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SUSTAINABILITY AND EU COMPETITION LAW: GREEN REGULATIONS

SÜRDÜRÜLEBİLİRLİK VE AVRUPA BİRLİĞİ REKABET HUKUKU:
YEŞİL DÜZENLEMELER

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ABSTRACT

Environmental considerations in the enforcement of competition regulations have recently become one of the most controversial debate topics in the European Union after the adoption of the new Horizontal Guidelines. There are serious competition law concerns that are deemed to surface with the relaxation of the competition enforcement, and any amendment to the enforcement of competition regulations shall be made with prudence. Environmental considerations in the enforcement of competition regulations shall be necessary to some extent for creating more room for particular sustainability agreements where there is no way of doing so by other means. The amendments made to the European Horizontal Guidelines show prudence while satisfying the need for environmental considerations for particular sustainability agreements. However, some amendments shall be revised to relieve serious competition law concerns.

Keywords: Competition law, Sustainability, Enforcement, Cooperation, Environment.

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ÖZET

Rekabet düzenlemelerinin çevresel düşünceler çerçevesinde esnek olarak uygulanması, Avrupa Birliği yatay anlaşmalarına dair mevzuatının ve rehberinin güncellenmesinden sonra en tartışmalı konulardan biri haline gelmiştir. Rekabet mevzuatının uygulanmasının gevşetilmesiyle ciddi rekabet hukuku endişelerinin ortaya çıkacağı bir gerçek. Bu bakımdan rekabet düzenlemelerinde yapılacak herhangi bir güncelleme etraflıca düşünülmesi gereken bir mevzu olarak karşımıza çıkmaktadır. Rekabet düzenlemelerinin uygulanmasında çevresel düşüncelerin, belirli sürdürülebilirlik anlaşmaları için daha fazla alan yaratmak adına başka yollar olmadığında gerekli olduğunu söylemek gerekmektedir. Avrupa Birliği yatay anlaşmalarına dair mevzuat ve rehberde yapılan değişiklikler, belirli sürdürülebilirlik anlaşmaları için çevresel düşüncelerin gerekliliğini ortaya koymaktadır, ancak bazı değişiklikler ciddi rekabet hukuku endişelerini hafifletmek için gözden geçirilmelidir.

Anahtar Kelimeler: Rekabet, Sürdürülebilirlik, AB mevzuatı, İşbirliği anlaşmaları, Çevre.

INTRODUCTION

The limited and scarce resources and unlimited desires of humankind have come together to form a recipe for disaster. Unions, states and individuals have taken considerable steps towards postponing the outcomes of these environmental problems to leave a sustainable future for the next generations. The approach to be taken is not yet fully agreed upon by scholars. Some argue that cooperation between businesses is the key to resolve environmental problems, while others argue that competition will be the drive for a greener tomorrow. Those who believe that cooperation shall be encouraged to diminish environmental harm argue that leniency in competition enforcement -particularly towards agreements with environmental objectives- is imperative¹. On the other hand, some think that the lenient approach to sustainability agreements will bring about several competition law concerns that shall not be disregarded².

¹ Suzanne Kingston, "Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special", *European Law Journal*, 16(6), 2010, p. 780–805; Giorgio Monti, "Four Options for a Greener Competition Law", *Journal of European Competition Law & Practice*, 11(3-4), 2020, p. 124–132.

² Simon Holmes, "Climate Change, Sustainability, and Competition Law", *Journal of Antitrust Enforcement*, 8(2), 2020, p. 354–405; Cento Veljanovski, "The Case Against Green Antitrust", *European Competition Journal*, 18(3), 2022, p. 501-513.

This article will specifically centre on the debate concerning the relaxation of competition enforcement to relieve environmental concerns. It will be argued that deviating from fundamental competition principles gives rise to various concerns in theory and in practice, hindering long-term environmental welfare. Yet, it will be demonstrated how some specific types of sustainability agreements are worth encouraging for.

I. BACKGROUND

The European Commission announced the “European Green Deal” in December 2019, that constitutes a commitment to climate neutrality by 2050³. To achieve this objective the Commission decided to take initiatives in several policy areas, however the competition policy was not addressed in the earlier stages of “European Green Deal”. In September 2020, Executive Vice President Margrethe Vestager who is responsible for the competition aspect at the Commission, evoked the debate about the interplay of sustainability and competition regulations⁴. Vestager pointed out that competition policies and environmental policies go hand in hand and induced a discussion on how can these policies work together.

Of course, the aims of the environmental and competition policy are in harmony, as all public policies should be⁵. Furthermore, it is crucial to tackle environmental concerns by maintaining sustainable consumption and production so that social welfare maximization can be achieved⁶. To do so, there has not been a consensus about how competition and environmental policies are going to work together. In response to the evolving dynamics within the European Union (EU), a significant step towards a greener antitrust was witnessed on June 1, 2023, with the adoption of new Horizontal Block

³ European Commission, “The European Green Deal sets out how to make Europe the first climate-neutral continent by 2050, boosting the economy, improving people’s health and quality of life, caring for nature, and leaving no one behind”, *Press Corner*, 2019, <https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6691>, Accessed 20 February 2024, p. 1.

⁴ European Commission, “The Green Deal and competition policy”, *Press Corner*, 2020, <https://ec.europa.eu/commission/presscorner/detail/en/speech_20_2913>, Accessed 20 February 2024, p. 1.

⁵ OECD, “Environmental Regulation and Competition”, *OECD Journal of Competition Law & Policy*, 9, 2007, 9 p. 167.

⁶ Lewis Akenji / Magnus Bengtsson, “Making Sustainable Consumption and Production the Core of Sustainable Development Goals”, *Sustainability*, 6(2), 2014, p. 513.

Exemption Regulations and Horizontal Guidelines (Guidelines)⁷. This regulatory shift introduced a rather more lenient stance towards cooperative agreements, although shows signs of prudence as well. The massive steps taken by the European Commission have not yet prompted the advocates of a greener antitrust to collectively breathe a sigh of relief⁸. While some argue for a deviation from fundamental competition principles to accommodate greater collaboration in the realm of sustainability⁹, this article contends that any amendments in the enforcement of competition regulations should be approached with great prudence.

