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COMPETITION POLICY AND ENVIRONMENTAL SUSTAINABILITY

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General index

Página

Página

"Green" business cooperation under Article 101 TFEU: an analysis of key reform and implementation options and the positioning of the European Commission

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1. INTRODUCTION

This contribution focuses on Article 101 TFEU and its main objective is to answer the following questions: To what extent should companies be allowed to cooperate under Article 101 TFEU to combat climate change and enhance environmental protection? For example, should business agreements be permitted to phase out products and methods that contribute excessively to climate change, or agreements to produce more energy-efficient goods, even if this means higher prices for consumers and reduced choice? Does the current design and interpretation of Article

101 sufficiently allow for environmental considerations to be taken into account? What scope and options should Article 101 provide to contribute, while respecting competition, to improving green objectives? What is the European Commission's position on this? And in particular, what direction does it point in the new Guidelines on Horizontal Cooperation?

The research[1] focuses on exploring the following options[2]:

– First, using the discretion of competition authorities to set their own priorities as a tool to contribute more to green objectives;

– Second, exploring the exclusion route (non-application of Article 101.1) to certain types of green agreements;

– Third, the route of exemption under Article 101.3, reflecting on the possibilities for exploiting, adapting, expanding, or reinterpreting the exception.

For each of these options, the pros and cons will be analyzed, and, in some cases, possibilities for managing or combining them to achieve the best possible results will be suggested.

The last section will examine the new Guidelines on Horizontal Cooperation to attempt an initial interpretation of the position the European Commission appears to be taking regarding some of these options.

Finally, we will end with some overall reflections and conclusions.

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1. For previous research in the field, see among others, KINGSTON, S., Greening EU Competition Law and Policy, Cambridge University Press, 2012; or more recently HOLMES, S., MIDDELSCHULTE, D. & SNOEP; M. (eds), Competition Law, Climate Change & Environmental Sustainability, Concurrences, 2021; MAILLO, J., "Cooperación empresarial "verde" bajo el artículo 101 TFUE: un análisis de opciones", in ROBLES, A. y ZURIMENDI, A., Estudios de la red Académica de Defensa de la Competencia (RADC), Aranzadi Thomson Reuters, 2022, pp. 337-360, or HAUCAP, J., PODSZUN, R., ROHNER, T. & RÖSNER, Competition and sustainability. Economic Policy and Options for reform in Antitrust and Competition Law, Edward Elgar, 2024, or MARCO, S., "Antitrust's Environmental Footprint: Redefining the Boundaries of Green Antitrust", 103 N.C. L. REV. 135 (2024). For the debate among competition authorities at the European level, see: MALINAUSKAITE, J., "Competition Law and Sustainability: EU and National Perspectives", Journal of European Competition Law & Practice, 2022, Vol. 13, No. 5, p. 336.
2. For a further catalogue of options, see HAUCAP, J., PODSZUN, R., ROHNER, T. & RÖSNER, Competition and sustainability. Economic Policy and Options for reform in Antitrust and Competition Law, Edward Elgar, 2024.

2. THE PRIORITIZATION APPROACH

Although the European Commission has always had broad discretion to initiate or not initiate an investigation on its own initiative, the rejection of a complaint for not being a priority was only established in the European system after the ruling in the well-known Automec case[3]. Subsequently, Regulation 1/2003 confirmed this power of the Commission by stating that the Commission may "dismiss a complaint for lack of Community interest, even if no other competition authority has expressed its intention to deal with the matter"[4].

It is true that the European Commission is, in any case, obliged to carry out a thorough examination of the factual and legal elements presented by the complainants in order to establish whether they contain information about restrictive conduct and to appropriately assess the Community interest[5].

However, it enjoys considerable discretion in this regard[6]. As established in case law and in the Commission Communication on the handling of complaints[7], scenarios in which there may be no Community interest include: (1) if the complainant can bring an action before national courts[8]; (2) if the disputed practices have ceased[9]; or if the companies in question agree to change their conduct[10]. It is important to emphasize

3. Judgment of the Court of First Instance of the EU (CFI), of 18 September 1992, in case T-24/90, Automec Srl v. Commission, Rec. p. II-2223, para. 85.
4. Recital No 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the competition rules laid down in Articles 81 and 82 of the Treaty, OJEU, L 1, 4.1.2003, p. 1.
5. Judgment of the CFI, of 9 January 1996, in case T-575/93, Casper Koelman v. Commission, Rec. p. II-1, para. 39.
6. Judgment of the CFI, of 18 September 1992, in case T-24/90, Automec Srl v. Commission, Rec. p. II-2223, para. 85.
7. Communication from the Commission on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJEU C 11 of 27.4.2004, p. 65, paras. 41-45.
8. See, for example, case T-575/93, Casper Koelman v Commission of the European Communities, Rec. 1996, p. II-1, paragraphs 75-80.
9. Case T-77/95, Syndicat français de l'Express International and others/Commission of the European Communities, Rec. 1997, p. II-1, paragraph 57, confirmed in case C-119/97 P, Union française de l'express (Ufex) and others/Commission of the European Communities, Rec. 1999, p. I-1341, paragraph 95.
10. Case T-77/95, Syndicat français de l'Express International and others/Commission of the European Communities, ECR 1997, p. II-1, paragraph 57, confirmed in case

that there is no exhaustive list of criteria or scenarios that the European Commission must adhere to[11].

