting competition within the internal market.[139] In this case, the restrictive effects of the agreement may be weighed against the pro-competitive effects under Article 101(3) TFEU.[140] In *Société Technique Minière*, the Court found that if an agreement has an anticompetitive object, it is unnecessary to prove anti-competitive effects.*[141]* However, only a limited number of specific practices constitute by-object restrictions.[142] As long as an anti-competitive sustainability agreement does not contain a by-object practice, it will be evaluated as an effects based restriction. After all, sustainability agreements, by definition, pursue a sustainable objective. Therefore, the decision of whether a sustainable agreement infringes Article 101 TFEU likely depends on whether any advantages offset the negative effects on competition under Article 101(3) TFEU.

[136] Reg 17/62 (n 103) art 8(1).; Brook (n 19) 124.
[137] TFEU (n 16) art 101 para 1.
[138] See a detailed account of by-object and by effect restrictions in Richard Whish and David Bailey, *Competition Law* (7th edn, OUP 2012) 121-134.
[139] See how these distinctions relate to formalism: Justin Lindeboom, 'Formalism in Competition Law' (2022) 18 Journal of Competition Law & Economics 832, 847-850.
[140] Case T-374/94 European Night Services and Others v Commission EU:T:1998:198 para 136.
[141] Case C-56/65 Société Technique Minière v Maschinenbau Ulm GmbH [1966] ECR 235, p 249.
[142] Whish and Bailey (n 138)124.

3.2.2. The Article 101(3) Exemption Conditions

Article 101(3) TFEU provides four cumulative exemption criteria that apply after a restriction to competition is found under Article 101(1) TFEU.[143] The analysis will use the *Article 81(3) Guidelines* (hereinafter *Article 101(3) Guidelines* for the sake of clarity) as it is the most up-to-date source specifically dedicated to the interpretation of the exemption conditions.[144] The *Article 101(3) Guidelines* explains:

> The assessment of restrictions of competition by object or effect under Article 81(1) is only one side of the analysis. The other side, which is reflected in Article 81(3), is the assessment of the positive economic effects of restrictive agreements.[145]

Interestingly, the 2023 Horizontal Guidelines mention that the stated purpose of Article 101(3) TFEU is 'to determine the advantages produced by the agreement, and to assess whether those advantages offset the disadvantages for competition.'[146] The noteworthy language shift from 'economic effects' to 'advantages' indicates that the interpretation of benefits considered under Article 101(3) TFEU may have evolved; however, this will be discussed further in Chapter 4.

3.2.2.1. Condition 1: Improvement

One could argue that this is the only substantive condition of Article 101(3) TFEU, with the other three acting as limitations or requirements thereof.[147] The provision provides four potential routes for benefits: (1) an improvement in the production of goods; (2) an improvement in the distribution of goods; (3) technical progress; *or* (4) economic progress. Holmes (2020) points out that economic progress is only one of four ways that competition authorities consider benefits under Article 101(3) TFEU and observes that economic progress is not tantamount to economic efficiency.[148] In fact, the term 'pro-competitive effects' is not found in the wording of any of the exemption conditions.[149] Thus, Holmes (2020) asserts that there is room for sustainability benefits by virtue of the first three routes or even under economic progress as a function of dynamic efficiency gains.[150] For example, scholars have identified how sustainability benefits constitute quality improvements.[151]

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[143] TFEU (n 16) art 101 para 3.
[144] Article 101(3) Guidelines (n 114)
[145] Ibid para 32.
[146] 2023 Horizontal Guidelines (n 14) para 18; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C- 519/06 P GlaxoSmithKline v Commission EU:C:2009:610, para 95. The CJEU requires an "appreciable objective advantage of such a kind as to offset the disadvantage which it entailed for competition."
[147] Brook (n 19) 135.
[148] Holmes (n 3) 372.
[149] Ibid 373.
[150] Ibid 374.
[151] For example, Volpin (n 77).

For an agreement to be considered beneficial in the EU, it must provide an objective advantage that benefits the entire EU; it cannot only benefit the parties involved.[152] To substantiate an efficiency, the following must be verified: (a) the nature of the claimed efficiency; (b) the link between the agreement and the efficiencies; (c) the likelihood and magnitude of each claimed efficiency; and (d) how and when each claimed efficiency would be achieved.[153]

3.2.2.2. Condition 2: Fair share to consumers

Article 101(3) TFEU stipulates that the agreement must give consumers a fair share of the agreement's benefits derived from the first condition. Consumers include all direct or indirect users of the products covered by the agreement, including undertakings. The concept of 'fair share' implies that there must be a 'pass on' of benefits to fully compensate consumers for any actual or likely negative impact resulting from the restriction.[154] The net effect must be at least equal or else the condition is not fulfilled.[155] The Commission considers that the benefits generally apply to the consumer class as a whole, notwithstanding instances where an individual consumer does not benefit.[156]

In order to determine whether the efficiency gains will be passed on to consumers, the *Article 101(3) Guidelines* establish a framework for both quantitative and qualitative efficiencies.[157] For agreements producing monetary efficiencies, such as cost-effectiveness, there might be a pass on to consumers depending on the (a) characteristics and structure of the market, (b) the nature and magnitude of the efficiency gains, (c) the elasticity of demand, and (d) the magnitude of the restriction of competition.[158] The effects of an increase in market power caused by a restrictive effect, and the corollary incentive to raise prices, must be balanced against the types of cost efficiencies that may incentivize a firm to reduce prices for consumers.[159] In this sense, firms' proclivity to pass on profits to consumers is determined on a sliding scale, depending on how substantially the competitive restraints are reduced as a result of the agreement. If there is still competition, then pass-on to consumers will be more likely.

In terms of qualitative efficiencies, the *Article 101(3) Guidelines* provides that 'consumer pass-on can also take the form of qualitative efficiencies such as new and improved products, creating sufficient value for consumers to compensate for the anti-competitive effects of the agreement, including a price increase.'[160] The Commission notes that qualitative efficiencies

[152] Joined cases 56 and 58/64 *Consten and Grundig v Commission* EU:C:1966:41 p 344; *GlaxoSmithKline v Commission* (n 146) para 89-96.
[153] Article 101(3) Guidelines (n 114) para 51.
[154] Ibid para 85.
[155] Ibid.
[156] Case C- 238/05 *Asnef- Equifax v Asociación de Usuarios de Servicios Bancarios* EU:C:2006:734, para 70.
[157] Article 101(3) Guidelines (n 114) para 93.
[158] Ibid para 96.
[159] Ibid para 110.
[160] Ibid para 102.

require making value judgments because it might be difficult to assign precise values to dynamic efficiencies.[161]

The fair share condition is by far the most contentious in green antitrust. Holmes (2020) points out that the condition does not stipulate that consumers must benefit from a *lower price*; instead, it speaks of *benefits* to consumers—which may also take the form of qualitative efficiencies.[162] The wording of the condition also raises the question: What constitutes a 'fair share' for consumers? Martijn Snoep, Chairman for the Dutch NCA, asserts that if an agreement is indispensable to the reduction of greenhouse gas emissions, it automatically gives consumers a fair share of the resulting benefit—recognizing that climate change poses an existential threat to humanity.[163]

However, 'fairness' is not clearly defined in EU competition law, in spite of its growing prevalence in political and competition discourse.[164] The EU Commission considers fairness under Article 101(3) TFEU in terms of allocating efficiency gains and maximizing consumer surplus.[165] Even if fairness was defined clearly beyond efficiency gains, Dunne (2021) explains how the notion of fairness is not always clear cut: is it unfair for consumers to give away their data, perhaps unknowingly, in order to access a valuable and free social media service?[166] How can we juxtapose fair living wages for foreign workers against price increases to consumers in terms of fairness? The answer is that meaning fairness depends on the lens in which one views the problem, including how benefits are measured and which beneficiaries are considered.

3.2.2.3. Condition 3: Indispensability

The indispensability condition gives effect to the proportionality principle in EU law, stipulating that an agreement must not impose restrictions that are not indispensable to the attainment of its objectives.[167] It implies a two-fold test. First, the efficiencies must be 'specific to the agreement in question in the sense that there are no other economically practical and less restrictive means of achieving the efficiencies.'[168] The Commission will only intervene if it is 'reasonably clear that there are realistic and attainable alternatives.'[169] Undertakings do not have to consider hypothetical or theoretical alternatives. However, upon the identification of such by the Commission, undertakings are obliged to 'explain and demonstrate why such seemingly realistic and significantly less restrictive alternatives to the agreement would be significantly

[161] Ibid para 103.
[162] Holmes (n 3) 378-80.
[163] Snoep (n 6) 4.
[164] Niamh Dunne, 'Fairness and the Challenge of Making Markets Work Better' (2021) 84(2) Modern Law Review 230, 244.
[165] Ibid 246.
[166] Ibid 247.
[167] Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Brill Nijhoff 2015) 20.
[168] Article 101(3) Guidelines (n 114) para 75.
[169] Ibid.

less efficient.'[170] Alternative considerations may constitute another type of agreement, such as a standardization agreement, or the status quo—price competition.[171]

The second test stipulates that the individual restrictions of competition that flow from the agreement must be reasonably necessary to attain the efficiencies.[172] Put differently, 'a restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that flow from the agreement.'[173] Thus, the second test connects all individual restrictions to the agreement's benefits.