II. CONCERNS ON ALLOWING MORE ROOM FOR COOPERATION

Consumers that are buying or producers that are selling any product are responding to a price signal¹⁰. This communication sets out the basis of the principle, as the price mechanism moves the consumers and producers to the optimum level and provides efficiency. The cost of a product may not be perfectly demonstrated at all times due to externalities¹¹. Thus, there occur miscommunications in the price mechanism. This may be caused from a negative externality like environmental harm¹². In line with Article 101(3), agreements that reduce this externality shall be permissible if they provide social welfare that offsets the negative effect of potential restriction in competition. If the assessment of such agreements' societal benefits is calculated with small margins of error and if it is recognized that the efficiencies are not likely to

⁷ European Commission, "Antitrust: Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines", *Press Corner*, 2023, <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2990>, Accessed 20 February 2024, p. 1.

⁸ David Little / Werner Berg / Clément Pradille / Axelle Aubry, "The European Commission's Draft Guidelines on Sustainability Agreements—a Legal Analysis and Practical Implications", *European Competition Law Review*, 43(9), 2022, p. 410.

⁹ ACM, "Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law", 2021, <<https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>> Accessed 20 February 2024, p. 8.

¹⁰ Erik Bækkeskov, "market failure", *Encyclopedia Britannica*, 2023, <<https://www.britannica.com/money/topic/market-failure>>, Accessed 20 February 2024, p. 1.

¹¹ Joseph E. Stiglitz / Jay K. Rosengard, *Economics of the Public Sector*, 4th Ed., WW Norton & Company, 2015, p. 86-87.

¹² Keith N. Hylton, "The Economic Theory of Nuisance Law and Implications for Environmental Regulation", *Case Western Reserve Law Review*, 58(3), 2008, p. 677.

happen absent the agreement, then such agreements shall increase welfare¹³. However, it is not plausible to assume that the authorities are perfectly able to assess the efficiencies of a sustainability with small margins of error since there is no metric for sustainability¹⁴.

One reason for this is that the efficiencies of the sustainability agreements are not always directly related to consumer welfare or the use-value of a product. In addition, the benefit of the sustainability agreements is not expected in the same market that the agreement in question is affecting in some cases¹⁵. Generally, sustainability agreements are aiming to bring societal welfare or efficiencies of the non-use value of a product such as reducing its negative environmental externalities¹⁶. However, the question that shall be examined is: is there a need for more cooperation agreements in addressing environmental concerns? It is evident that introducing leniency towards sustainability agreements in the Guidelines is going to weaken the enforcement of competition regulations. This leniency might inadvertently open the door to potential misuse of provisions under the guise of promoting environmental interests¹⁷. Therefore, any amendments to the Guidelines shall be handled with prudence. Considering the potential risks that are brought by welcoming more cooperation agreements, which will be elaborated below, the necessity of a greener antitrust is in doubt.

A. Cartel Activities

The main concern that a “greener” Article 101(3) is deemed to bring is an increase in cartel activities¹⁸. In any medium where communication between

¹³ Roman Inderst / Eftichios Sartzetakis / Anastasios Xepapadeas, “Competition and Co-Operation When Consumers’ Sustainability Preferences Depend on Social Norms”, *Deos Working Papers Athens University of Economics and Business*, No 2109, 2021 p. 3.

¹⁴ Roman Inderst / Stefan Thomas, “Integrating Benefits from Sustainability into the Competitive Assessment—How Can We Measure Them?”, *Journal of European Competition Law & Practice*, 12(9), 2021, p. 706.

¹⁵ European Commission, “Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements”, *Official Journal of the European Union*, C 259, 2023, p. 119, para. 575. [Hereinafter Horizontal Guidelines]

¹⁶ Roman Inderst / Felix Rhiel / Stefan Thomas, “Sustainability Agreements and Social Norms”, *Social Science Research Network*, 2021, p. 5.

¹⁷ Jurgita Malinauskaite, “Competition Law and Sustainability: EU and National Perspectives”, *Journal of European Competition Law & Practice*, 13(5), 2022, p. 339.

¹⁸ Veljanovski, p. 51; Monti, p. 124-132.

rivals is allowed, there is a high risk of cartel activities being practised¹⁹. When it comes to sustainability agreements, the risk of cartel activities being exercised appears to be higher than that of other kinds of horizontal agreements. This is because sustainability agreements provide a perfect front for cartel activities due to the positive objectives they seem to have at first glance. In addition, the benefits a sustainability agreement promises to bring are non-quantifiable and thus can be easily manipulated. For instance, striving for more sustainable products is a positive objective however, firms tend to use it to force excessive prices on consumers – as it is extremely difficult for the authorities to determine the sustainability efficiencies. Nevertheless, strictly combatting cartels that pose threats to both competition and environmental goals through vigorous enforcement of Article 101 of the TFEU appears to be the least controversial way towards a greener tomorrow²⁰.

B. Cooperation and Innovation

There is a growing trend globally in the average premium consumers are willing to pay for sustainable products²¹. If consumers are willing and able to pay extra for more sustainable products, then firms have the incentive to practice anticompetitive activities, which guarantees an increase in profitability. This incentive, combined with an extended room for cooperation agreements, poses a great risk. Firms may participate in lobbying activities, which would relieve firms' future competitive concerns. Furthermore, it could also cause firms to stagger innovation. Thus, it shall be emphasized that allowing more room for cooperation agreements may raise serious concerns, as its presumed advantages are based on the faulty assumption that firms are willing to cooperate for a greener tomorrow but are disincentivized by the strict enforcement of competition regulations.

On a further note, cooperation in this sense does not foster innovation, it rather causes it to stagger. Competition is positively correlated with innovation²². In a purely competitive market, a firm has to invest in innovation

¹⁹ Maximilian Andres / Lisa Bruttel / Jana Friedrichsen, "The Leniency Rule Revisited: Experiments on Cartel Formation with Open Communication", *International Journal of Industrial Organization*, 76, 2021, p. 1.

²⁰ Birgit Peters / Eva Julia Lohse, *Sustainability Through Participation?*, Brill, 2023, p. 264.

²¹ Shanshan Li / Zein Kallas, "Meta-Analysis of Consumers' Willingness to Pay for Sustainable Food Products", *Appetite*, 2021, p. 163.