Thus, the European Commission has considerable discretion to prioritize (and dismiss) complaints, making subsequent judicial review difficult, although not impossible and still existing in a formal sense. Indeed, the Commission is obliged to inform the complainant of its intention to dismiss the complaint and on which grounds. If the complainant does not submit any objections, the complaint will be deemed to have been withdrawn, and the European Commission may conclude the proceedings. Otherwise, the European Commission must continue the proceedings and adopt a formal decision of dismissal. The Commission cannot simply refer to the Community interest in the abstract, but must justify its decision based on the factual and legal circumstances of the specific case[12]. The formal decision may be appealed to the General Court within two months. However, given the Commission's considerable discretion, it is highly unlikely that the Commission will lose and be forced to continue the investigation, let alone adopt a decision of infringement.

More recently, this prioritization option has also been imposed on national competition authorities (NCAs) when applying Article 101 TFEU. Back in 2013, given the disparities in national regulations on this issue, the European Network of Competition Authorities (ECN) made an initial call for greater convergence, stating that: "further convergence on the ability of the Authorities to set priorities would help enhance effectiveness and efficiency in enforcement (…) by allowing them to focus their action on the most serious infringements/sectors and areas most in need of their action, thereby increasing the impact of their action for the benefit of consumers"[13]. And finally, the so-called ECN+ Directive[14], with a view to

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C-119/97 P, Union française de l'express (Ufex) and others/Commission of the European Communities, ECR 1999, p. I-1341, paragraph 95.

11. Judgment of the ECJ, of 4 March 1999, in case C-119/97 P, Union française de l'express (Ufex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE v. Commission and May Courier, ECR p. I-1341, § 79.
12. Article 296 TFEU. See again paragraph 85 of the Automec case.
13. ECN's Recommendation on the Power to Set Priorities, 2013, app. 4, available at https://ec.europa.eu/competition/ecn/recommendation_priority_09122013_en.pdf
14. Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to provide competition authorities in the Member States with the means to enforce competition rules more effectively and to ensure the proper functioning of the internal market (ECN+ Directive), OJEU L 11, 14.1.2019, p. 3.

strengthening National Competition Authorities and their effectiveness, has established that:

"To the extent that these authorities are obliged to examine formal complaints submitted, they shall have the power to dismiss them if they do not consider their enforcement a priority"[15].

This should be understood "without prejudice to the right of a Member State government to issue priority rules or general policy guidelines to national competition administrative authorities that are not related to sectoral investigations or to specific procedures for the application of Articles 101 and 102 TFEU"[16].

Thus, as was already the case with the European Commission, all NCAs now have a prioritization power that extends not only to deciding which investigations they open ex officio, but also to dismissing a complaint based on their priorities. However, it is important to be aware that very significant aspects of the application of this prioritization, both procedural and substantive, remain open and will depend on each national system[17]. Therefore, the margin of discretion when prioritizing will depend heavily on each National Competition Authority (NCA) and the national framework in which it operates.

For instance, in the Spanish case, until the transposition of the ECN+ Directive, the CNMC (National Markets and Competition Commission) lacked the ability to dismiss a complaint based solely on the fact that the investigation was not among its priorities. After the transposition of the Directive in Spain[18], a new Article 49.4 of the Competition Act (LDC) was introduced, which establishes the following:

> "In the event of a complaint, the Competition Directorate may decide not to initiate proceedings if it considers that the investigation of the

15. Article 4.5 of the ECN+ Directive.
16. Recital no. 23 of the Explanatory Memorandum of the ECN+ Directive.
17. BROOK, O. & CSERES, K., Policy Report: Priority Setting in EU and National Competition Law Enforcement (September 28, 2021). Available at SSRN: https://ssrn.com/abstract=3930189 or http://dx.doi.org/10.2139/ssrn.3930189, p. 15.
18. Royal Decree-Law 7/2021, of April 27, transposing European Union directives on matters of competition, prevention of money laundering, credit institutions, telecommunications, tax measures, prevention and remediation of environmental damage, posting of workers in the provision of transnational services and consumer protection, Official State Gazette no. 101 of April 28, 2021, p. 49749.

> facts alleged therein does not constitute a priority. To this end, it will inform the Board of its intention not to initiate proceedings. If the Board has not provided reasons for its objection within 15 days, the Competition Directorate will inform the complainant.
>
> Complaints that may be considered non-priority include, among others:
>
> a) They provide scant evidence or weak indications, making it unlikely that the Competition Directorate, even with dedicated resources, will be able to prove the unlawful conduct.
>
> b) They refer to unlawful conduct whose potential scope is limited or the potential harm they may cause to consumers or to the competitiveness of markets for factors of production, goods, or services is minimal.
>
> c) They refer to conduct whose prevention or eradication is feasible through other legal instruments designed to preserve and promote competition, thus making more efficient use of the resources of the National Markets and Competition Commission.
>
> All of this is without prejudice to the priorities established for the National Markets and Competition Commission by its Board, in accordance with the provisions of Article 20.16 of Law 3/2013, of June 4, and the powers to direct the Government's general policy provided for in Article 3.2 of that same law".