3.2.2.4. Condition 4: No Elimination of Competition

The final condition stipulates that the agreement must not allow the parties to eliminate competition in respect of a substantial part of the market and underlines a primary objective of Article 101 TFEU: to protect the structure of the market and thus competition as such.[174] Therefore, it is given priority over potentially pro-competitive effects.[175] The *Article 101(3) Guidelines* specifies factors that impact whether there has been a substantial elimination of competition: (1) the degree of competition in the market;[176] (2) actual and potential competition;[177] and (3) entry barriers such as sunk costs, the minimum efficient scale within the industry, competitive strengths of potential entrants, and the economic outlook of the industry.[178] However, this condition will rarely prevent a sustainability agreement from meeting the exemption conditions because EU competition authorities have rarely used it to reject an agreement after post-modernization.[179]

3.2.3. Theoretical Considerations: Wording of Article 101(3) TFEU and Economic Cost-Benefit Analysis

How does the wording of Article 101(3) TFEU relate to a formal cost-benefit analysis? The benefits of exempting a sustainability agreement are determined through the first condition. Therefore, EU competition authorities' interpretation of its material, temporal and territorial scope will impact the inclusion of sustainability benefits. If the fair share condition is interpreted narrowly and applied strictly, there is a higher likelihood that genuine sustainability agreements will be rejected because realized collective benefits will be excluded from the cost-benefit analysis.

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[170] Ibid.
[171] Ibid para 76.
[172] Ibid para 73.
[173] Ibid para 79.
[174] 2023 EU Horizontal Guidelines (n 14) para 23.
[175] Article 101(3) Guidelines (n 114) para 105.
[176] Ibid para 107.
[177] Ibid para 114.
[178] Ibid para 115.
[179] Brook (n 19) 44-45.

The indispensability condition evaluates the cost-effectiveness of an alternative. Even though it is not a CBA in the sense of comparing alternatives, it generally improves the chance of achieving a more formal CBA. Homes (2020) considers the indispensability criterion to be an essential check to a broad interpretation of the fair share condition because it invites firms to consider less restrictive ways to achieve sustainability goals.[180]

Exemption Condition	*Proximity to Formal Cost-Benefit Analysis*
Improvement in the production or distribution of goods or in technical or economic progress	*Axis 1* *Depends on the extent to which sustainability benefits are considered under this condition. Are they quantified? How are they measured?*
Fair share to consumers	*Axis 1* *Depends on the interpretation of what constitutes a fair share to consumers and the extent to which it excludes collective benefits.*
Indispensability	*Axis 3* *Depends on the amount of alternative scenarios and how they are quantified. Are they true alternatives? This criterion works towards cost-effectiveness.*
No elimination of competition	*No Axis* *The impact on sustainability agreements is unclear.*

Table 2: how the interpretation of the exemption conditions impacts the proximity to a formal cost-benefit analysis.

3.3. Conclusion

The original drafters of Article 101(3) TFEU framed the exemption conditions with considerable flexibility. Therefore, as illustrated above, the extent to which the balancing approach resembles a formal CBA is determined by the interpretive practices of the Commission and national competition authorities—there is no definitive answer from the wording alone. In addition, the discussion in this Chapter has been relatively one-sided: only the benefits of the sustainability agreement positive-exemption-scenario have been considered. While perhaps indispensability and the discussion of Article 101(1) TFEU added some insights into the costs of alternatives, it is necessary to delve into specific prominent case examples and recent guidance documents to understand the precision of the balancing test under Axis 2 of the theoretical framework and the interpretation of the first two conditions in practice.

[180] Holmes (n 3) 381.

Chapter 4

Weighing Sustainability Interests in Case Law, Commission Decisions, and Guidance Documents

How are sustainability interests balanced under Article 101(3) by the Commission and ACM?

The aim of this Chapter is twofold: (1) to understand alternative approaches to balance sustainability interests in the EU antitrust enforcement, and (2) to describe the balancing approach in the 2023 Horizontal Guidelines, which will serve as a basis for analysis and policy recommendations in Chapter 4. To accomplish the former, Section 1 and Section 2 will overview prominent environmental and social interest Commission decisions during the pre-modernization enforcement era, along with sustainability cases and guidance documents from the Dutch Autoriteit Consument & Markt (ACM)—one of the most progressive national competition authorities when it comes to climate change. Thereafter, Section 3 will turn to the 2023 Horizontal Guidelines, specifically focusing on how the Commission quantifies sustainability benefits and how the Commission's interpretation of the fair share condition differs from the ACM. Section 4 concludes.

4.1. Early Cases and Decisions

4.1.1. Pollution Abatement in the *CECED* Washing Machine Decision

The *CECED* Commission decision is arguably the most well-known Article 101(3) exemption in the context of green antitrust.[181] Proponents use it as evidence to support a flexible interpretation of the fair share condition and the inclusion of collective benefits, while opponents dismiss those assertions based on the balancing approach found in the decision itself.[182] This section will overview the decision's balancing approach and determine whether it creates a sufficient legal basis to support green antitrust.

4.1.1.1. Infringement under Article 101(1) TFEU

The facts are as follows: The Conseil Européen de la Construction d'Appareils Domestiques (CECED), an association comprised of domestic appliance manufacturers and trade associations, instituted an agreement amongst its members to cease the production and import of inefficient washing machines—those belonging to energy label categories E, F, and G. Category D washing machines would also be subject to restrictions.

Under the Commission's legal assessment, the agreement was found to impact consumer choice and, thus, competition on the relevant market because energy efficiency was deemed to be a

[181] *CECED* (Case IV.F.1/36.718) Commission Decision 2000/475/EC [2000] OJ L187/47.
[182] Holmes (n 3) 375; Schinkel and Treuren (n 8) 3.

relevant product characteristic.[183] Additionally, the agreement was found to raise production costs for the manufacturers who previously produced the inefficient washing machines because they would need to change their production processes to account for new minimum standards.[184] The Commission noted that, in the short term, those manufacturers' product lines would be more expensive, thereby distorting price competition on the market.[185] Therefore, the agreement to prevent the parties from producing or importing categories of washing machines under energy labels D to G was found to have the object of restricting or distorting competition within the meaning of (now) Article 101(1) TFEU by impacting two competition parameters: choice and price.[186]

After identifying the restriction, the Commission assessed whether the agreement should be exempted by virtue of Article 101(3) TFEU. Significantly, the applicants invoke the agreement's environmental benefits.

4.1.1.2. Benefit and Fair Share to Consumers

The Commission's analysis starts by addressing the first two conditions of Article 101(3) TFEU. Individual economic benefits and collective environmental benefits are separately addressed in the decision. For the former, consumers were found to recoup the higher purchase costs derived from the stringent standards due to electricity bill savings after 9-40 months, depending on the frequency of washing and electricity prices.[187] Further, the Commission indicated that negatively affecting competition for one product dimension, energy consumption, might result in greater competition for other product characteristics, such as price.[188] The Commission did not explicitly indicate that these individual economic benefits fully compensated consumers but rather ambiguously concluded, 'Were these competition-enhancing effects to take place, the narrowing of the price range and the increase in average selling prices would be less pronounced than would otherwise be foreseeable.'[189]

For collective environmental benefits, CECED reported that the reduction of energy consumption and technical efficiency gains resulting from the agreement would reduce 3.5 million tons of CO2, 17,000 tons of sulfur dioxide, and 6000 tons of nitrous oxide per year in 2010.[190] The Commission observed that even though environmental damage should be rectified at the source, pursuant to (now) Article 191(2) TFEU, the Community objective of rational utilization of natural resources may apply to the CECED agreement as long as the economic benefits outweigh the costs and are compatible with competition rules.[191] To quantify the

[183] *CECED* (n 181) para 32, 33.
[184] *CECED* (n 181) para 34.
[185] Ibid para 34.
[186] Ibid para 37.
[187] Ibid para 52.
[188] Ibid para 53.
[189] Ibid para 54.
[190] Ibid para 47-51.
[191] TFEU (n 16) art. 91(2); ibid para 55.

pollution abatement benefits in economic terms, the Commission estimated the savings derived from avoided damage from CO2, sulfur dioxide, and nitrous oxide emissions, concluding:

> On the basis of reasonable assumptions, the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines.[192]

Consequently, the Commission concluded: in light of the sevenfold benefit-to-cost ratio (quoted above) *and* the return on investment for individual users, the agreement satisfied the first two conditions.[193]

4.1.1.3. Indispensability

After approving the first two conditions, the Commission analyzed whether there were less restrictive alternatives that would achieve similar reductions in energy consumption. The Commission considered three possible alternatives: an industry-wide target, information campaigns, and a greater focus on fulfilling EU eco-label criteria.

For the industry-wide target, the Commission rejected its application because it would have higher transaction and monitoring costs, and it may enable purchasers to reduce the system to what would effectively be a minimum standard.[194]

Information campaigns were deemed to be less effective than the standard set by the agreement for three reasons. First, the Community already had energy labels that communicated information on energy efficiency. Second, evidence suggests that 'external costs are not fully reflected in consumer's calculations when contemplating a purchase, the provision of information is not sufficient to realise the agreement's environmental benefits to their fullest possible extent.'[195] Finally, the information requirements in the agreement relating to the conditions on the use of the machine, allowing for further electricity reduction; thus, it is not a substitute but rather complementary to the standard.[196]

The eco-label was also found to be inapplicable because it awarded the most efficient machines, A and B categories, without any specific intention to target the least efficient machines, which were the focus of the agreement.[197] Therefore, it was deemed a complementary and reinforcing mechanism instead of a substitute.

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[192] *CECED* (n 181) para 56.
[193] Ibid para 57.
[194] Ibid para 60-61.
[195] Ibid.
[196] Ibid para 62.
[197] Ibid para 63.

4.1.1.4. No Elimination of Competition

The Commission determined that the agreement satisfied the final condition of Article 101(3) TFEU as there were other factors that impact purchase decisions, such as price, brand image, and technical performance.[198] In addition, there would still be competition between categories A to C and part of D, and between the firms who are not party to the agreement that will still import or produce the less energy efficient machines.[199] Therefore, the fourth condition was not a decisive factor.