²² Jianmin Tang, "Competition and Innovation Behaviour", *Research Policy*, 35(1), 2006, p. 81.

in order to compete with its rivals, which in the end, increases efficiency and reduces the prices for the consumers. On the other hand, cooperation does not likely lead to innovation because it diminishes the producers' expected profits²³. In the case of cooperation the firms have more incentive to practice cartel activities and they have less incentives to innovate. It is evident that companies have the incentive to stagger innovation, because it decreases a lot of the pressure of the unforeseen competitive atmosphere that would be present if not for the collusion. That is why a lenient Article 101(3) brought about by across-the-board relaxations of the competition enforcement poses a great risk. It simply gives the operators in the market more medium to practice lobbying against the rather normal supply of technology and innovation – because slowing down the introduction of greener technologies eases a significant amount of future competitive pressure. Hence, the enforcement of competition regulations shall not be relaxed imprudently for the sake of relieving environmental concerns, as it would contradict both competition and environmental policies.

C. Cooperation and Corporate Social Responsibility

The firms in a competitive market have small to no incentive to cooperate in the name of environmental concerns. The main reasoning behind the need for more lenient Guidelines on the application of the Article 101(3) is the concern that the firms in the market are willing to form such agreements but are disincentivized by the possibility of fouling the competition regulations²⁴. However, this concern is unfounded. A firm's incentives to cooperate for sustainability are expected to be less than its incentives for increasing its profit. For instance, production agreements that benefit consumers will not increase a firm's profitability, and thus, a firm will not voluntarily form such an agreement²⁵. It is given that, in the long run, it is better for a firm to be more sustainable or environmental-friendly to increase its profitability²⁶.

²³ Maarten Pieter Schinkel / Leonard Green Treuren, "Corporate Social Responsibility by Joint Agreement", *Journal of Environmental Economics and Management*, 123, 2024, p. 13.

²⁴ Maarten Pieter Schinkel / Leonard Treuren, "Antitrust: (More) Friendly Fire in the Fight against Climate Change", *Amsterdam Center for Law & Economics Working Paper No. 2020-07*, 2020, p. 10.

²⁵ Maarten Pieter Schinkel / Yossi Spiegel / Leonard Treuren, "Production Agreements, Sustainability Investments, and Consumer Welfare", *Economics Letters*, 216, 2022, p. 5.

²⁶ Fanny Hermundsdottir / Arild Aspelund, "Sustainability Innovations and Firm Competitiveness: A Review", *Journal of Cleaner Production*, 280, 2021, p. 12.

However, this in itself is not enough of an incentive for a firm to cooperate with its rivals, aiming for green objectives. Because there is an easier path to achieving the same goal – self practiced Corporate Social Responsibility (CSR). No evidence supports the idea that firms engaged in anti-competitive cooperative agreements will generate innovation in the area of sustainability faster than when they act on their own²⁷.

The effect of cooperation and competition on CSR shall be analysed in order to determine the extent of the necessity for creating more room for cooperation. First of all, the incentive for CSR for a firm is mainly profit, as sustainable products allow firms to attract more consumers at a higher price level²⁸. In a study done by Schinkel and Treuren it is highlighted that cooperation agreements may look friendly at first glance, however, after considerable analysis of the company's incentives, it has become clear that the opposite is the case²⁹. When consumers prefer to buy from firms with a higher CSR profile, cooperative CSR agreements tend to lower CSR activities. This is because, by demonstrating CSR, companies steal consumers from their competitors, and when companies decide together on their costly CSR activities, this aspect of competition is abolished³⁰. In other words, CSR investments are made because creating a more sustainable profile widens the consumer portfolio of the firm by deterring consumers from firms that are putting out less CSR efforts. This finding proves that market operators do not have enough incentive to participate in cooperative agreements because it does not increase the firm's profitability. That is why competition is a better drive in CSR efforts, as it will enable the companies to have a competitive advantage over their rivals. The cooperation agreements highlight the possibility of the firms to steal consumers from less sustainable firms, hence diminishing the incentives to invest in CSR activities.

One may ask: if not for the profitability why would a firm would want to cooperate with its rivals in the name of sustainability? One possibility is that a firm might genuinely want to address environmental concerns and invest for a greener tomorrow. Where this is not the case -which happens to be the more common- the cooperation agreements provide a perfect front for cartel

²⁷ Veljanovski, p. 513.

²⁸ Schinkel / Treuren, *Corporate Social Responsibility*, p. 12.

²⁹ Schinkel / Treuren, *Corporate Social Responsibility*, p. 25.

³⁰ Schinkel / Treuren, *Corporate Social Responsibility*, p. 25.

activities, price-fixing and abusing market power. Overall, the consumers are left with higher prices and the firms are left with more room to engage in anti-competitive activities, decreasing the social welfare in the long run.

As explained above the incentives for a firm to cooperate are insufficient to justify the need for a more lenient Article 101(3). On the contrary, in a competitive market, a firm is more likely to engage in CSR activities because competition is likely a better drive for CSR than cooperation. According to the study of Fernandez-Kranz and Santalo, where the empirical link between product market competition and CSR is investigated, doubling market competition boosts an average company's CSR ratings from 184 per cent to 800 per cent, assuming all other factors remain equal³¹. The results of the study show that businesses operating in highly competitive markets are more socially responsible, and thus, the necessity of relaxing competition enforcement to increase CSR activities is called into question.

D. Cooperation and Willingness to Pay

When assessing the effects of a sustainability agreement, a parameter to be pointed out is a willingness to pay. This parameter is used to gauge the effects of a cooperation agreement in a national decision of The Netherland Authority of Consumers and Markets (ACM)³². ACM has elaborated that the actors in the market of poultry are not allowed to make cooperative agreements about the production and supply of more sustainable chicken meat in the “Chicken of Tomorrow” analysis. The initiative “Chicken of Tomorrow” aims to replace regular chicken meat on the shelves with a more sustainable alternative³³. ACM pointed out that this initiative restricts competition and therefore raises concerns under Article 101 of the TFEU. After an investigation that ACM does, it is concluded that the initiative does not bring efficiencies that outweigh the negative effects of the restriction of competition³⁴. Thus, it is elaborated that the “Chicken of Tomorrow” initiative is not qualified for an exemption. In

³¹ Daniel Fernández-Kranz / Juan Santaló, “When Necessity Becomes A Virtue: The Effect of Product Market Competition on Corporate Social Responsibility”, *Journal of Economics & Management Strategy*, 19, 2010, p. 453.

³² The Netherland Authority of Consumers and Markets, “ACM’s analysis of the sustainability arrangements concerning the ‘Chicken of Tomorrow’”, *ACM/DM/2014/206028* <https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf> Accessed 20 February 2024.