Thus, as expected, the change is confirmed by granting the CNMC the power to dismiss a complaint for lack of priority. Furthermore, although with certain shortcomings and not exhaustive in nature, initial guidelines are offered with a list of scenarios in which such dismissal is possible, and reference is made to other guidelines that may be established by the CNMC Council or the Government, always in full compliance with the ECN+ Directive[19].

Overall, this represents a significant leap forward for the CNMC. It will allow it to concentrate on priority issues and use its resources more

19. In this regard, COSTAS COMESAÑA, J., "La transposición de la Directiva ECN+: otra oportunidad perdida para mejorar la eficacia del Derecho español de la competencia", in ROBLES, A. Y OLMEDO, E. (Dirs.), Estudios de la Red Académica de Defensa de la Competencia (RADC) 2021, Thomson Reuters Aranzadi, 2022, pp. 27-55, especially pp. 43-44.

efficiently[20]. The new regulation goes beyond the minimum required by the ECN+ Directive, offering guidance and, therefore, increasing legal certainty and transparency[21]. Logically, it may encourage private enforcement, since those matters that the CNMC does not consider a priority, or presumably would not consider a priority, may be forced to be brought directly before the courts after this reform.

But to what extent can these prioritization powers of both the European Commission and the CNMC be used to promote environmental sustainability?

We can consider two approaches: one that we could describe as "more competition" and a second that would fall under "less competition".

In the first, it is feasible to consider, for example, stricter enforcement of controls on business cooperation that blocks or delays green innovation, or harms both competition and sustainability. Consider, for example, collusion to hinder innovation in diesel vehicle emission standards. In this case, competition authorities could prioritize the investigation and prosecution of these practices given the double harm that such business cooperation would cause to competition and sustainability. I believe that such prioritization would fall within the broad prioritization powers of both authorities, both with regard to investigations initiated on their own initiative and those stemming from a complaint. And I don't think this option could be objected to.

It is true that, hypothetically, there could be some complaints or criticisms that the same authorities have not initiated action against other practices with similar anti-competitive effects (but without environmental damage). However, I don't believe these differences could be successfully challenged legally. In fact, I think similar situations have been occurring for some time now, for example, in the European Commission's prioritization of anti-competitive conduct in digital markets, or during the coronavirus pandemic, in markets for products or services related to the crisis (medical,

20. OLMEDO, E., "La discrecionalidad de la Comisión Europea y las ANCS en la tramitación de expedientes de Defensa de la Competencia: incoación, negociación de compromisos y control de sus decisiones", in TATO, A., COSTAS, J., FERNÁNDEZ, P. Y TORRES, F. (Dirs.), Nuevas tendencias en el Derecho de la Competencia y de la propiedad industrial II, Comares, 2019, pp. 105-126.
21. MAILLO, J., "ECN+ Directive Implementation: Spain, A First Assessment", CoRe 3|2021, pp. 321-324.

pharmaceutical, funeral, banking, etc.). This increased attention to certain markets or practices does not appear to exceed the discretionary powers of the authorities. Furthermore, we cannot forget that this does not leave other sectors or practices unchecked, since it is always possible to bring cases directly before national courts. It must be acknowledged, however, that in practice it may be more difficult to bring a case to court, at least in some scenarios. In short, there is little (or nothing) to object to in this "more competition" strategy.

Regarding the second point, which we have named "less competition", the conclusion is undoubtedly more controversial.

For example, could a competition authority decide not to take action against genuine green business cooperation (particularly if there is consensus on its positive environmental impact and it has broad social support) even if it were restrictive of competition? In answering this, a distinction should be made between the European Commission and the CNMC (Spanish National Markets and Competition Commission).

With respect to the former, it seems clear that the European Commission could perfectly well choose not to initiate an investigation on its own initiative or even dismiss a complaint as not being a priority. For example, the Commission could base the lack of EU interest on the fact that the complainant can bring an action before national courts[22]. We could also consider whether, in this scenario, the Commission might opt for other approaches, such as a commitment from companies to change their behavior (towards less restrictive practices that still maintain most of the positive environmental effects)[23]. However, it is crucial to recognize that Article 101 is not only applied by the European Commission but also, directly and fully, by National Competition Authorities (NCAs) and the courts.

Regarding the CNMC (National Markets and Competition Commission), a scenario like the one presented does not appear to fit any of the scenarios listed in Article 49.4 of the Competition Act (LDC), and, for now, there are no new guidelines from the CNMC Board or the Government. However, it cannot be ruled out since the list in Article 49.4 LDC is not exhaustive. Furthermore, the justification for a lack of priority

22. European Commission communication on the handling of complaints, cited above, paragraph 44, first dash.
23. *Ibidem*, ap. 44, sixth dash.

interest could not be solely that it is genuine green cooperation (unless one of the exclusion options, which we will examine below, is deemed valid).