4.1.1.5. Theoretical Considerations

Concerning Axis 1 for a formal CBA, the Commission integrated collective and out-of-market pollution abatement interests and quantified them in monetary terms. This reflects a welfare-maximizing CBA because climate change poses real dangers to human health, such as coastal flooding and extreme weather events.[200]

Green antitrust proponents point to the Commission's statement that the agreement's environmental benefits to society would satisfy the fair share condition 'even if no benefits accrued to individual purchases of the machines' as evidence that collective benefits could satisfy the fair share condition even if consumers accrue no direct benefits.[201] Despite the potential of the Commission statement, its normative basis should be relativized based on the reasoning of the entire decision. As shown above, the Commission stated that if the monetary benefits of an environmental agreement are *seven times* greater than the adverse price effects on consumers, then it would satisfy the second condition. And even in this context, the Commission still relied on the individual benefits to consumers to support the decision.[202] Therefore, it is not clear that there is legal precedent for the Commission to exempt an agreement that, say, produces collective benefits that are twice as much as the costs to individual consumers.

Recalling Axis 2, a precise CBA is one that makes a decision where marginal benefit equals marginal cost, or at least a precise comparison to ensure benefits exceed costs.[203] One could argue that from a welfare economics perspective, the Commission behaves as if a price increase to consumers would have *greater welfare effects* than an equal amount of savings from pollution abatement. This assumption should be revisited in light of the existential threat that climate change poses to our species. Therefore, the precision of the balancing approach in *CECED* falls on the informal end because it was not determined at any identifiable margin.

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[198] Ibid para 64.
[199] Ibid para 66
[200] Commission, 'Consequences of climate change' available at <https://climate.ec.europa.eu/climate-change/consequences-climate-change_en#:~:text=Climate%20change%20may%20aggravate%20erosion,temperatures%20and%20changing%20precipitation%20patterns.>.
[201] Holmes (n 3) 375; CECED (n 181) para 56
[202] *CECED* (n 181) para 57.
[203] Sinden (n 78) 109.

Concerning the indispensability condition, the Commission added multiple alternatives and effectively distinguished between complementary and substitutable alternatives. At the same time, the Commission did not quantify the options. Therefore, this interpretation translates to a moderate level for Axis 3 and informal for Axis 1.

4.1.2. Social Interest in *Metro* and *Ford/Volkswagen*

Social interests are a salient and often neglected element of sustainability. Pre-modernization,the Commission and CJEU considered social interests in an Article 101(3) TFEU assessment. This subsection will overview the extent of their integration by looking into two prominent cases: *Metro*[204] and *Ford/Volkswagen.*[205]

Beyond introducing the 'workable competition standard' described in Chapter 2, *Metro* included social interests within the meaning of the first condition of Article 101(3) TFEU. In the 1977 case, the CJEU was tasked to examine a Commission decision to exempt a selective distribution agreement instituted by Saba—a manufacturer of electronic consumer goods. The Court noted that the conclusion of supply contracts for six months would enable a stable supply of relevant products and thus establish supply forecasts which would constitute *a stabilizing factor with regard to the provision of employment.*[206] The Court ultimately decided in favor of the Commission's exemption decision and dismissed the application.[207]

Fifteen years later in *Ford/Volkswagen (1992)* the Commission exempted a joint venture to develop a multi-purpose vehicle in Portugal.[208] Beyond discernable efficiency gains, the Commission noted the 'extremely positive effects on the infrastructure and employment in one of the poorest regions in the Community' which helped determine that the notified agreement fulfilled the four conditions of Article 101(3)TFEU. [209] However, on appeal to the General Court, neither the Commission nor the General Court elaborated on the role of employment interests in its decision.[210]

Despite their mention in the 101(3) TFEU assessment, the Commission and CJEU only used social interests as an ancillary, supporting argument to back efficiency gains found in the first exemption condition during pre-modernization. Neither case explicitly quantified the social benefits.

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[204] Case C-26/76 *Metro v Commission* EU:C:1977:167.
[205] *Ford/Volkswagen* (Case IV/33.814) Commission Decision 93/49/EEC [1193] OJ L20/14.
[206] *Metro* (n 203) para 43 (emphasis added).
[207] Ibid para 50-51.
[208] *Ford/Volkswagen* (n 204) para 1.
[209] Ibid para 23.
[210] Case T-17/93 *Matra Hachette SA v Commission* EU:T:1994:89.

4.2. Interpretive Practice of the Dutch Autoriteit Consument & Markt

As observed in Chapter 2, the modernization of EU competition law decentralized the enforcement of Article 101(3) TFEU and shifted towards an economic approach grounded in the consumer welfare standard. However, increasing concerns about climate change and human rights coupled with NCAs newfound ability to apply Article 101(3) TFEU has created diverging interpretive practices across the Union.[211] The ACM is one of the foremost national competition authorities in the context of green antitrust.[212] To understand the ACM's approach to balance sustainability interests, Section 4.2.1 and Section 4.2.2 will briefly overview two landmark cases in early NCA green antitrust, followed by a detailed look at the ACM Sustainability Agreements Guidance Document.

4.2.1. Coal-Fired Power Plants

In 2013 Energie Nederland, a Dutch energy industry trade association, instituted an agreement to close down five heavy emitting coal-fired power plants built in the 1980s.[213] The reasoning found in the ACM decision is as follows.

After finding that the agreement would create anticompetitive effects due to the upward pressure on energy prices due to the phase-out, the ACM sought to evaluate whether the agreement's positive effects would offset the price increase. The ACM recognized that environmental benefits resulting from clean energy constituted a benefit under the first condition; however, the ACM only considered NOx and SO2. CO2 abatement was excluded from the assessment because it was deemed to have effectively no benefit—it would simply free up credits under the EU Emissions Trading System (ETS) which would be used elsewhere.[214]

The benefits of the agreement were determined using the costs of other (efficient) measures that would not have to be taken—i.e. avoided costs. Using this method, the total benefits of the agreement amounted to EUR 180 million for the entire period (up to 2022).

The negative price effects of the agreement were derived from an estimated average wholesale price increase of 0.9 percent for the period of 2016—2021, and its corollary impact on business and private consumers in the Netherlands.

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[211] For a more detailed account of the balancing practices, see Brook (n 19) 293, 309.
[212] The ACM is also responsible for consumer protection; Malinauskaite (n 22) 344.
[213] ACM, 'Analysis by the Netherlands Authority for Consumers and Markets (ACM) of the Planned Agreement on Closing Down Coal Power Plants from the 1980s As Part of the Social and Economic Council of the Netherlands' SER Energieakkoord (ACM Coal-Fired Power Plants)' (2013) available at https://www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf.
[214] Ibid 4.

The ACM estimated the total increase in electricity costs amounted to EUR 450 million for the entire period, over EUR 270 million more than the benefits, and thus concluded that the fair share condition of Article 101(3) TFEU was unfulfilled and rejected the agreement. Of course, the outcome of this case may have been different if CO2 emissions were considered in the calculation.[215]

4.2.2. Chicken of Tomorrow

In 2015, the ACM assessed the 'Chicken of Tomorrow' sustainability agreement between producers and retailers which aimed to completely replace regularly-produced broiler chicken meat by 2020.[216] As broiler chicken meat was part of a standard product range of supermarkets, the ACM found that this industry wide agreement increased prices and reduced consumer choice. Therefore, it was deemed to be anticompetitive within the meaning of Article 101(1) TFEU.

Under the Article 101(3) analysis, the ACM analyzed the costs and benefits of the agreement, considering animal welfare, the environment, and public health. As these factors may be difficult to quantify, the ACM determined the benefits based on 'how much value consumers attach to the measures for the improvement of animal welfare of broiler chickens.'[217] Through surveys, the ACM determined that consumers would be willing to pay .82 euro per kilo more than the status quo; yet, the additional costs to consumers amounted to a price increase of 1.46 euro per kilo. As a result, the ACM rejected the agreement.

Interestingly, a retrospective five years after the ACM's decision reveals that the quality of chicken sold in Dutch supermarkets is now at a higher level than the standard set by the 'Chicken of Tomorrow Agreement.'[218]

4.2.3. ACM Sustainability Agreement Guidelines

In 2021 the ACM released the second draft version of the Guidelines on Sustainability Agreements (ACM Guidelines).[219] The ACM Guidelines intend to inform undertakings of the opportunities permissible sustainability agreements present and where competition law draws the line. In addition, the ACM Guidelines intend to contribute to the normative development

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[215] Schinkel and Treuren (n 8) 8-9.
[216] ACM, 'ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow (Chicken of Tomorrow)'(2015) available at <https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow>.
[217]Ibid 1.
[218] ACM, 'Welzijn kip van nu en 'Kip van Morgen'' (2020) available at <https://www.acm.nl/sites/default/files/documents/2020-08/welzijn-kip-van-nu-en-kip-van-morgen.pdf>.
[219] ACM, 'Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law (ACM Guidelines)' (2021) available at <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf>.

of EU competition law—recognizing that the Dutch market cannot correct negative externalities by itself.[220]

The following will explain the ACM's interpretation of the Article 101(3) TFEU exemption conditions in the context of sustainability agreements.[221] The ACM notably considers out-of-market benefits and adopts a flexible interpretation of the fair share condition for environmental damage agreements.

4.2.3.1. Types of Sustainability Agreements

The ACM defines a sustainability agreement as 'any agreements between undertakings, as well as any decisions of associations of undertakings, that are aimed at the identification, prevention, restriction or mitigation of the negative impact of economic activities on people (including their working conditions), animals, the environment, or nature.'[222] There are two subcategories of a sustainability agreement: environmental damage agreements and other sustainability agreements.