³³ The Netherland Authority of Consumers and Markets, *Chicken of Tomorrow*, p. 2.

³⁴ The Netherland Authority of Consumers and Markets, *Chicken of Tomorrow*, p. 8.

the research and analysis that is done by the ACM, willingness to pay has been put into the spotlight to determine whether the initiative's advantages offset the negative effects of the restriction of competition. In the surveys that are conducted, it is evident that the consumers of chicken meat are willing to pay only slightly more for the more sustainable alternative. Hence, the amount that the consumers are willing to pay more is not enough to offset the costs that are brought with the implementation of the initiative³⁵. This implies that the consumers will be worse off after the implementation of the initiative because they will be charged more than they are willing to pay for the internalization of the externality.

However, even if the willingness to pay was sufficiently greater than the costs that are to be carried by the initiative, there are other aspects to be investigated in order to determine the necessity of such cooperation agreements. If the willingness to pay is positive, firms are naturally incentivized to produce more sustainable products because it will enable them to charge higher prices and not lose consumers to less expensive alternatives. Thus, their profitability will increase. If the willingness to pay is negative on the other hand, then firms will have no incentive to invest in green -whether through cooperation or competition- because their investments will not be compensated by the per unit profit³⁶. At this point, the question that shall be raised is why would firms want to cooperate if the willingness to pay is positive? When willingness to pay is positive then the competition will be a better drive for investing in green than cooperation³⁷. This is because, willingness to pay in its essence is an opportunity to steal consumers from rivals by offering a greener alternative. If all the operators in a market cooperated to supply a more sustainable product they would all increase their costs and the end price of their products but there would be no reward for the investments because there is no less-green alternative to attract customers from. Thus, there is less incentive for the firms operating in a market to cooperate where willingness to pay is positive. In that case, firms are better off investing on their own to offer a greener product into the market to both charge higher prices and steal consumers from their rivals.

³⁵ The Netherland Authority of Consumers and Markets, *Chicken of Tomorrow*, p. 8.

³⁶ Pablo Ibanez Colomo, "Relaxing whilst doing Competition Law is not an Oxymoron Sustainability agreements and antitrust: none of the above (by Maarten Pieter Schinkel)", (Chilling Competition, 2021) <<https://chillingcompetition.com/2021/09/15/sustainability-agreements-and-antitrust-none-of-the-above-by-maarten-pieter-schinkel/>> Accessed 20 February 2024, p. 1.

³⁷ Colomo, p. 1.

If, on the other hand, firms choose to cooperate in such conditions, there is the possibility of colluding to produce less sustainable products because the producers simply want to avoid competition³⁸.

III. CREATING ROOM FOR COOPERATION BY OTHER MEANS

There may be some sectors, in which the characteristics of the market require more cooperation agreements. This might be because of the existence of serious environmental damage risk directly caused by the operators in that market. In other cases, there might be unique hindrances to the cooperation agreements in a given sector. Sector-specific problems require sector-specific solutions. Thus, rather than an across-the-board solution which applies to all sectors, more room for sustainability agreements can be created by sector-specific regulations. By doing so, the floodgates for the risks that some sustainability agreements might bring would not be opened and the concerns of the advocates of a greener antitrust would be addressed as well. It is proposed that the revised version of the Horizontal Guidelines does not pose as the perfect solution for a greener tomorrow, and environmental concerns are better addressed with sector-specific regulations.

Article 210a of Regulation (EU) 1308/2013 (CMO Regulation), exempts restrictions of competition in agreements that are indispensable to achieving sustainability standards in the agriculture sector. Initiatives aimed at (a) environmental objectives, (b) improvement of the production of agricultural products or (c) animal health and animal welfare are eligible for the exemption³⁹. If Article 210a of the CMO Regulation is complied with, it will no longer be necessary to rely on an efficiency defence for certain sustainability initiatives in the agri-food sector.

Thus, there is the way of implementing regulations in specific sectors to create more room for sustainability agreements that are worth encouraging. Compared to a general relaxation of Article 101 of the TFEU brought by the newly adopted Horizontal Guidelines, this seems to be a better approach in

³⁸ Edith Loozen, “Strict Competition Enforcement and Welfare: A Constitutional Perspective Based on Article 101 TFEU and Sustainability”, *Common Market Law Review*, 56, 2019, p. 1286.

³⁹ The European Parliament and the Council of the European Union, “Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021”, *Official Journal of the European Union*, (L 435), 2021, p. 298.

creating more room for cooperation agreements in the name of environmental concerns. Evidently, there is a substantial opportunity for legitimate collaborative endeavours concerning sustainability issues⁴⁰.

There are other examples around the world where certain sectors are excluded from the requirements of the antitrust law so that the companies in that sector can benefit from being freely involved in sustainability agreements without the fear of falling foul of competition regulations. For instance, the Capper-Vostead Act that was adopted in the United States in 1922 allows certain associations to be exempt from the antitrust laws in the agriculture sector⁴¹. Although these kinds of regulations do not bring full immunity to the undertakings in terms of being exempt from the antitrust law, it is important to acknowledge that firms' incentives to be involved in sustainability activities can be increased through such specific regulations. This appears to be a better solution for the low incentives of the firms in involving sustainability agreements because it substantially diminishes the legal uncertainty that is induced by competition regulations. Since sustainability agreements are more practised or need to be encouraged in specific sectors, the specific regulations provide a better solution. Although proponents of a greener antitrust suggest that an "all-hands-on deck" approach shall be taken⁴², it seems rather more sensible that sector-specific are addressed with sector-specific solutions. Therefore, the newly adopted Horizontal Guidelines will not address the sector-specific problems as efficiently as the specialized regulations. Hence, it is suggested that prior to considering the relaxation of competition enforcement, an examination of sector-specific characteristics should be conducted to ascertain the impediments faced by sustainability agreements. The main concern here is that the newly adopted Horizontal Guidelines, motivated with a green aim of allowing more room for sustainability agreements, might also allow room for cartel activities or several other concerns that are mentioned in this article. Therefore, it is hereby proposed that the European Commission shall "re-revise" the Horizontal Guidelines and consider sector-specific solutions to be the main instrument in transitioning to greener competition enforcement. Thus, the effects of the amendment on across-the-board relaxation are minimized prior to the point of no return.

⁴⁰ Birgit, p. 262.

⁴¹ Frank Robotka, "Capper-Volstead and the Cooperatives", *Journal of Farm Economics*, 49, 1959, p. 1213.