Conversely, it could be argued that, in a scenario where the boundaries of what is permitted and prohibited are not clear, it would be in the interest (and therefore, to some extent, a priority for the general interest) to initiate or continue the investigation and expressly pronounce itself, either to condemn the practice and clearly mark the limits, or to record that a type of cooperation does not pose problems and thus encourage other operators to adopt similar green agreements.

3. THE EXCLUSION ROUTE (PRACTICE NOT SUBJECT TO ARTICLE 101.1 TFEU)

This option includes various scenarios of green agreements that, for several reasons, fall outside the scope of Article 101.1 TFEU. Among these, we elaborate below on up to four possibilities or groups of scenarios.

First, it is possible that the cooperation is not related to competition parameters and, therefore, does not fall under Article 101.1. For example, one could consider agreements that simply promote consumer awareness, increase transparency regarding the green nature of products or services, encourage or facilitate responsible corporate conduct in favor of green sustainability, or enable or improve databases on environmental impacts and related business practices. This first group of scenarios does not raise conceptual objections. This is without prejudice to the potential difficulty of its application in a specific case and the therefore desirability of having specific guidelines from the authorities to the greatest extent possible. Indeed, if these green agreements fall outside the scope of Article 101.1, it will be because, after due analysis, it is concluded that they do not constitute a significant restriction of competition in the market, either by object or effect. This is mainly due to three possible reasons: i) their object is cooperation unrelated to market competition parameters (such as price, quality, variety, innovation, etc.); ii) they refer to phases or stages far removed from production and marketing and therefore will not significantly affect market competition; iii) they are of minor importance, which would mean that, even if a restriction of competition existed, it would not be appreciable and therefore would not infringe Article 101.1 TFEU. The method and criteria for determining these aspects are well known and do not differ substantially from those applied to other types of agreements. Authorities, judges, companies, and other legal actors

are accustomed to using them and should not encounter any major difficulties.

It is important to bear in mind that it is not uncommon for business coordination on matters that do not present competition problems to eventually extend to other areas that do involve punishable restrictions[24]. Therefore, we must be especially vigilant to prevent this from happening and react accordingly if it does.

Secondly, the possibility of using the Wouters[25] or Meca Medina[26] case law has been raised.

Wouters concerned measures taken by the Dutch Bar Association that prevented lawyers from associating with certain other professions, particularly auditors. This restriction could have been considered a limitation on production and technical progress prohibited by Article 101.1(b). However, the CJEU ruled that such measures fell outside the scope of 101.1 if they could reasonably be considered necessary to ensure the proper practice of the legal profession as it was organized, thereby guaranteeing the integrity and expertise of the profession for the benefit of clients of legal services (end consumers) and the administration of justice.

Similarly, in Meca Medina (and in ISU[27]), the Court assessed whether anti-doping regulations and sanctions imposed by the International Olympic Committee against certain athletes could be contrary to competition law and the principle of free movement of services. The CJEU considered that such regulations and sanctions could have economic effects and therefore should be subject to scrutiny by competition authorities. However, if legitimate objectives were pursued and the measures were proportionate, they would be compatible with Article 101.1 TFEU.

From this case law, it can therefore be deduced that some restrictive agreements can be excluded from Article 101.1 if they pursue a legitimate interest, the restrictive effects are inherent to that interest, and provided that the restrictions respect the principle of proportionality.

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24. See, for example, cases AT.39824-Trucks (July 19, 2016), app. 50, and COMP/39579-Detergents (April 13, 2011), para. 24.
25. Case Wouters v Algemene Raad van de Nederlandse Orde van Advocaten (2002) C-309/99, EU:C:2002:98
26. Case C519/04 P, Meca Medina and Igor Majcen v. Commission, ECLI:EU:C:2006:492.
27. Case T93/18, International Skating Union (ISU) v. Commission, ECLI:EU:T:2020:610.

The possibility of also applying this line of case law to green or sustainability agreements has been raised. This would allow some restrictive agreements to be excluded from Article 101.1 because they pursue a legitimate interest (environmental protection and climate change) and provided that the restrictions are proportionate.

In my opinion, however, this extension of the Wouters and Meca Medina case law would be excessive and would entail serious risks and distortions. It cannot be forgotten that both cases are very extraordinary and in both we were talking about regulatory or quasi-regulatory measures of entities that exercised a kind of substitution or delegation of regulatory power of the public authority to establish rules applicable to a profession or a sport.

In the case of green agreements, we wouldn't be in an analogous scenario: neither a profession nor a sport is being specifically regulated, nor would the companies that reach such a green agreement have the same status as the bar association or the International Olympic Committee. Furthermore, if we pursue this path, why only protect the environment and not also other equally or even more legitimate objectives? To what extent and in what way should we accept these agreements? In my view, Wouters and Meca Medina are the exception that proves the rule, a very extraordinary exception that should remain limited to very extraordinary and clearly defined cases. Extending it to other types of situations, such as green agreements, would generate a great deal of uncertainty, damage the effectiveness of competition regulations, and would be attributing decision-making powers to competition authorities (and the courts) for which they are neither well-prepared nor legitimate. For all these reasons, I am not in favor of using this approach for this second group of situations.