4.2.3.1.1. Environmental Damage Agreements

An environmental damage agreement aims to address negative externalities. It considers benefits beyond individual consumers and stipulates that consumers do not need to be fully compensated for the harm the agreement causes because 'their demand for the products in question essentially creates the problem for which society needs to find solutions.'[223] The ACM connected this notion to the polluter pays principle.[224]

The conditions to establish an environmental damage agreement are twofold. First, it must concern the reduction of environmental damage resulting from negative externalities, such as harmful air pollutants or raw material waste, resulting in the more efficient use of scarce natural resources (common resources).[225] Second, it must efficiently contribute to an international or national standard (to which the undertakings are not bound) or to a concrete policy objective.[226]

The benefits of environmental damage agreements are expressed in monetary terms using environmental prices, that is, the value that society assigns to the harm of the environmental damage.[227] The ACM identifies two pricing methods: *prevention costs* if the environmental

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[220] OECD, 'Summary of Discussion of the Hearing on Sustainability and Competition' (2022) DAF/COMP/M(2020)2/ANN1/FINAL, 8.
[221] This work will refer to Article 101(3) TFEU notwithstanding the equivalent national counterpart 6(3) Mw.
[222] ACM Guidelines (n 218) para 7.
[223] Ibid para 8, 36.
[224] ACM, 'What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?' (2021) available at <https://www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf>, 5.
[225] ACM Guidelines (n 218) para 8.
[226] Ibid para 48.
[227] Ibid para 58.

price is set to realize a concrete policy objective and *damage costs* if it is directly based on damage that a certain production or consumption causes humans and the environment.[228] Interestingly, a recent no-action letter from the ACM revealed that environmental damage agreements qualify for the rule that undertakings with a combined market share below 30% only require a qualitative assessment.[229]

The ACM Guidelines provide an example of how the regulator can exempt an environmental damage agreement even if it does not fully compensate consumers.[230] The case example concerns an agreement between five producers to make their manufacturing processes completely carbon-neutral within five years. The undertakings do not fall under the EU Emissions Trading System (ETS) and have a market share of over 30%. The ACM calculated the agreements' benefit using prevention costs. Ultimately, the ACM exempted the agreement because the total benefits to Dutch society outweighed the costs, notwithstanding that the benefits realized by consumers in the relevant market were not enough to offset the price increase.

However, it should be noted that the ACM's interpretation of the fair share condition in the Guidelines is no different from the 2013 Coal-Fired Power Plant case because, in the latter, the parties were subject to the EU ETS. The ACM assumes that the EU ETS and sustainable agreements between undertakings that are subject to the ETS and result in CO2 reduction are substitutes rather than complementary. However, given that this interpretation effectively discourages firms from reducing CO2 emissions beyond what is required by the ETS, further research should investigate whether any non-offset benefits can be achieved from these types of agreements, such as reducing emissions faster than expected, or whether a mechanism within the ETS could align the respective approaches.

4.2.3.1.2. Other Sustainability Agreements

'Other sustainability agreements' do not fulfill the conditions of an environmental damage agreement.[231] These agreements concern animal welfare, working conditions, social sustainability, and human rights; they must provide consumers full compensation.[232]

The ACM Guidelines endorse revealed and stated preferences to determine how much consumers value a sustainability agreement.[233] The ACM Guidelines provide a case example of an agreement between five pig slaughterhouses to improve the living conditions of the

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[228] Ibid para 58; for more information on quantifying environmental benefits in a CBA see: OECD, 'Environmental cost-benefit analysis: Foundations, stages and evolving issues' (n 38) 31-45.
[229] ACM Guidelines (n 218) paras 55-56; ACM 'No action letter agreement Shell and TotalEnergies regarding storage of CO2 Northsea' available at <https://www.acm.nl/system/files/documents/no-action-letter-agreement-shell-and-totalenergies-regarding-storage-of-co2-northsea.pdf>.
[230] ACM Guidelines (n 218) para 58.
[231] ACM Guidelines (n 218) para 49. These agreements pursue an environmental standard but go beyond the policy objective.
[232] Ibid para 50.
[233] Ibid para 61–62.

pigs.[234] In the assessment under Article 101(3) TFEU, however, the consumer willingness to pay for an increase in 'animal friendliness' did not outweigh the price increase to consumers and was therefore rejected. The pig slaughterhouse example resembles the outcome in the aforementioned Chickens of Tomorrow case.[235]

Interestingly, the ACM Guidelines also mention a category of sustainability agreements which focus on ensuring compliance with national or international standards for doing business in countries outside Europe, particularly in developing countries.[236] The Guidelines explain undertakings can institute minimum levels of protection in areas where internationally recognized standards are not upheld through CSR covenants. These covenants often concern child labor, livable wages, the right to unionize, protecting natural resources, and establishing fair trade rules.[237] If a CSR covenant directly transposes the international standard, then it will not fall under the general cartel prohibition. If the CSR covenant involves compliance with standards that go beyond international norms or where the binding effect within the Dutch legal system is unclear, then the Guidelines stipulate it is necessary to carry out an assessment under Article 101(3) TFEU.[238]

4.2.3.2. Indispensability and No Elimination of Competition

The third and fourth conditions do not significantly deviate from the traditional interpretation derived from the Article 101(3) Guidelines. Agreements must be cost-efficient and, in principle, there is no difference between environmental damage agreements and other sustainable agreements. For the former, however, the costs of any measures cannot exceed the costs to users for any upcoming measure with any similar sustainability objective.[239] The ACM also invites undertakings to contact the ACM with questions about the interpretation of the document in order to find possible solutions and identify options.[240]

4.3. 2023 Horizontal Guidelines

The 2023 EU Horizontal Guidelines (HG) contain a section expressly dedicated to sustainability agreements. As described in Chapter 1, the HG defines a sustainability agreement as 'any horizontal cooperation agreement that pursues a sustainability objective, irrespective of the form of cooperation.'[241] Unlike the ACM Guidelines, the HG definition does not reference specific environmental or social initiatives, nor does it differentiate between specific types of sustainability agreements. Furthermore, HG stipulates that consumers must receive a fair share

[234]Ibid para 62.
[235]Chickens of Tomorrow (n 215).
[236] ACM Guidelines (n 218) para 27.
[237] Ibid 28-29.
[238] Ibid para 29.
[239] Ibid para 67.
[240] Ibid para 71.
[241] For more discussion on definitional issues, see Roman Inderst and Stefan Thomas, 'Sustainability Agreements in the European Commission's Draft Horizontal Guidelines' (2022) 13(8) Journal of European Competition Law and Practice 571, 572.

of the benefits from the agreement 'so that the overall effect on consumers in the relevant market is at least neutral.'[242] As discussed below, this interpretation results in a different allocation of benefits compared to the ACM. The following will describe the Commission's interpretation of the exemption conditions, focusing on efficiency gains, fair share, and indispensability.

4.3.1. Efficiency Gains and Fair Share

Akin to the ACM Guidelines, efficiencies must be objective, concrete, and verifiable.[243] There are three types of benefits the Commission takes into consideration: individual use value benefits, individual non-use value benefits, and collective benefits.

Individual use value benefits are the benefits that result from the actual use of the product and directly improve the consumer's experience of the product in question.[244] For example, replacing plastic with more durable, expensive material will increase the longevity of a product, thereby increasing quality.[245] If these benefits to consumers outweigh the harm caused by a price increase, consumers will be compensated, and the second condition will be fulfilled.

Individual non-use value benefits consist of the 'indirect benefits resulting from consumers' appreciation of the impact of their sustainable consumption of others.'[246] For instance, consumers may be willing to pay a higher price for furniture made from sustainable wood not for the quality improvement but because they want to stop deforestation and the loss of natural habitats.[247] The HG suggests using stated preference approaches to quantify these qualitative benefits, such as willingness to pay surveys.[248] Further, the HG advises that surveys should include sufficient social context to avoid discrepancies between consumer purchasing behavior and actual preferences.[249] The second condition will be satisfied if consumers' stated preferences outweigh the negative effects.

Significantly, the HG includes collective benefits. These benefits 'occur irrespective of the consumers' individual appreciation of the product and accrue to a wider section of society than just consumers in the relevant market.'[250] The HG provides that collective benefits may only fulfill the fair share condition if consumers in the relevant market *substantially overlap with, or form part of the group of beneficiaries outside the relevant market.* For example, drivers purchasing less polluting fuel are citizens who benefit from clean air; therefore, the fair share

[242] 2023 EU Horizontal Guidelines (n 14) para 569.
[243] Ibid para 559.
[244] Ibid para 571.
[245] Ibid para 572; Quality improvements are in line with a circular economy, see, for example, OECD, 'Competition in the Circular Economy' (2023) OECD Competition Policy Roundtable Background Note available at <https://www.oecd.org/daf/competition/competition-in-the-circular-economy-2023.pdf>.
[246]2023 EU Horizontal Guidelines (n 14) para 575.
[247] Ibid para 576.
[248] Ibid para 578.
[249] Ibid para 579.
[250] Ibid para 582.

condition will likely be established because there is substantial overlap.[251] On the other hand, if firms procure sustainable cotton that uses fewer fertilizers and less water on the land where the cotton is cultivated, it will not satisfy the obligation of 'substantial overlap' because the consumers in Europe are not the beneficiaries of the agreement—instead it is the foreign workers.