⁴² Malinauskaite, p. 348.

IV. NECESSARY COOPERATION

Sustainability agreements that are covered in Chapter 9 of the new Horizontal Guidelines will not bring about an increase in CSR activities of the firms operating in a market. Plus, the necessity of the cooperation agreements is rather questionable when firms and consumers are better off when competition is a drive for sustainability efforts rather than cooperation. However, it is also important to elaborate on the fact that there may be certain types of sustainability agreements to be made in certain markets that are worth encouraging. These agreements, illustrated below, bring about enough incentives for firms to invest in a greener tomorrow and do not result in charging excessive prices to consumers. Thus, allowing room for some specific types of sustainability agreements appears to be requisite.

A. Market Expansion and Cooperation

A study illustrates various parameters that shall be considered in assessing sustainability agreements and lays out two possible effects of cooperation. It is pointed out that when the sustainable product allows firms to expand their market "...firms' coordination is more likely to result in more sustainable production and consumption."⁴³. On the other hand, it is also suggested that when the firms that are cooperating cover most of the relevant market there appears to be an incentive for the firms to cooperate not to introduce a more sustainable alternative⁴⁴. Thus, it can be deduced that when firms expect an expansion of the market they are likely to cooperate to introduce more sustainable alternatives. When there is an expectation for the market to expand, it is plausible that the cooperation agreements in the name of sustainability will foster innovation because firms then have the incentive to cooperate for offering a more sustainable alternative. However, it shall not be disregarded that there is a risk of cooperation in the name of staggering innovation and avoiding competition if the market is not expected to expand and if the cooperating firms cover most of the relevant market. Thus, it would simply be incorrect to blindly relax the competition enforcement to allow more room for cooperation agreements in the name of sustainability⁴⁵. It is proven by empirical studies that analyse consumer behaviour and firms' strategic choices, that in some cases sustainability agreements that allow cooperation between

⁴³ Inderst, p. 27.

⁴⁴ Inderst, p. 27.

⁴⁵ Inderst, p. 27.

companies may bring about efficiencies that outweigh the negative effects of the restriction of competition – and absent the agreement the introduction of a sustainable alternative into the market becomes slower. Thus, there shall be more clarification of the assessment of the efficiencies of such agreements -addressing the expansion of the market- in the Horizontal Guidelines.

B. Solving First Mover Disadvantage When Necessary

1. Welfare Benefit Disguised as an Avoidance of Welfare Cost

Although it is illustrated above how cooperation to overcome first mover disadvantage results in a decrease in consumer welfare there might be cases in which first mover disadvantage poses a great disincentive for greener production and consumption and there is no other way to achieve sustainability aims absent cooperation. This situation is illustrated in the Vision Document of the ACM with the example of overfishing. “An individual fisherman who, on his own, adopts a fishing quota cannot solve the bigger problem, and may price himself out of the market. This means that individual fishermen do not have any incentive for conservative fishing, unless other fishermen do the same. Only a joint initiative might solve the problem.”⁴⁶.

In this case, if the overfishing problem is not addressed the scarce resources will come to an end and thus there will be no fish left for the future consumers. Thus, the welfare benefit that is introduced by the sustainability agreement here is the avoidance of the welfare cost of the market failure in the future⁴⁷. In assessing the efficiencies of such cooperation agreements there is this obstacle of not accounting the avoidance of a welfare cost in the future. As illustrated above allowing more room for cooperation agreements to compensate for mover disadvantages result in a decrease in consumer welfare. However, in certain cases there might be no room for the operators in the market to handle the burden of such externalities. In the fisherman case, if consumers are not charged with prices over the amount they are willing to pay, then there remains no other solution in which the overconsumption of a scarce resource can be prevented. Thus, it is hereby suggested that in the situations in which the welfare benefit is disguised as an avoidance of a welfare cost,

⁴⁶ The Netherland Authority of Consumers and Markets, “Vision Document ‘Competition & Sustainability’”, <https://www.acm.nl/sites/default/files/old_publication/publicaties/13077_vision-document-competition-and-sustainability-2014-05-09.pdf>, Accessed 20 February 2024, p. 12.

⁴⁷ The Netherland Authority of Consumers and Markets, *Vision Document*, p. 12.

cooperation agreements appear to be the viable solution, and thus more room for such agreements shall be created by addressing them in the Guidelines.

2. First Mover Disadvantage and Free Riding

When a firm invests in sustainable production and consumption and its rivals benefit from it at no cost, there appears to be a competition problem⁴⁸. Even though a firm wants to invest in sustainable production and consumption with the probable incentive of gaining a competitive edge, its rivals benefit from the investments of that firm without any investments and thus the firms who do not invest in sustainable production and consumption gain the competitive edge. This causes a remarkable obstacle in front of environmental advances and sustainability efforts of the firms, since not investing in sustainability efforts in some cases comes with the benefit of having competitive advantage on firms who did invest.

In such cases, sustainability agreements that allow firms to cooperate in financing the costs of a sustainability investment are worth encouraging. Firms might want to avoid fines and thus be involved in environmentally friendly activities. If firms in a market are willing to offer a sustainability solution but are disincentivized from the free-riding problem, then they have an incentive to cooperate in order to avoid future government intervention.

Therefore, sustainability agreements designed to mitigate free-riding issues should be encouraged in certain cases, as without such agreements, there is little to no incentive for firms to provide individual solutions to externalities. If firms were to prove that involvement in a sustainability effort will result in a free-riding problem and allow their rivals to gain a competitive edge and thus there is no other way to solve an externality absent a cooperation agreement. Then, authorities shall consider this fact in the assessment of that agreement for an exemption because it outweighs the adverse effects of the restriction of competition. Thus, it is acknowledged that the Horizontal Guidelines have explicitly addressed the issue of free-riding through examples⁴⁹, enabling authorities to conduct a more precise assessment of sustainability agreements.

⁴⁸ Directorate-General for Competition (European Commission), *Glossary of terms used in EU competition policy Antitrust and control of concentrations*, EU Publications, 2002, p. 21.

⁴⁹ Horizontal Guidelines, p. 118, para. 566.

V. AN ASSESSMENT OF THE NEW HORIZONTAL GUIDELINES

European Commission is putting forward recognizable efforts to create more room for sustainability agreements. It seems to be the case that Commission considers cooperation as an instrument to address environmental concerns. The revised Guidelines constitute a concrete example that the European Commission is taking substantial steps towards tackling the disincentivising legal uncertainty obstacle brought about by strict enforcement of competition regulations. One of the key changes in the revised Guidelines appears to be about further guidance about sustainability agreements addressed under “*Chapter 9*”.