Third, the option of using the case law precedent set in FNV Kunsten Informatie en Media v Staat der Nederlanden[28] has also been raised. In paragraphs 22 and 23 of its judgment, the CJEU recalls that:

> "while certain restrictive effects on competition are inherent in collective agreements concluded between representative

28. FNV Kunsten Informatie en Media v. Staat der Nederlanden (C-413/13). This ruling follows the jurisprudential line of other cases. See Albany, EU:C:1999:430, ap. 60; Brentjens, EU:C:1999:434, ap. 57; Drijvende Bokken, EU:C:1999:437, paragraph 47; Pavlov and Others, C-180/98 to C-184/98, EU:C:2000:428, ap. 67; van der Woude, EU:C:2000:475, ap. 22; and AG2R Prévoyance, C437/09, EU:C:2011:112, ap. 29.

> organizations of employers and workers, the social policy objectives pursued by such agreements would be seriously compromised if the social partners were subject to Article 101(1) TFEU in the joint pursuit of measures aimed at improving employment and working conditions".
>
> Therefore, "…agreements concluded within the framework of collective bargaining between social partners for the achievement of those objectives should not be considered, by virtue of their nature and subject matter, to fall within the scope of Article 101(1) TFEU".

In this particular case, the agreement in question was concluded between an employers' organization and certain mixed-composition workers' organizations that negotiated, in accordance with national law, not only on behalf of employed substitutes but also on behalf of self-employed substitutes affiliated with them. Therefore, the first condition would only be met if the trade unions negotiated on behalf of salaried workers or "false self-employed" workers, a matter on which the CJEU leaves the decision to the national court that referred the preliminary question[29]. The second condition was fully met, since the subject of the negotiation was minimum wages, which implied aiming for higher basic remuneration and, in turn, a greater contribution to the workers' retirement pension insurance[30].

From this line of case law, it is clear that collective bargaining between employers and workers aimed at improving employment and working conditions falls outside the scope of Article 101(1) TFEU. It would be worth exploring whether, just as the aforementioned agreements are excluded, other agreements involving the participation and consensus of the main stakeholders (producers, consumers, etc.) that improve green sustainability could also be excluded. The debate would then center on the extent to which self-regulation agreed upon by representatives of all relevant stakeholders could fall outside the scope of Article 101.1 TFEU, as collective bargaining in the labor sector is. This debate would then not be limited to agreements promoting green sustainability but should be extended to other objectives of general interest.

In my opinion, as the case law stands, this step has clearly not been taken. The case law, at least for now, is only applicable to collective

29. Paragraph 38 of the judgment
30. Paragraph 40 of the judgment.

bargaining in the labor sector and, moreover, as we have explained, only and strictly to the extent that one of the parties represents salaried workers (or false self-employed workers, who are in fact workers) and the objective of the negotiation is to achieve measures aimed at improving employment and working conditions. Therefore, there are guarantees and strict requirements from both a procedural and substantive perspective. The CJEU is being very demanding: it limits it to an area in which the delegation of state regulatory powers to legitimate social partners (who are also easily identifiable) is recognized and consolidated; only if it concerns labor matters (the social objective of improving employment and working conditions is pursued); and only to the extent that one of the parties represents employees. This third element is key because, as we know, Article 101 only applies to agreements between companies. Employees are not companies, and therefore it makes perfect sense that company-employee agreements fall outside the scope of Article 101, just as a company-employee labour contract does[31].

In my opinion, these requirements could not be easily met in the case of green agreements. First, there has been no delegation of state regulatory powers by law or even constitutional texts, as in the case of collective bargaining. Creating an institutionalized forum with representatives of all relevant actors for this self-regulation would be possible, but very complicated and more controversial. The number and variety of relevant actors would be much greater (producers, employees, consumers, environmental NGOs, etc.), and the legitimacy of their representation would be much harder to accept. Furthermore, there would be no express delegation of regulatory powers or subsequent recognition thereof, unless the regulator were also involved in the agreement. The second requirement, the pursuit of a general interest recognized at the European level, would indeed be met. Article 11 of the TFEU, with its horizontal and cross-cutting mandate that all EU policies must integrate environmental protection and promote sustainable development, strongly supports this. Finally, the third element would be missing or at least much more debatable, since the green agreement would imply cooperation between multiple companies (in fact, to be legitimate, it should cover the entire business spectrum).

31. It is true that one of the parties represents a group of companies and it could be thought that this in itself makes the agreement to be considered between several companies, in the absence of the aforementioned jurisprudential line that extends the logic of the exclusion of the employment contract to that of collective labor agreements.