More specifically, the Commission dictates four conditions for collective benefits to be taken into account: (1) the parties must be able to clearly identify the benefits and provide evidence they have already occurred or are likely to occur, (2) clearly define the beneficiaries, (3) demonstrate that consumers in the relevant market substantially overlap with the beneficiaries or form part of them, and (4) demonstrate that the share of the collective benefits that occurs to the consumers in the relevant market, along with use and non-use value benefits to consumers, outweighs the harm suffered by those consumers as a result of the restriction.[252] As the fourth condition stipulates that only the 'share' of collective benefits going to consumers are the benefits that can outweigh the harm, then the amount of collective benefits added to the analysis depends on the proportion of overlap between the consumer class and total benefits. Figure 4 illustrates the distinction below.

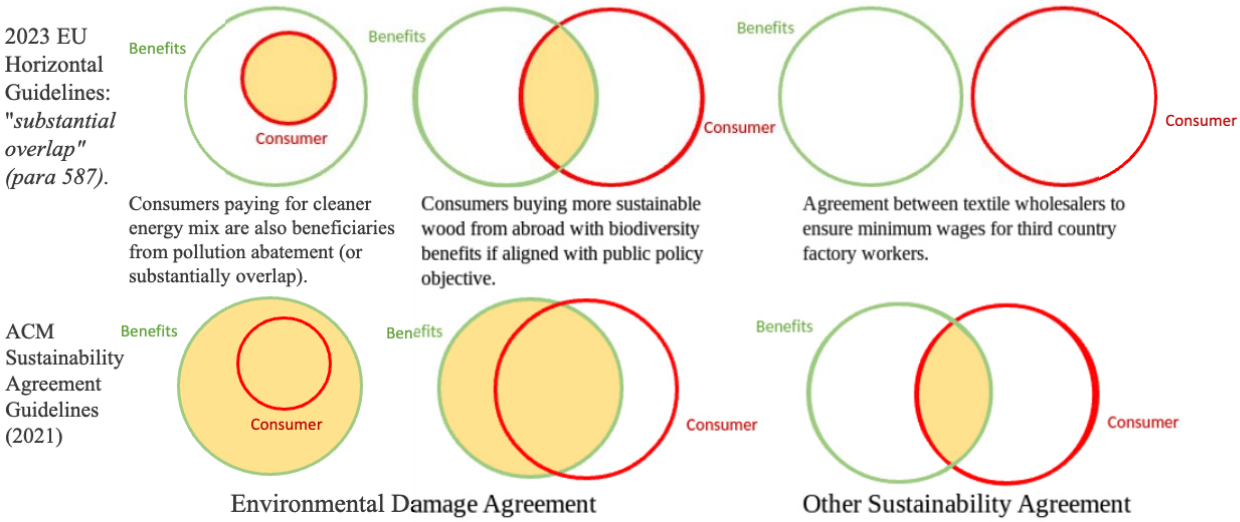

Figure 4: Comparison of 2023 Horizontal Guidelines and ACM Sustainability Agreements Guidance Document[253]

B represents the total benefits of the agreement, C represents the consumer class, and the yellow shaded area represents the benefits that each respective competition authority considers in its analysis of whether the costs outweigh the benefits. The ACM environmental damage agreements include more benefits than the HG counterparts. The top rightmost figure illustrates that if there is no overlap between benefits and consumers, the fair share condition will not be

[251] Ibid para 585.
[252] Ibid para 587.
[253] Inspired by Maurits Dolmans and Wanjie Lin, 'EU adopts antitrust guidelines for sustainability agreements' (2023) Clearly Antitrust Watch available at <https://www.clearyantitrustwatch.com/2023/06/eu-adopts-antitrust-guidelines-for-sustainability-agreements/>.

fulfilled according to the HG. The lower rightmost figure depicts the ACM's fair share interpretation of other sustainability agreements—it is no different from the EU Horizontal Guidelines.

4.3.2. Indispensability

The 2023 HG provides that negative externalities are best addressed through public policy and regulation.[254] Therefore, undertakings cannot institute cooperation agreements to simply comply with an existing EU or national law that has a sustainability objective because each undertaking is already obliged to comply with the initiative individually. Following this general rule, the HG provides three situations where agreements may fulfill the indispensability criterion.

First, an agreement may be indispensable 'if not all aspects of a market failure are addressed by regulation, leaving residual scope for cooperation agreements.'[255] For example, undertakings may institute an agreement that sets a higher standard than the one set by regulation. Second, sustainability agreements may be indispensable if they reach the goal in a more cost-efficient manner or more quickly.[256] Third, the HG re-states the former general situations by way of three examples of cooperation agreements that cannot be achieved through the free interplay of market forces: to avoid free-riding on investments at the initial phase of a project, to achieve economies of scale, and to align incentives of the parties.[257]

4.4. Conclusion

Competition authorities' treatment of sustainability interests vis à vis competitive restraints has varied across enforcement eras and between enforcement agencies.

During the pre-modernization, the Commission was open to non-competition interests, such as pollution abatement in *CECED* or employment in *Metro* and *Ford/Volkswagen.* However, these decisions do not offer a defensible legal basis for contemporary green antitrust because sustainability interests were either veiled in individual benefits despite being seven times greater than the price increase to consumers, or left ancillary to the main decision.

After modernization, the Dutch ACM sparked green antitrust through the Coal-Fired Power Plants (2013) and Chickens of Tomorrow (2014) decisions. In the former, the ACM omitted CO2 emissions from the assessment due to the EU Emissions Trading System. In the latter, the ACM determined consumers' willingness to pay for animal welfare did not exceed the resulting price increase and thus determined that the Article 101(3) TFEU conditions were not fulfilled.

[254] Ibid para 564.
[255] Ibid para 565.
[256] Interestingly, speed was only added in the latest version of 2023 EU Horizontal Guidelines (n 14) para 565.
[257]Ibid para 562.

Therefore, the ACM considered sustainability benefits in both cases, but rejected them nonetheless.

Almost a decade later, the ACM published the second version of its draft Sustainability Agreement Guidelines. The ACM Guidelines introduced 'environmental damage agreements' which receive a flexible interpretation of the fair share condition if it contributes to (1) more efficient use of scarce natural resources and (2) an international or national standard to which the undertakings are not bound. Therefore, agreements related to animal welfare, human rights, fair wages, and other elements of social sustainability must provide full compensation to consumers in the relevant market.

The 2023 Horizontal Guidelines adopt a narrow interpretation of the fair share condition by requiring full compensation to consumers in all cases. Even though the HG recognizes that collective benefits may accrue to consumers, there must be substantial overlap between the consumer class and the beneficiaries. As illustrated by Figure (x), the actual amount of benefits under consideration differs between ACM environmental damage agreements and sustainability agreements under the EU Horizontal Guidelines. Compared to the Commission, the ACM adopts a more encompassing balancing approach for environmental interests, while social interests still lag for both enforcement agencies—especially if the benefits are realized abroad.

Chapter 5

Analysis, Policy Recommendations, and Limitations

To what extent does the 2023 Horizontal Guidelines balancing approach align with a formal, economic cost-benefit analysis? What policy recommendations overcome these discrepancies?

The previous Chapter discussed the historical and contemporary Article 101(3) balancing approaches. This Chapter analyzes where they fall on the cost-benefit analysis formality spectrum by comparing the previously identified green antitrust decisions with respect to quantification and monetization, precision, and number of alternatives. Building on these findings, policy recommendations are directed towards the Commission to more effectively distinguish between disguised cartels and genuine sustainability agreements. Finally, this Chapter concludes by discussing the limitations of the research.

5.1. Analysis and Policy Recommendations

Table 3 compares the green antitrust decisions from the Commission, European Court of Justice, and Dutch ACM using Sinden's (2015) formality CBA framework described in Chapter 2.[258]

Primary Source/Era	Facts	Outcome	Quantification	Precision	Alternatives
Pre-Modernization					
CECED (1999)	Agreement between appliance manufactures to phase out least energy efficient washing machine models.	Article 101(3) exemption **accepted**.	**Moderate:** use of environmental damage costs. Indispensability alternatives not quantified.	**Informal:** collective benefits significantly outweighed costs, yet still reliance on consumer benefits.	**Moderate:** Considered three alternatives in depth. Plus status quo.
Metro I (1979) & *Ford/Volkswagen* (1992)	Consideration of employment interests, but ancillary to main efficiency gains.	Article 101(3) exemption **accepted**.	**Informal:** not quantified or monetized.	N/A	N/A
Dutch ACM					
Coal Fired Power Plants (2013)	Phasing out coal fired power plants from the 1980s; CO2 emission reduction ignored due to ETS; costs to consumers in higher energy prices exceeded benefits of NOx and SO2 abatement.	Article 101(3) exemption **rejected** for failing to fulfill efficiency gains and fair share condition.	**Formal**: collective pollution abatement benefits quantified and monetized, along with energy price increase to consumers.	**Formal:** compared the benefits, 180 million euro, to the costs 450 million euro.	**Informal:** only the status quo is considered in detail.
Chickens of Tomorrow (2014)	Agreement between producers and retailers to completely replace broiler chicken meat by 2020; consumer willingness to pay for animal welfare (82 eurocent) compared to 1.46 (euro) cost to consumers.	Article 101(3) exemption **rejected** for failing to generate net benefits to consumers (efficiency gains and fair share).	**Formal**: benefits quantified and monetized using willingness to pay survey, while costs to consumers assessed considering price increase.	**Moderate:** the .82-euro benefit was precisely compared to the 1.46-euro price increase to come to the decision.	**Informal:** only the status quo is considered in detail.
ACM Sustainability Agreements Guidelines (2021)	Introduces distinction between environmental damage agreement and other sustainability agreement.	N/A	N/A	N/A	N/A

[258] *CECED* (n 181)*; Metro* (n 203); Ford/Volkswagen (n 204); ACM Coal-Fired Power Plants (n 212); Chicken of Tomorrow (n 215); ACM Guidelines (n 218); 2023 EU Horizontal Guidelines (n 14)