This article strongly advocates exercising caution in implementing any across-the-board relaxation of competition enforcement, emphasizing instead the use of sector-specific amendments as the primary instrument for addressing environmental concerns. Nevertheless, an assessment of the modifications made in the Guidelines will help determine whether the amendments have been implemented prudently or if they give rise to the competition law concerns put forth in this article.

A. Soft Safe Harbour

A “*Soft safe harbour*” for sustainability standardisation agreements is offered in the revised Guidelines⁵⁰. It is illustrated that sustainability standardisation agreements are unlikely to fall foul of Article 101 if certain cumulative conditions are satisfied⁵¹. It is pointed out that the sustainability standard developing process shall be transparent and all interested operators in the market can take place in the process⁵². The standard shall not pose any obligations on the operators unwilling to participate⁵³. Plus, willing operators in the market shall be able to adopt higher standards than the agreed standard through the cooperation agreement⁵⁴. Furthermore, the undertakings shall not exchange sensitive information that is more than necessary for the course of the standardization⁵⁵. Non-discriminatory access to the requirements for

⁵⁰ Horizontal Guidelines, p. 115-116, para. 549-553.

⁵¹ Horizontal Guidelines, p. 115, para. 549.

⁵² Horizontal Guidelines, p. 115, para. 549.

⁵³ Horizontal Guidelines, p. 115, para. 549.

⁵⁴ Horizontal Guidelines, p. 115, para. 549.

⁵⁵ Horizontal Guidelines, p. 115, para. 549.

obtaining the proposed label for non-participants shall be established in the future⁵⁶. In addition, “The standard must not lead to a significant increase in the price or a significant reduction in the quality of the products concerned”⁵⁷ and that, “[t]he combined market share of the participating undertakings must not exceed 20% on any relevant market affected by the standard.”⁵⁸.

These conditions are set out so that the standardisation agreements do not restrict competition more than necessary and do not hinder further innovation. It seems that the revised Guidelines provide for better clarification for sustainability standardisation agreements, which shall reduce the concerns of the greener antitrust advocates in terms of the disincentivizing legal uncertainty claims. Since specific conditions are set out in the revised Guidelines for sustainability agreements that will not fall in the scope of Article 101, then firms shall act upon their incentives towards cooperating in the name of sustainability with less fear of getting caught by Article 101 of the TFEU. The revised Guidelines do not imply that agreements failing to meet all the conditions outlined for the “safe harbour” will violate Article 101. Nonetheless, if an agreement does not adhere to these requirements, a comprehensive assessment will be conducted to evaluate whether the standardization agreement will impede competition⁵⁹. Thus, adhering to specific requirements allows firms to bypass additional assessments of the sustainability agreement, leading to an increased incentive for engaging in further sustainability efforts. After the adoption of the new Horizontal Guidelines, there shall remain fewer justifications for advocating a more relaxed competition enforcement in the context of sustainability, given the expanded scope for certain sustainability agreements that are anticipated not to impede competition. The meticulous delineation of cumulative conditions within the horizontal guidelines exemplifies a prudent approach to safeguarding fundamental competition principles.

B. Assessment of Sustainability Agreements under Article 101(3)

The new Horizontal Guidelines suggest that when the undertakings cannot meet the “Soft safe harbour” conditions because the agreement is likely to cause a significant increase in price or a decrease in the freedom of choice, then

⁵⁶ Horizontal Guidelines, p. 115, para. 549.

⁵⁷ Horizontal Guidelines, p. 115, para. 549.

⁵⁸ Horizontal Guidelines, p. 115, para. 549.

⁵⁹ Horizontal Guidelines, p. 116, para. 552.

the undertakings shall seek for the exemption provided under Article 101(3)⁶⁰. Further clarification is offered on the assessment of sustainability agreements under Article 101(3)⁶¹. An analysis will be conducted to evaluate the necessity of the amendments through a detailed examination of the clarification provided in the new Horizontal Guidelines regarding the assessment of sustainability agreements under Article 101(3).

1. Efficiency Gains

As previously discussed in this article, evaluating the efficiency gains of sustainability agreements presents challenges, especially with respect to those agreements that do not translate into direct consumer benefits. It seems like the clarification of the assessment under Article 101(3) relieves concerns that suggest, sustainability agreements are deemed not passable under Article 101 of the TFEU, because firms fear that there are not enough efficiency gains to outweigh the anti-competitiveness the agreement is going to bring. The new Horizontal Guidelines provide for further elements that shall be considered as efficiency gains so that there will be more incentive for the firms to be involved in certain sustainability cooperation agreements⁶². It is stated in the new Horizontal Guidelines that Article 101(3) allows for a broad spectrum of sustainability benefits resulting from the use of specific ingredients, technologies, and production processes to be considered as efficiency gains⁶³. However, as argued in this article, a general relaxation of the competition enforcement shall be avoided due to certain risks and characteristics of the firms. The new Horizontal Guidelines address the concerns raised by this article by saying that “[s]uch efficiencies cannot simply be assumed; they must be capable of being substantiated.”⁶⁴. This decreases the risk of an across-the-board exemption of sustainability agreements that merely put forward generic claims that there will be environmental benefits. The new Horizontal Guidelines specifically suggest that the efficiencies shall be “concrete”, “objective” and “verifiable” which provides for prudence in the substantiation of the said efficiencies and relieves some of the concerns raised in this article.

It is deduced that, the sustainability agreements that the European

⁶⁰ Horizontal Guidelines, p. 116, para. 555.

⁶¹ Horizontal Guidelines, p.117-122, para. 556-596.

⁶² Horizontal Guidelines, p.117, para. 557-559.

⁶³ Horizontal Guidelines, p.117, para. 558.

⁶⁴ Horizontal Guidelines, p.117, para. 559.

Commission is willing to create room for, are the ones that will not get in the way of innovation. The revised Guidelines read: "...if the claimed efficiency consists of product improvement, the parties have to demonstrate the exact characteristics of the product improvement."⁶⁵ Requiring concrete, objective and verifiable efficiency claims then, draws specific boundaries for the introduction of a greener alternative and thus limits the risk of cartel activities to some extent.