It is also possible that producers might have other companies as clients-which should also be represented in the agreement-and not just end consumers. If this were the case, the gap with collective bargaining would be insurmountable. It is true that we could imagine a scenario in which the other party (the one opposed to the producers) consisted only of end consumers, employees, and environmental NGOs that are not companies, but even so, the lack of a clear precedent like the exclusion of employment contracts from Article 101 makes compliance with this requirement, and therefore the application of the analogy in this area, highly controversial.

The main advantage for proponents of these options is that they eliminate the need for cost-benefit analysis. Others would see this as a disadvantage because such a cost-benefit analysis makes the decision more complex, but it also shifts it to a more technical level and encourages a thorough analysis of the pros and cons of cooperation.

In any case, it should be clear that this path is not currently open under existing case law. Furthermore, opening it would be highly controversial and complex because: i) it would have to be applied more generally (to all types of self-regulation in the interest of the public good, even if conditions could be imposed), which would have significant spillover effects; and ii) it would also require prior judicial validation by the CJEU (ideally beforehand), without which it would be very risky for companies, authorities, or national courts to proceed.

Fourthly, a combination of the two previous scenarios could be explored, along with their interaction with the first option (priorities of competition authorities). This would imply that competition authorities, citing a lack of priority, might decide not to intervene in an agreement that restricts competition because the agreement is the result of a consensus among all legitimately represented relevant actors (preferably in an institutionalized forum to which regulatory powers have been delegated), pursues an objective of general interest (pro-green sustainability), and the agreed measures are inherent to and proportionate to its achievement. For the assessment of this possibility, I refer to what has already been discussed in the section on prioritization. The only difference compared to other prioritization cases is that, in this scenario, the authority's non-intervention would be supported by the consensus reached in a legitimate forum regarding the balance between the values of competitive markets and other general interests. It might therefore feel more comfortable not having to make this assessment (for which it is not well-positioned) alone.

This is essentially the scenario that has been explicitly supported by the Dutch competition authority[32].

4. THE ROUTE OF THE EXEMPTION UNDER ARTICLE 101.3 (TFEU). EXTENSION (REINTERPRETATION) OF THE EXEMPTION

There were periods when the exemption under what is now Article 101.3 TFEU was interpreted broadly, including (at least occasionally) not only economic efficiencies but also contributions to other general objectives such as employment, economic and social cohesion, and the environment[33]. These were times when the European Commission held a monopoly on granting exemptions under 101.3, and therefore this broad interpretation was less relevant. However, since 2004, when the modernization of the application of Articles 101 and 102 TFEU was implemented and the full application of 101.3 was decentralized to national authorities and courts, the Commission has favored a more restrictive interpretation based strictly on economic efficiencies, as reflected in the European Commission's Guidelines on Article 101.3 TFEU[34].

For some stakeholders, however, this interpretation and its traditional application leave very little room to appreciate environmental benefits and better reconcile competition and green sustainability. Therefore, they propose exploring new formulas for its application, a renewed reading of some of its requirements, or even a reinterpretation that broadens the possibilities of taking these environmental benefits into account.

Many options are being proposed to adapt and expand the use of the 101.3 exception for these purposes. We can group these proposals into two main categories:

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32. 'ACM sets basic principles for oversight of sustainability arrangements' (Press Release, 2 December 2016).
33. See, for example, with regard to the promotion of employment, the judgment of the CJEU in Metro v. Commission, case 26/6, EU:C:1977:167, para. 43; with regard to economic and social cohesion, the Commission decision in the case Ford v. Volkswagen, OJEU 1993 L 20/14; or with regard to the environment, the CEDED case, OJEU 200 L 187/47.
34. Commission Communication — Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, pp. 97-118). See, among others, WHISH, R. & BAILEY, D., Competition Law, 9th ed., Oxford University Press, 2018, pp. 166-168. For a critical view of the Communication and this restrictive view, see HANCHER, L. & LUGARD, P. 'HONEY, I., "Shrunk the Article! A Critical Assessment of the Commission's Notice on Article 81(3) of the EC Treaty" [2004] 25(7) ECLR 410.

First, those that refer to the type of efficiency or benefit that should be valued and how to value it. These are mainly linked to compliance with the first condition of 101.3 TFEU: the improvement of the production or distribution of products or the promotion of technical or economic progress. However, some of the formulas in this group are also linked, as we will see, to the second condition of 101.3 TFEU (that the efficiencies accrue equitably to consumers). Among the approaches that fall into this group are:

a) Giving greater weight and importance to efficiencies not related to price or cost reduction (qualitative efficiencies). In this respect, a key issue is the quantification of these qualitative efficiencies and their time frame (valuing the medium to long term more than just the short term).