Soda Companies (2021)	Several soda companies and suppliers of packaging materials agree on promoting cardboard packaging. Modest and temporary increase in price for buyers. Sufficient remaining competition in market. Plus, consumers have preference for reducing packaging waste.	Article 101(3) exemption **accepted** without requiring a quantitative assessment.	**Informal:** benefits assumed to outweigh costs without need to quantitative assessment.	**Informal:** costs and benefits roughly compared due to no quantification.	**Informal:** only the status quo is considered in detail.
Semi-Finished Product (2021)	Agreement between five producers of a product sold in the NL to make their manufacturing process completely carbon-neutral within five years. Not subject to ETS.	Article 101(3) exemption **accepted** based on collective (Dutch) benefits generated from agreement, would not have been accepted if only considering consumer benefits.	**Formal**: Price increase to consumers and pollution abatement benefits in prevention costs are quantified and monetized.	**Moderate:** the total benefits of the agreement are compared to the total costs are used in the calculation to determine the outcome.	**Informal:** only the status quo is considered in detail.
Pig Slaughterhouse (2021)	Pig slaughterhouses want to make a market-wide agreement in which they only offer pork that has certain 'green' features. Large market share coverage (80%); 10 years for benefits.	Article 101(3) exemption **rejected** because willingness to pay assessment revealed consumers were willing to pay less for animal friendly meat compared to the price increase.	**Formal**: percentage price increase to consumers compared to willingness to pay increase in monetary terms.	**Moderate:** the willingness to pay 3% was precisely compared to the 5-10% increase in price across a 10-year period.	**Moderate:** a handful of alternatives were mentioned, but only status quo in depth.
2023 Horizontal Guidelines.					
Fair Clothing Label	An agreement between clothing retail chains to purchase clothing from producers in developing countries that respect minimum wage levels. The wage of textile workers increased on average by 20% and more nutritious food and healthcare have a positive effect on productivity. The increase price at which parties sell the shirt is at most 1.5-2%.	Based on the estimates for the effect on price, it can be concluded that the Fair Clothing agreements are unlikely to have appreciable negative effects for customers of the parties to the agreements and are therefore **not caught by Article 101(1).**	**Moderate:** price increase estimated generally along with general estimation of wage increases; other benefits such as healthcare and nutritious food left unquantified.	**Informal**: decision based on rough estimate of costs and benefits.	**Informal:** only the status quo is considered in detail.
Recommended Fat Levels	Major manufacturers of processed foods in the same MS agree to set. recommended fat levels for the products, coupled with a national advertising campaign. Reduction in consumer choice.	Unlikely to restrict Article 101(1); if need for assessment under Article 101(3), then **will likely satisfy conditions** because the benefits for consumers in terms of information and health effects outweigh harm of reduction of choice.	**Informal:** benefits of health and information and decrease in consumer choice left quantified.	**Informal:** decision based on rough estimate of costs and benefits.	**Informal:** only the status quo is considered in detail.
Energy Efficient Washing Machines	Producers covering almost 100% of washing machine market decide to phase out least energy efficient washing machine models. It affects competition between competitors depending on their product mix, consumer choice, average purchase cost. However, consumers recoup the purchase price within one or two years, and there are environmental benefits from the reduction of electricity and water use.	Agreement **likely satisfies Article 101(3)** conditions because it passes the indispensability test and "consumers in the relevant market derive a net benefit as a result of the individual use value benefits and the collective environmental benefits."	**Moderate:** price increase to consumers and pollution abatement and energy/water savings partially quantified; indispensability alternatives unquantified.	**Moderate:** consumers in relevant market deemed to derive a net benefit as a result of the individual use value benefits and collective environmental benefits. Not all benefits expressed in monetary terms, however.	**Moderate:** Mentions two alternatives. Plus status quo.

5.1.1. Quantification and Monetization

As identified in Chapter 2, the proximity of the Article 101(3) TFEU balancing approach to a formal CBA depends on the extent to which sustainability benefits are considered under the first condition, whether they are quantified, and how they are measured. Additionally, the regulators' interpretation of what constitutes fair share to consumers impacts how much of the agreements' total benefits become relevant in the balancing assessment.

5.1.1.1. Problem

It is well-known at this point that environmental benefits are more straightforward to quantify in monetary terms than social benefits. Table 3 indicates that environmental agreements are more likely to be exempted; however, the veracity of this finding likely requires further empirical support.[259] In *CECED*, pollution abatement was quantified in terms of environmental damage costs, while later in 'Energy Efficient Washing Machines' the Commission mentions pollution abatement benefits but does not clarify how it is quantified. The ACM uses prevention costs in the 'semi-finished product' example.

Following modernization, Table 3 reveals that the quantification and monetization of social benefits has improved through stated preference studies, such as willingness to pay in the ACM Chickens of Tomorrow and 'Pig Slaughterhouse' cases; yet, it appears that the more formal exemption cases are less successful than the ones where they are left unquantified and roughly compared.[260] Given the novelty of using stated preference surveys under Article 101(3) TFEU, it cannot be decisively concluded that qualitative descriptions of social benefits are more likely to achieve an exemption compared to WTP surveys. Nevertheless, plenty of research has indicated that stated preference surveys may not reflect consumers' complete willingness to pay for sustainable products.[261] For example, consumers may discount the detrimental effects that a decision poses to future generations because the consequences do not directly affect them: 'making the choice between bearing an individual cost today and contributing to individual and collective benefit in the future is a complex assessment.'[262] Furthermore, consumers may use heuristics to reduce the processing of information to only a couple of parameters, with price generally standing out.[263] Moreover, research indicates that willingness to pay surveys can have markedly different results depending on the employed research method.[264]

Time is a critical component when quantifying benefits and sustainable development includes the well-being of future generations by definition.[265] *CECED,* 'Pig Slaughterhouse', and 'Semi-Finished Product' all quantify the agreement's benefits across a time dimension. Interestingly, even though the ACM Guidelines and HG mention future generations in the boilerplate sustainability discussion, only the HG explains that 'the value of future benefits must be appropriately discounted.'[266] However, the HG only references the Article 101(3) Guidelines which provides that future benefits must be discounted from the present value without further explanation on how this can be accomplished in practice.[267] It is problematic that these

[259] Pre-modernization, environmental exemptions appear to be more prevalent than social exemptions but the difference is marginal see, for example, Figure 3.3 in Brook (n 19) 103.
[260] cf Chicken of Tomorrow (n 215), Pig Slaughterhouse, Fair Clothing Label, Recommended Fat Levels.
[261] Volpin (n 77); Dolmans 'Sustainable Competition Policy' (n 5) 8.
[262] Christina Volpin (n 77) 3.
[263] Ibid.
[264] OECD, 'Subjective well-being valuation' in *Cost-Benefit Analysis and the Environment: Further Developments and Policy Use* (OECD Publishing Paris 2018) 179.
[265] *Our Common Future* (n 50).
[266] 2023 EU Horizontal Guidelines (n 14) para 591.
[267] Article 101(3) Guidelines (n 114) para 87, 88.

approaches are not thoroughly described because undertakings cannot self-assess their agreements accurately.

The fair share condition effectively stands in the way of realizing benefits derived by the agreement because it excludes benefits realized by beneficiaries who are not consumers in the relevant market. The ACM Guidelines notably work around this shortcoming by determining that consumers receive adequate compensation for environmental damage agreements. Unfortunately, the HG endorse a narrow reading of the condition. One could argue that this interpretation is a setback for sustainable development because it perpetuates a confrontational dynamic between industry and public authorities, disregarding the potential of the private sector to address negative environmental externalities.[268] Furthermore, it carries the question of whether the Dutch ACM's interpretation conforms with EU law.

The Commission's sluggish integration of sustainability is further evident when comparing *CECED* (1999) to the 'Energy Efficient Washing Machine' (2023) case example. Concerning the former, the Commission stated that environmental benefits to society would satisfy the fair share condition 'even if no benefits accrued to individual purchases of the machines.'[269] Even though Chapter 3 has criticized the characterization of this paragraph as the legal basis of green antitrust, the 'Energy Efficient Washing Machine' example arguably adopts an *even less* progressive interpretation because it makes no mention of such a clause and adds more benefits to consumers than the original decision—such as efficient water use—to justify the exemption.

In sum, the cases and interpretations within the 2023 Horizontal Guidelines rank relatively high on the formality spectrum for quantification and monetization. This is preferable to achieve a formal CBA; however, it is problematic that (1) out of market benefits are excluded and (2) measurement methods are not expounded thoroughly.

5.1.1.2. Policy Recommendations

How can the Commission effectively quantify and monetize interests? If material benefits are excluded from a cost-benefit analysis, Sinden (2015) suggests that the assessment could fail entirely.[270] Unilever has termed the Commission's approach as 'polluter-must-benefit principle'.[271] Although mildly exaggerated, a narrow interpretation of the fair share condition raises valid questions about who should be paying for pollution.[272] To overcome this problem, the Commission should adopt a flexible interpretation of the fair share condition for

[268] Peter Buckley and Peter Liesch, 'Externalities in global value chains: Firm solutions for regulation challenges' (2022) 13(2) Global Strategy Journal 420.
[269] *CECED* (n 181) para 56,
[270] Sinden (n 78) 116.
[271] Unilever, 'European Commission Consultation on Draft Horizontal Cooperation Guidelines: Unilever Response on Sustainability Agreements' (2022) available at <https://www.unilever.com/files/24af84a6-ac65-4097-ae19-64100ff61aa7/unilever-response-to-hgl-sustainability-chapter-consultation.pdf>.
[272] Maurits Dolmans, 'The "polluter Pays" Principle as a Basis for Sustainable Competition Policy' in Simon Holmes, Martijn Snoep, and Dirk Middelschulte (eds), *Competition Law and Environmental Sustainability* (Concurrences 2020).

environmental damage agreements insofar as the benefits are quantified and monetized accurately. This interpretation would be in line with the ACM Guidelines and uphold the EU's status as a global leader on climate and environmental measures.[273] Furthermore, it would prevent CBA failure by including all relevant benefits in the decision-making process.