2. Indispensability

Of course, there is another possibility that firms may collude to slow down the process of product improvement so that they can diminish future competition. However, this is further avoided by clarification of the assessment of the indispensability of sustainability agreements⁶⁶. The indispensability condition under Article 101(3) suggests that, "...the parties must be able to demonstrate that their agreement as such, and each of the restrictions of competition that it entails, are reasonably necessary for the claimed sustainability benefits to materialise, and that there are no other economically practicable and less restrictive means of achieving those benefits."⁶⁷

Therefore, parties are also to provide evidence that absent the collaboration agreement product improvement is less practicable. This way the undertakings that are involved in the cooperation agreement are obliged put in the sufficient effort in order to introduce the greener technology to the market, otherwise the indispensability condition will not be satisfied.

There are certain sustainability agreements that allow firms to achieve environmental goals by collaborating and there is no other way of achieving that same environmental goal when firms act independently. As it has been illustrated how free riding and first mover disadvantage can get in the way of firms achieving environmental goals individually, it is concluded that in such cases sustainability agreements shall be encouraged. That falls parallel with the indispensability condition of Article 101(3) of the TFEU, because cooperation is avoided in cases where firms are better off absent the agreement. Thus, this clarification also reimburses the idea that rather than an across-the-board relaxation on the competition enforcement, a prudently allowed leniency

⁶⁵ Horizontal Guidelines, p.117, para. 559.

⁶⁶ Horizontal Guidelines, p.117-118, para. 560-568.

⁶⁷ Horizontal Guidelines, p. 117, para. 561.

towards specific types of sustainability agreements under specific conditions shall be strived for.

3. Assumption of Future Willingness to Pay

The new Horizontal Guidelines also suggest that there might be instances in which consumers are in a difficult situation to objectively balance the future benefits that they will enjoy from the agreement against the direct harm they go under as a result of the agreement. It is stated that this might be due to a lack of sufficient knowledge about the product; hence, if firms can prove that consumers are overestimating the price increase, then the agreement shall be considered necessary⁶⁸. This approach rather seems non-parallel with the provided clarification of recognizing sustainability benefits as efficiency gains. It is suggested in the Guidelines that the efficiency gains shall not be “assumed”, but rather shall be “substantiated”⁶⁹. It is not plausible, thus, to give firms room to claim that the consumers are in a difficult position to balance the price increase against the welfare benefits an agreement promises to bring. Furthermore, this suggestion in the new Horizontal Guidelines creates further difficulties in assessing sustainability agreements under Article 101(3). Permitting firms to collaborate based on the assumption that consumers are overestimating the price increase fails to consider consumer welfare as an inherent concern. Allowing firms to collaborate based on the assumption that consumers are overestimating the price increase could create a loophole that firms could exploit to engage in anti-competitive behaviour. This presents a significant risk that must not be overlooked for the sake of speculation. On a further note, considering future willingness to pay creates ambiguity in the assessment of sustainability agreements, as there is no tangible way for a firm to prove such a claim. The new Horizontal Guidelines read: “...possible benefits to consumers could be shown using evidence of their willingness to pay”⁷⁰, which appears to be a relatively modest endeavour on the part of the Commission.

Moreover, the suggestion that consumers are overestimating the price increase is somewhat paternalistic. It assumes that consumers are not capable of making informed decisions about the value of sustainability agreements. This is not always the case. Modern consumers are increasingly conscious of

⁶⁸ Horizontal Guidelines, p. 118, para. 563.

⁶⁹ Horizontal Guidelines, p. 117, para. 559.

⁷⁰ Horizontal Guidelines, p. 118, para. 563, fn. 395.

the significance of sustainability. Consumers are often willing to pay a premium for products that align with their environmental concerns⁷¹. This phenomenon raises further competition concerns because asymmetric information could incentivise firms to practice excessive pricing. The concept of “signalling” will be explained to elaborate that the solution proposed in the Horizontal Guidelines lacks thorough consideration.

“The decision to post a price is a strategic decision.”⁷². “A firm can signal the environmental affinity of its product by a high price.”⁷³. “Competition among firms in a market can be thought of as a process whereby firms, through their prices and product attributes, submit consumer surplus ‘bids’ to consumers. Consumers then choose the firm that offers the greatest amount of consumer surplus.”⁷⁴. This concept poses a challenge in practical application, because price is frequently used as a component of the value proposition, leading to a complex interplay between price and willingness to pay⁷⁵. A significant aspect of the value proposition of environmentally friendly goods is a high price, which indicates “green”. Prosocial consumer behaviour typically involves a self-sacrifice for the good of others or of society⁷⁶. The relatively high price of a sustainable product enables consumers to make a conscious sacrifice for the benefit of the environment. Thus, the prosocial consumer will be willing to pay for a “green premium”, which presents a substantial opportunity for firms to collect revenue⁷⁷. Nevertheless, this opportunity shall be reserved for firms presenting a sustainable alternative, a condition inherently reliant upon maintaining a competitive market that fosters innovation. Absent such conditions, there exists the potential for collusive behaviour among firms,

⁷¹ Paul H. Luehr, “Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising”, *UCLA Journal of Environmental Law and Policy*, 10, 1992, p. 313.

⁷² Michael Spence, “Signaling in Retrospect and the Informational Structure of Markets”, *The American Economic Review*, 92, 2002, p. 455.

⁷³ Hyoshin Ki / Jeong-Yoo Kim, “Sell Green and Buy Green: A Signaling Theory of Green Products”, *Resource and Energy Economics*, 67, 2022 p. 9.

⁷⁴ David Besanko, *Economics of Strategy*, 6th Ed., Wiley, 2013, p. 298.

⁷⁵ Geoffrey Lewis / Tatiana Zalan, “Strategic Implications of the Relationship Between Price and Willingness to Pay: Evidence from a Wine-Tasting Experiment”, *Journal of Wine Economics*, 9, 2014, p. 118.

⁷⁶ Deborah A. Small / Cynthia Cryder, “Prosocial Consumer Behavior”, *Current Opinion in Psychology*, 10, 2016, p. 107.

⁷⁷ Luehr, p. 313.

camouflaged under the guise of indispensable sustainability agreements. With this potential risk considered, this inclusion in the revised Guidelines is hereby criticised, as it lacks a prudent approach to the relaxation of competition enforcement.