The current General Guidelines on Article 101.3 already clearly recognize that not all efficiencies involve cost reductions, but that quality improvements and other qualitative efficiencies also fall under Article 101.3, and that these types of efficiencies can be of equal or greater importance than economic ones[35]. Among these, we can mention those frequently produced by research and development agreements or technology licensing agreements. These can involve synergies that enable innovations, new products, or quality improvements to existing products, which would be impossible without such cooperation, or at least not with the same speed and effectiveness. They can also lead to a wider dissemination of improvements and innovations, reaching a greater number of operators and users[36]. These qualitative efficiencies are difficult to quantify, and therefore, weighing the positive and negative effects is more complex than with quantitative efficiencies. However, this does not preclude them from being taken into account and considered sufficient to justify applying the exception. At most, it may advise caution (especially in cases where restrictions imply higher prices for consumers or a worsening of competitive conditions and freedom of choice) and verifying that the qualitative efficiency creates "real" value that outweighs the negative effects[37].

Until recently, however, precedents and experience in identifying these qualitative efficiencies in green cooperation agreements were scarce

35. Paragraph 69 of the Guidelines on the application of Article 81(3) of the Treaty (now Article 101[3] TFEU), OJEU C 101, 27.4.2004, p. 97.
36. *Ibid.* ap. 70-72.
37. *Ibid.* ap. 104.

(and still are), as were methods for assessing and comparing them with the restrictions arising from the cooperation. Furthermore, there was a tendency towards a restrictive view of the efficiencies that could be considered, focusing them more —if not exclusively— on improvements in quality, innovation or variety of products and avoiding valuing other more general public health or environmental benefits that also had an impact on the affected consumers.

In this respect, it is highly significant that the Guidelines on Horizontal Cooperation published in 2011 (now already reviewed) followed the same line as the General Guidelines on the 101.3 exemption and even expanded upon it[38]. As Monti points out[39], they not only abandon the previous specific category relating to environmental standards (subsuming it under the general category of standardization agreements) but also limit the types of benefits to be considered in these agreements. Thus, the hypothetical example he gives of environmental standards is an agreement by almost all washing machine manufacturers (90%), sponsored by a public body, to stop manufacturing products that do not meet certain environmental criteria[40]. Among the positive aspects of the agreement, the Commission anticipates that consumers will be able to use a greater number of washing machine programs and that the washing machine's operating costs will be lower due to reduced consumption of water, electricity, and detergent. However, it makes no mention of any environmental benefits derived from reduced pollution and increased energy efficiency, not even the proportional share of the collective benefit that might accrue to buyers and users of washing machines. This is something it had considered in similar previous decisions[41] and which some national competition authorities believe should be taken into account[42]. This is more generally

38. European Commission Communication, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJEU C 11, 14.1.2011, p. 1.

39. MONTI, G., "Four Options for a Greener Competition Law", Journal of European Competition Law & Practice, 2020, Vol. 11, No. 3-4, p. 124.

40. Horizontal Guidelines 2011, para. 329.

41. See Case IV.F.1/36.718, CECED, OJEU L187 of 2000, p. 47, paras. 47-57. It is true that this decision dates from before the modernization and decentralization of the application of 101-102 TFEU.

42. This is the case, for example, of the Dutch authority in its analysis of the proposed closure of coal-fired power plants, which included the environmental benefits of reduced pollution, improved public health, and increased life expectancy. Available at https://www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-

in line with the consideration of other general objectives under Article 101.3 TFEU by some national authorities, which have a much more open view of the nature of the positive effects to be assessed than the European Commission[43].

Given the increasing importance of environmental improvements in today's society (and the growing value that citizens-consumers-place on them), special attention must be paid to identifying and properly assessing them. Greater attention to these improvements should therefore be encouraged, with all due caution, but also with an open, modern attitude and a strong awareness of their importance. It is also important to move towards greater uniformity in interpretation, particularly regarding the nature of the benefits to be considered and their valuation.

In any case, it should not be forgotten that the burden of proof for these positive aspects lies with the companies. They are the ones who will have to provide sufficient evidence that the agreement generates these positive effects and of their significance. They may obviously encounter difficulties in identifying, objectifying, and valuing them, but there is a growing body of research by environmental economists exploring and identifying methods for doing so[44]. Competition authorities or judges must examine this evidence to determine its realism and, if necessary, compare it with other studies. Difficulties in this process should not prevent it from being carried out, as is already the case with other qualitative efficiencies where there is more experience. This is especially true given that the burden of proof lies with the party making the claim. However, for companies to make this effort-not only to cooperate but also to bear the burden of proof-the authorities must demonstrate an open attitude toward its examination and evaluation.

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of-closing-down-5-coal-power-plants-as-part-of-serenergieakkoord.pdf. See also, more generally, its Draft Guidelines on Sustainability Agreements. Opportunities within competition (2nd draft), available at https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law. For an analysis of the position of various national authorities, see MALINAUSKAITE, J., "Competition Law and Sustainability: EU and National Perspectives", Journal of European Competition Law & Practice, 2022, Vol. 13, No. 5, p. 336.

43. BROOK, O., "Struggling With Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities". Common Market Law Review (2019), 56(1), pp. 121-156.

44. See, for example, HUSSEN, A.M., Principles of Environmental Economics and Sustainability, Taylor & Francis, 4th ed., 2018.