Concerning social sustainability, the Commission should promote workers' rights abroad. A 2021 ILO study found that 27.6 million persons were subject to forced labor, mostly imposed by private actors in low-income regions.[274] A similar 2014 ILO study revealed that forced labor is profitable—amounting to almost 50 billion per year for developed economies.[275] Therefore, private actors operating internationally, many who serve European end-consumers, play a role in perpetuating these systemic issues. However, the private sector also has the power to overcome this problem. The EU HG should make clear that undertakings can collectively work towards eliminating first-mover disadvantage for workers' rights violations abroad. For example, the EU HG could adopt the approach found in ACM Guidelines which provides that undertakings can institute sustainability agreements that comply with recognized CSR covenants.[276] Further, the Commission could even greenlight sustainability agreements that ensured the minimum level of the fundamental rights found in their home country insofar as the agreement satisfies a strict indispensability test. These interpretations of environmental and social agreements would help integrate the agreement's total benefits into the assessment under Article 101(3) TFEU.

Sinden (2015) also suggests that it is crucial to measure the benefits accurately.[277] Even though WTP is an excellent tool to monetize and quantify social benefits, the Commission should further inform undertakings about how these surveys can be conducted and the weight of their benefits in the Article 101(3) TFEU assessment—WTP and its drawbacks are only briefly mentioned in the HG.[278] Furthermore, the Commission could explore more encompassing stated preference approaches such as collective willingness to pay.[279] In any case, the WTP approach does not have to be perfect if it is coupled with other evaluative techniques.[280] For instance, the HG should clarify the role of discount rates in relation to the fair share condition and produce guidelines to inform undertakings how they can be measured under Article 101(3)

[273] Commission, 'The European Green Deal' COM (2019) 640 final.
[274] ILO, 'Global Estimates of Modern Slavery: Forced Labour and Forced Marriage' (2022) available at <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_854733.pdf> 25-29.
[275] ILO, 'Profits and Poverty: The economics of forced labour' (2014) available at <https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_243027.pdf>.
[276] ACM Guidelines (n 218) 28-29.
[277] Sinden (n 78) 152.
[278] 2023 EU Horizontal Guidelines (n 14) para 578-581.
[279] Roman Inderst and Stefan Thomas, ‘'The Scope and Limitations of Incorporating Externalities in Competition Analysis within a Consumer Welfare Approach' (2022) CEPR Discussion Paper No. DP16879.
[280] For example, a WTP survey formulated too broadly might measure *all* externalities rather than just the residual ones left after taxes: Roman Inderst and Stefan Thomas, 'Measuring Consumer Sustainability Benefits' (2021) CEPR Discussion Paper No. DP16903, 8.

TFEU.[281] Furthermore, scholars have even advocated for using composite indicators that account for value beyond price, such as a capabilities and human welfare approach.[282] Lastly, the Commission could give guidance on how contributing to the measurable SDG targets relates to the fair share condition.[283]

5.1.2. Precision of the Balancing Test

Axis 2 dictates that competition authorities must adopt a precise balancing test: decisions must be based on whether the agreements' benefits outweigh the costs at the margin. As observed above, the environmental benefits in *CECED* outweighed the negative price effects sevenfold, and yet, the individual benefits to consumers were necessary to exempt the agreement. As such, the fair share condition also impacts the fulcrum or 'tipping point' where the proportion of benefits to costs is sufficient to trigger a decision. To move towards a welfare enhancing CBA, the test should predicate decision-making on whether benefits exceed costs in net.

Following modernization, Table 3 indicates that the precision of the balancing test has become formal for agreements when the benefits are quantified—using either environmental pricing or stated preference surveys—and informal when an agreement is deemed to not require quantification. Even though it appears that the decisions with formal precision rankings are more likely to be rejected, this is likely due to the general rule that only the most appreciable restrictions to competition require a quantitative assessment, presumably to avoid undue administrative costs.

5.1.2.1. Problem

The precision axis brings to light a fundamental element overlooked by contemporary green antitrust scholarship: the status quo/counterfactual. The aforementioned discussion has predominantly revolved around integrating and quantifying the sustainability benefits into the positive-exemption alternative. However, the exemption-rejection alternative is generally forgotten about in the balancing test—it is simply perceived as the price increase or reduction to quality, choice, or innovation that the benefits derived from the sustainability agreement must overcome. This is problematic because an economic CBA requires the benefits of all alternatives to be quantified and monetized accurately.

From a normative perspective, one could question whether a competition authority should be able to adjust its treatment of negative effects based on its impact on welfare (in the broad sense of the word). On the one hand, most competition circles agree that preferencing should be left

[281] See for example, UK Competition and Markets Authority, 'Draft Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements' (2023) CMA177, 5.25; OECD, 'Discounting' (n 69) Table 8.5 at 220.
[282] Eva van der Zee, 'Quantifying Benefits of Sustainability Agreements Under Article 101 TFEU' (2020) Institute of Law and Economics Hamburg Working Paper No.31,12-13.
[283] UN, 'Sustainable Development Goals' (n 53).

to the legislature—competition enforcement is not political.[284] On the other hand, it is undeniable that a price increase to consumers in the energy market is markedly different from an equivalent price increase to consumers of sugary drinks in terms of human well-being.[285] The crux of the debate circles back to a complex and contested question: what is the purpose of competition law?[286] Given the scope of this thesis, the debate will be framed as follows:

The traditional purpose of competition law is economic efficiency: extracting the most value out of markets and delivering it to the intended beneficiaries. By way of analogy, the competition regime is a car engine. The more competition and economic efficiency, the more horsepower of the engine. The traditional perspective believes that the engine's horsepower should be fully maximized because the regulator is 'steering' the car in the right direction. On the other hand, green antitrust questions whether the engine, as it is currently built, is even capable of bringing us to our desired destination—notwithstanding the steering attempts by the regulator. Green antitrust proponents raise this critique because they assert that an unrelenting march to low prices and high prices is not preferable in all cases—we need a nuanced view to make markets work for people.[287]

5.1.2.2. Policy Recommendation

How can the EU Horizontal Guidelines account for these factors? One alternative is to tailor the stringency of the indispensability test based on the sector. This was the approach adopted by the Commission pre-modernization.[288] In fact, the Commission could tailor the stringency of the indispensability and fair share test based on the extent to which the restriction to competition affects the welfare of consumers in light of the characteristics of the market.[289] Let's say there are two agreements that both promote fair wages and working conditions for foreign workers who harvest raw materials. On the one hand, if the procuring parties are EU sugary drink manufacturers and the price to end consumers increases 20%, it should be deemed to pass the indispensability and fair share conditions. After all, do soda-drinkers even benefit from low prices and high output? On the other hand, a similar agreement concerning the procurement of liquified natural gas should be subject to a more strict interpretation of indispensability and fair share because the price increase to end-consumers markedly affects their welfare.[290]

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[284] See, for example, Loozen, 'EU Antitrust in Support of the Green Deal. Why Good is Not Good Enough' (n 10).
[285] van der Zee (n 282) 9.
[286] For more on the goals of EU antitrust, see, for example, Oles Andriychuk, *The Normative Foundations of European Competition Law: Assessing the Goals of Antitrust Through the Lens of Legal Philosophy*, (Edward Elgar Publishing 2017).

[287] Snoep (n 6).
[288] Brook (n 19) 131.
[289] Article 101(3) Guidelines (n 114) para 96.
[290] The Economist, 'Expensive energy may have killed more Europeans than covid-19 last winter' (2023). availabe at <https://www.economist.com/graphic-detail/2023/05/10/expensive-energy-may-have-killed-more-europeans-than-covid-19-last-winter>.

Additionally, regulators could place a multiplier on the monetary benefits and costs of an agreement based on their respective welfare impact. For example, 200,000 euro benefits in pollution abatement would outweigh a 300,000 euro cost to soda-drinkers if, say, the value of pollution abatement was deemed to weigh twice as much as soda prices. Perhaps social benefits to low-income workers would also benefit from a moderator related to the welfare economics phenomenon known as the decrease marginal utility of money: a one euro increase to an individual on the verge of poverty is worth more than a one euro cost to a consumer of luxury goods in terms of welfare.[291]

Some scholars argue that these types of agreements would be better addressed by the legislature because they invite the government to further shun their responsibility for designing proper regulation.[292] However, in case of social sustainability abroad, the European regulators lack the appropriate jurisdiction and information to enforce these initiatives. Furthermore, private actors can forum shop to avoid responsibility.[293] Therefore, these options are worth exploring.

5.1.3. Number of Alternatives

Axis 3 is dictated by the envisioned alternatives in the indispensability test—plus the status quo. The indispensability test may be problematic for an economic CBA when it creates alternatives out of complementary measures.

5.1.3.1. Problem

Table 3 indicates that the pre-modernization balancing approach contained more alternatives due to the stricter application of the indispensability condition. For example, in *CECED* the Commission identified multiple alternatives to the agreement and assessed whether they were (1) cost-effective and (2) complementary or true alternatives.

Following modernization, the Commission explains in the HG that any agreement between undertakings bound by a cap-and-trade system to reduce CO2 emissions will result in a net zero effect on pollution.[294] Therefore, akin to ACM Coal-Fired Power Plants (2013), the Commission views the cap-and-trade system as an alternative to the agreement rather than complementary. Overall, the number of alternatives during the modernization era has remained on the informal end of the spectrum.