4. Pass on to Consumers

The newly introduced Horizontal Guidelines proceed to provide elucidation on a highly pivotal subject – pass-on to consumers⁷⁸. Article 101(3) requires that consumers receive a “fair share” of the benefits that the agreement claims to bring. This is required from the agreements so that overall the effect on the market will at least be neutral. The Guidelines successfully clarify which positive externalities shall be considered as benefits in the assessment of a sustainability agreement. This further clarification provides for better guidance for the use-value and non-use-value debate of a product when assessing a sustainability agreement’s benefits. It is pointed out that consumer benefits that are caused by a sustainability agreement can be direct and also indirect. It illustrates how sometimes consumers opt for a greener product that has a lower use value compared to its competitors. “Hence, indirect, non-use value benefits accrue to consumers within the relevant market via their individual valuation of the effect on others, including on non-users outside the relevant market.”⁷⁹. Because of the benefits to others, consumers who are willing to pay extra for such products regard them to be of greater quality. In other terms sustainability is considered to be a quality element by the consumers. As a result, such non-use value benefits are not very distinct from the use value benefits. This clarification concerning the non-use value in the “benefit” assessment of a sustainability agreement alleviates concerns about claims that sustainability agreements encounter obstacles in the Article 101(3) exemption assessment, primarily because they often provide non-use value benefits for consumers.

On the other hand, this clarification does not provide for an across-the-board relaxation of the “fair share” condition of Article 101(3) because the willingness to pay of the consumers still plays a role in regarding the non-use value benefits as efficiencies of a sustainability agreement. Consequently, the competition concerns that this article puts forward are addressed, so that, not all proclaimed non-use benefits will be regarded as a “fair share” to the consumers

⁷⁸ Horizontal Guidelines, p. 119, para. 569-574.

⁷⁹ Horizontal Guidelines, p. 120, para. 577.

but only those which customers are willing to pay for. It is further clarified in the Guidelines that “[s]uch indirect, non-use value benefits can in some cases be measured by investigating consumers’ willingness to pay, for instance, through customer surveys.”⁸⁰ It is also suggested that, the undertakings of the agreement shall submit convincing proof of customers’ true choices in order to prove the efficiencies of the agreement. This amendment also provides for a more lenient but rather prudent approach towards sustainability agreements. The clarification in which the non-use value benefits are presented to be more recognizable, will certainly create more room for sustainability agreements. However, it shall only create room for sustainability agreements that ought to bring non-use value benefits that the consumers are willing to enjoy.

5. Collective Benefits

Another aspect of the “fair share” condition laid out in Article 101(3) is that this “fair share” shall be observed in the market that the agreement is affecting. Benefits of cooperation agreements are then, typically assessed under Article 101(3) in the context of a single relevant market. Thus, the net effect of the agreement on the consumers in a specific market will at least be neutral⁸¹. Generally, sustainability agreements are constructed to bring about broader benefits which are not always observed in the market that they are affecting. However, as mentioned above, beneficiaries of out-of-market benefits of sustainability agreements may overlap with the consumers in certain cases. Only then, the “collective benefits” can be considered in the assessment of an agreement for the exemption.

Parallely, the new Horizontal Guidelines provide that the out-of-market benefits shall only be regarded in the assessment if there is an overlapping⁸². The new Horizontal Guidelines offer concrete examples of sustainability agreements with out-of-the-market benefits and illustrate how, in certain cases where there is an overlap, the out-of-market benefits of sustainability agreements can be recognized as efficiencies. The Guidelines further clarify in the section “*Collective Benefits*”⁸³ by setting out conditions for the parties of a sustainability agreement to satisfy in order to prove the overlapping out-of-market-benefits. According to those conditions, the undertakings of an

⁸⁰ Horizontal Guidelines, p. 120, para. 578.

⁸¹ Horizontal Guidelines, p. 119, para. 569.

⁸² Horizontal Guidelines, p. 121, para. 584.

⁸³ Horizontal Guidelines, p. 120-121, para. 582-589.

agreement shall provide a description of the benefits and prove that they have occurred or are likely to occur⁸⁴. Plus, the undertakings are to provide a clear definition of the beneficiaries of the collective benefits⁸⁵. Penultimately, it shall be proven that there is a substantial overlap between the beneficiaries and the consumers in the market that the agreement is affecting⁸⁶. Most importantly, the new Horizontal Guidelines require undertakings to demonstrate that "... the share of the collective benefits that accrue to the consumers in the relevant market, (...), outweighs the harm suffered by those consumers as a result of the restriction."⁸⁷. The conditions provide for better clarification on which types of collective benefits shall be considered in the assessment of sustainability agreements and do a pretty good job of illustrating why all collective benefits cannot be counted in the assessment of such agreements. Overlapping effect both relieves the concerns of greener antitrust advocates as it allows greater room for sustainability agreements, and the concerns raised by this article.

CONCLUSIONS

The above discussion brings forth the conclusion that environmental considerations in competition enforcement shall be handled with prudence. An across-the-board relaxation of the competition enforcement is likely to open the floodgates for agreements which are neither beneficial to the consumers nor the environment. The risks of incautious leniency towards sustainability agreements are illustrated in order to stress the necessity of thorough prudence in implementing environmental considerations to the enforcement of competition regulations. Furthermore, the interplay between cooperation and several parameters in the market equilibria is pointed out in order to determine the extent to which sustainability agreements are necessary to relieve environmental concerns. Moreover, notable situations in which cooperation agreements are worth encouraging are recognized to point out the frontiers of environmental considerations in competition enforcement.

In addition, an assessment of the newly adopted Horizontal Guidelines is provided, in which several key solutions from the European Commission are acknowledged, and certain aspects are criticized. Ultimately, it is hereby proposed that there are certain risks in adopting greener antitrust enforcement

⁸⁴ Horizontal Guidelines, p. 121, para. 587.

⁸⁵ Horizontal Guidelines, p. 121, para. 587.

⁸⁶ Horizontal Guidelines, p. 121, para. 587.

⁸⁷ Horizontal Guidelines, p. 121, para. 587.

that shall be strictly avoided in order to better tackle environmental problems. While the recent adoption of the Horizontal Guidelines signifies a positive stride in the direction of accomplishing environmental objectives, caution is warranted in further relaxing competition enforcement due to the manifold risks associated with such actions. Consequently, any amendments to the Guidelines should rather prioritize caution than a heightened relaxation of competition enforcement. Prudence must serve as the guiding principle in the integration of environmental goals within the enforcement of competition – as grass might not always be greener on the other side.

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