Regarding the timeframe, I believe there should be no objection to considering not only the positive effects in the short term but also in the medium to long term, provided that these effects can be proven[45]. And here lies the difficulty, because the medium to long term will often involve more variables and therefore be more difficult to prove. Again, the burden of proof rests with the companies that wish to cooperate.

b) Expand the cases in which in-market efficiencies can be considered and/or also assess out-of-market efficiencies, at least partially and to the fullest extent possible. This also involves exploring not only individual benefits but also some collective ones. All of this is also linked to the reinterpretation of the second condition of 101.3 (fair share of benefits to consumers). In this respect, there is also debate about what the meaning of "fair share" should be and whether it entails full compensation for damages or if partial compensation is sufficient, and if so, to what extent.

Regarding the first set of questions, the key is to identify whether the positive effects to be considered are only those directly impacting consumers in the market where the restriction of competition occurs, or whether other indirect effects in that same market, effects on the same group of consumers in other markets, or even collective effects on society should also be taken into account.

According to the traditional interpretation, consumers are understood to be the clients of the parties to the agreement and subsequent purchasers, whether businesses or end consumers[46]. The focus is on the overall positive effects on all consumers in that reference market, rather than the effects on each individual consumer group[47]. However, case law has sometimes been more stringent and has held that if two groups of consumers exist, both must receive an "equitable share" of the benefits[48].

According to current case law, it does seem clear that negative effects on consumers in one geographical or product market cannot be offset by positive

45. This was clearly the position of the Netherlands authority. See paragraph 40 of its Guidelines on Sustainability Agreements: Opportunities within Competition (2nd draft): "ACMs will also take into account long-term benefits, since such are typical of many sustainability agreements".
46. General Guidelines on 101.3, para. 84.
47. *Ibid.* para. 87. See also case T-131/99, Shaw, Rec. 2002, p. II-2023, para. 163; or case C-382/12 P, Mastercard v. Commission, EU:C:2014:2201, para. 236.
48. Case T-111/08 Mastercard v. Commission, EU:T:2012:260, app. 228.

effects on consumers in another market, except when those markets are linked and the group of consumers affected by the restriction and the beneficiary of the efficiency improvements are substantially identical[49], or at least there are considerable commonalities between the two groups of consumers[50].

Regarding the meaning of "equitable share", the Commission has made it clear that consumers do not need to benefit from each of the observed efficiencies; it is sufficient that their overall benefits in that market are sufficient[51]. The Commission appeared to require, however, that the compensation be total: its guidelines stated that "the net effect of the agreement must be at least neutral" for consumers[52].

In short, the traditional position of the European Commission was quite restrictive. It seemed to include only the direct and indirect positive effects on consumers in the relevant market (or in other linked markets when there are at least considerable commonalities between the two groups of consumers). Collective benefits for society as a whole did not appear to be included (nor even the proportional share of those collective benefits). Furthermore, full compensation was required for each consumer group. This severely limits the in-market efficiencies that could be taken into account, and only very partially and under very strict conditions did it allow the use of out-of-market efficiencies. The limitation was further compounded by the requirement of a neutral effect for each affected consumer group.

In response to this approach, proposals for reinterpretation have been put forward that would give the exception of 101.3 a broader scope. The most ambitious of these come from the Dutch competition authority (ACN). In addition to having a broad conception of the nature or types of positive effects to be considered (including social and environmental sustainability, animal welfare, public health, etc.), it also considered that a neutral effect was not necessary for every consumer group. that could fit within 101.3, at least in certain scenarios, benefits not only for consumers but also for society in general, and that there could be an "equitable share" without a neutral effect[53].

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49. General Guidelines on 101.3, para. 43. See also case T-86/95, Compagnie Générale Maritime *et al.*, paras. 343 to 345, Rec. 2002, p. II-1011.
50. European Commission Decision of 23 May 2013, Case AT.39595, Air Canada/United Airlines/Lufthansa (Star Alliance), paras. 57-58.
51. General Guidelines on 101.3, para. 86. *Ibid.*, para. 85.
52. *Ibid.*, para. 85.
53. Paras. 45-52 of its Guidelines: Guidelines on Sustainability agreements. Opportunities within competition (2nd draft).

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The fight against climate change is one of today's greatest challenges. Reducing polluting emissions and moving towards a climate-neutral world is an urgent necessity for our society. All policies and instruments must, to the extent possible and respecting their fundamental principles, be placed at the service of this objective, without, of course, forgetting other challenges and laudable goals.

In the field of competition policy and law, a debate has also opened regarding its potential contributions to green sustainability. This debate affects virtually all instruments of European competition policy: from the control of cartels and restrictive agreements to the abuse of dominant position and business concentrations, not forgetting the control of public restrictions, among which state aid stands out. The scope for action depends heavily on each instrument, although there may be commonalities or cross-cutting ideas applicable to all of them.

After introducing the topic and the framework for analysis, this book explores under the sustainability lens the main areas: business cooperation agreements, abuse of dominance, mergers and finally state aid.

Each chapter analyzes in depth the current situation and recent progress, as well as, where applicable, what remains to be done, identifying new proposals for improvement and how to implement them.

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