5.1.3.2. Policy Recommendation

[291] For example, as a function the magnitude of efficiency gains within the meaning of the Article 101(3) Guidelines (n 114) para 96.
[292] Schinkel and Treuren (n 8) 6.
[293] Inderst and Thomas 'Sustainability Agreements in the European Commission's Draft Horizontal Guidelines' (n 240) 574.
[294] 2023 EU Horizontal Guidelines (n 14) para 564.

Suppose firms are already obliged to comply with a given standard, such as phasing out carbon emissions through the ETS. In that case, it is reasonable to assert that firms should not be able to consolidate market power and restrict competition. However, it may be worth exploring two points. First, an agreement that pursues a legislative objective may still generate benefits, such as accomplishing the outcome faster or cost-efficiently.[295] Inderst and Thomas (2022) suggest that this interpretation of indispensability may be too restrictive:

> For instance, when new supply chain legislation forces firms to ensure environmental compliance within their entire supply chain, firms may consider terminating their supply chain contacts to some countries, since the monitoring effort in relation to suppliers located there would be too costly and the legal uncertainty too great. To terminate such business relationships, however, would not be intended by the new supply chain legislation. If firms were, however, allowed to coordinate on standards this may instead induce them to continue their business in or with the respective country while complying with the monitoring obligations under the new supply chain legislation.[296]

Therefore, in cases where firms can easily adjust their business practices to avoid regulatory constraints, the indispensability test should be limited because it could undermine the intended outcomes of the legislation. Furthermore, it may be possible to align the incentives of these respective initiatives, such as moderating the ETS market stability reserve based on these agreements. Additionally, if national competition authorities and the Commission begin to subject exemption to certain conditions, then it will *de facto* bring about more alternatives. This was the approach employed by the Commission pre-modernization.[297]

5.2. Limitations

The findings of this thesis are not without limitations. First, the select case examples do not represent all Article 101(3) TFEU jurisprudence related to sustainability interests. For example, the Hungarian, German, and French NCAs have adopted different national balancing tools concerning non-competition interests.[298] Next, the scope of this thesis is limited to balancing at the margin through Article 101(3) TFEU assessment; however, there are many other approaches that sustainability interests can be integrated into the competition regime such as the Horizontal Block Exemption Regulations, standardization agreements, and soft-safe harbor clauses that are not discussed.[299] Furthermore, the reasoning of the thesis is predicated on various normative assumptions related to the nature of welfare and the purpose of EU competition law which impacted the interpretation of the empirical data.

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[295] Interestingly, the Commission only added 'quicker way' in the newest version of the 2023 EU Horizontal Guidelines (n 14) para 562.
[296] Inderst and Thomas 'Sustainability Agreements in the European Commission's Draft Horizontal Guidelines' (n 240) 574.
[297] Brook (n 19) 97.
[298] For more information, see Section 3.6 in Brook (n 19) 149.
[299] Holmes (n 3) 382.

There are also questions concerning the feasibility of some of these recommendations: when undertakings with deep pockets present complex discount rates, out-of-market benefits related to social sustainability, and WTP surveys, can a competition authority (cost-effectively) verify these benefits? Additionally, one could question the democratic legitimacy of these proposals, blurring the lines between private activities and public regulation.[300] Finally, it is difficult to generalize the findings with a high degree of certainty due to the scarcity of green antitrust balancing cases and the novelty of the 2023 Horizontal Guidelines.

[300] Hans Vedder, 'United in What Diversity? (Un)Communautaire Reasoning in Applying Competition Law to the Public-Private Divide on Two Sides of the Atlantic' in Justin Lindeboom and others (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (CUP 2019).

Chapter 6

Conclusion

Integrating sustainability interests within EU competition law is complex and contested. The debate becomes particularly prominent when sustainability conflicts with competition interests, for example, when companies establish anti-competitive agreements that yield environmental or social benefits. Unlike most academic discourse, this thesis asserts that we should look beyond whether competition helps or hurts sustainability *per se*. Instead, we should investigate how regulators ought to balance the costs and benefits in practice and to what end.

The literature dichotomizes genuine sustainability agreements and disguised cartels to denote the preferable and unpreferable outcomes; however, these concepts are not legally distinguished beyond that the determination is to be conducted within the framework of Article 101(3) TFEU. However, to effectively integrate sustainability in EU antitrust, regulators must be able to distinguish between these concepts. Therefore, this thesis questions: to what extent does the Article 101(3) balancing approach in the 2023 Horizontal Guidelines effectively distinguish between genuine sustainability agreements and disguised cartels?

Chapter 1 begins with the assertion that the only logical method to distinguish between the terms is through the lens of net welfare: a genuine sustainability agreement pursues a sustainable object and produces a net welfare gain for society, while a disguised cartel does not. As such, it is necessary to understand what is welfare-maximizing and how decisions can be made to identify welfare-maximizing outcomes. Chapter 1 addresses this by creating a theoretical framework using welfare economics and cost benefit analysis theory to benchmark against the Commission's undefined approach. Ultimately, it concludes that a more formal and economic cost-benefit analysis is theoretically preferable because it most precisely distinguishes between outcomes at the margin in a repeatable and transparent manner.

Given that (1) genuine sustainability agreements and disguised cartels are undefined, and (2) Article 101(3) balancing approach has varied across EU antitrust enforcement eras, Chapters 2 and Chapter 3 seek to understand how these interests were balanced historically and in the newly added sustainability agreements section of the 2023 Horizontal Guidelines. To accomplish this, Chapter 2 sets the stage by explaining the process of modernization and concludes that modernization shifted competition law to an effects-based regime with a focus on measurable economic efficiencies and consumer welfare. Furthermore, Chapter 2 delves into the wording of the Article 101(3) TFEU; it finds that the extent to which the Article 101(3) balancing approach aligns with a formal cost-benefit analysis depends on the competition authorities' interpretation of the exemption conditions. Specifically, how environmental and social benefits are quantified and monetized under the improvement condition and whether the fair share condition is interpreted strictly. Chapter 2 transitions to Chapter 3 by recognizing that these interpretations are found in EU antitrust regulators' decisional practice and guidance documents.

Chapter 3 describes the reasoning of the most prominent Article 101(3) environmental and social interest cases from the Commission, European Court of Justice, and Dutch Autoriteit Consument & Markt (ACM). Additionally, the Chapter delves into the balancing approach found in the recently published ACM Sustainability Agreements Guidelines and EU Horizontal Guidelines as they relate to sustainability agreements. Ultimately, it concludes by identifying differences between the respective approaches.

Building on these findings, Chapter 4 identifies four points where the balancing approach in the 2023 Horizontal Guidelines departs from a formal cost-benefit analysis and provides policy recommendations to improve the assessment.

First, the 2023 Horizontal Guidelines exclude crucial out-of-market benefits related to sustainability due to the fair share condition. The Commission should embrace the approach adopted by the Dutch ACM for environmental damage agreements whereby consumers are deemed to be compensated from the total collective benefits even if the consumer class is not fully compensated in relation to the negative effect on competition. Moreover, the Commission should explore options to permit out-of-market social benefits, such as fair remuneration and working conditions. Chapter 4 identifies how these can be integrated, such as through an agreement's compliance with a recognized CSR covenant or the constitutional rights of the undertaking's home country.

Second, the 2023 Horizontal Guidelines do not thoroughly explain methods of measuring the benefits of sustainability agreements. The Commission should further inform undertakings about the proper method to employ a willingness to pay survey and explore more progressive stated preference approaches such as collective willingness to pay. Further, the Commission should clarify how to calculate discount rates and their relationship to the fair share condition. In addition, the Commission should explore progressive composite indicators that account for value beyond price, such as capabilities, human welfare, and the SDG measurable targets.

Third, the 2023 Horizontal Guidelines creates an imprecise balancing test because the benefits of status quo alternatives are not calculated with respect to welfare. Likey the most contentious argument in the thesis, the Commission should explore options to moderate the monetized benefits based on their respective welfare impact, whether it be through a sectoral approach, a multiplier applied to the specific case at hand, or employing research that incorporate the decreasing marginal utility of income.

Fourth, the 2023 Horizontal Guidelines include less potential alternatives than the pre-modernization enforcement era. As a corollary to the aforementioned recommendation to relax the fair share condition, the Commission should endorse a more strict application of the indispensability condition because it creates more alternatives. However, the Commission should also beware that envisioned alternatives may be complementary rather than true alternatives.

Based on the foregoing, the sustainability agreements section within the 2023 Horizontal Guidelines requires considerable amendments and clarifications before the balancing approach is capable of effectively distinguishing between genuine sustainability agreements and disguised cartels.

Authors' Note:

Throughout the research, I have observed green antitrust opponents regularly inserting the following well-known and somewhat hackneyed Adam Smith quote:

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.[301]

And yet, akin to the revitalization of antitrust, I prefer a more contemporary quote to conclude this thesis:

Climate change, geopolitical instability, resource security, migration – these problems are not going away. If we do not involve business in fixing them, and treat it as the enemy, to be suppressed and sidelined, then we give business a free pass: we absolve it of its moral and economic responsibility to remedy the damage that it, in part, caused. But we also pass up the opportunity to access the vast resources at its disposal – not only cash and investments but also the millions of talented and resourceful people currently employed by private enterprises.[302]

[301] Adam Smith, *The Wealth of Nations* (1776) Book IV Chapter VIII p 660, para 49.
[302] Michelle Meagher, *Competition is Killing Us: How Big Business is Harming Our Society and Planet – and What to Do About It* (2020) 260-261.

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