Solving a Sustainability-Deficit in European Competition Law

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It is undeniable that there is a tension between European competition law and sustainability-focused agreements between undertakings. Whether it should, and how it could, be resolved is less clear. The necessity of providing 'more room' for sustainability-focused agreements is contested. Set within the wider discussion on the (proper) goals for European competition law, these public interests are often seen as alien to an economic approach of competition law. By taking developments in the Netherlands, where the tension seems to play out most visibly, as starting point, this article first sets out the argument that there is a sustainability-deficit within current competition law, and delineates where this deficit is 'located'. The article then provides an overview of possible solutions. These are not (all) immediately applicable but would need tweaking existing competition law's instruments. Thus both to the interpretation of the Article 101 (3) TFEU exception clause and to the doctrines relating to placing entities or activities outside the scope of Article 101 (1) TFEU are discussed, as is the underlying rationale relating to the dichotomy between market and government.

1 INTRODUCTION

It is undeniable that there is a tension between European competition law and sustainability-focused agreements between undertakings. At present, this tension seems to play out most visibly in the Netherlands. Several highly contested competition law cases show that it may be difficult for agreements that have social, environmental or sustainability aims to be made between competitors. For example, the Dutch competition authority held (in an informal assessment) that agreements aimed at improving chickens' animal-welfare, long-term environmental protection, and protection of fundamental rights was in contravention of the competition law rules. In response, the Dutch Parliament urged the Minister of Economic Affairs to provide 'more room' within competition law for such agreements. However, this proves difficult. Dutch competition law is very much intertwined with European competition law, which is predominantly focused on

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obtaining efficiencies that enhance (the economic concept of) consumer welfare. The limits of the Dutch equivalent of the exception of Article 101 (3) TFEU have been explored through new policy guidelines that have been set by the Minister for the Dutch competition authority. Furthermore, the Minister is drafting general legislation that may lead to the possibility of market-led sustainability initiatives being taken out of private hands. Instead, the Minister would perform a public interest test on these initiatives, and make them binding by governmental decree.

The necessity of providing 'more room' for sustainability-focused agreements is contested. Set within the wider discussion on the (proper) goals for European competition law, the public interests pursued by these agreements are often seen as alien to the 'more economic approach' adopted by the European Commission. This article includes an analysis of whether there is indeed a sustainability deficit, taking the developments in the Netherlands as starting point (section 2). The article will then provide an overview of possibilities to solve the sustainability deficit by tweaking existing competition law instruments (section 3). Section 4 concludes.

2 A SUSTAINABILITY DEFICIT

The 'Chicken of Tomorrow'-case is probably the most hotly debated case in the Netherlands.[1] The case concerns a widely supported sectoral agreement – which was pushed by local government and supported by many civil society organizations.[2] The primary aim of the agreement was to improve the chickens' welfare. The agreement was 'notified' to the Dutch competition authority (hereafter: ACM) who undertook an economic analysis. ACM concluded that the agreement would lead to a higher consumer price; for example, in supermarkets the price increase amounted to EUR 1.46 per kilo. In an assessment based on (the Dutch equivalent to) Article 101 (3) TFEU, ACM also quantified possible consumer welfare benefits.[3] These included benefits to the environment, to animal welfare and to public health (i.e. from using less antibiotics). To assess these effects, ACM used a willingness-to-pay survey. It was shown, however, that consumers were not willing to pay the increased price (they were only willing to pay EUR

[1] *See*: ACM, *Analyse ACM van duurzaamheidsafspraken Kip van Morgen*, https://www.acm.nl/nl/publicaties/publicatie/13758/Analyse-ACM-van-duurzaamheidsafspraken-Kip-van-Morgen/ (accessed 28 July 2017).

[2] 'Stichting Wakker Dier' was against the initiative: Wakker Dier, *Plofkip en alternatieven*, https://www.wakkerdier.nl/plofkip/kipvanmorgen?gclid=COO318OxzNQCFTYz0wodLUUD3A (accessed 28 July 2017).

[3] 'Quantification' in the sense of putting a monetary value on them. 'Monetization' might actually be more precise, but is less widely used in competition law: B. Baarsma & N. Rosenboom, *A Veritable Tower of Babel: On the Confusion Between the Legal and Economic Interpretations of Article 101 (3) of the Treaty on the Functioning of the European Union*, 11(2–3) Eur. Competition J. 402–425 (2015).

0.82 per kilo),[4] but would be willing to pay more (EUR 12.00) for a *more* sustainable chicken.[5] The agreement under discussion only provided for slightly more living space, and a slightly longer life before being processed for slaughter. Thus, it was concluded that the agreement would contravene competition law.[6]

A willingness-to-pay survey is an acceptable method for quantification of consumer-benefits in competition law assessments. This is not to say that it is beyond criticism, however. For example, it was pointed out that vegetarians – who are not willing to pay at all – should have been excluded from the survey. On a more general level, it can also be argued that the survey does not lead to the very precise calculated outcomes such as presented by ACM. Another well-known problem is the difference between stated and revealed preference of consumers. Other points of contestation are the difference between the preference of consumers and those of citizens, and, most fundamentally, the problem of incommensurability.[7] All these issues are relevant to ACM's opinion. But what seems to have surfaced most in public discussion of this case is a dismay over the fact that even a government-brokered, broadly supported initiative, to protect a widely accepted goal (even by taking only a small step forward) is not 'safe' from competition law.[8] How could – the argument runs – on the one hand, 'the government' support something that, on the other hand, 'the government' prohibits? This point touches upon the lack of policy coordination between different institutions of government.[9]

The Dutch debate was all the more fierce because this was not the first government-supported agreement to suffer such a fate. Earlier, ACM had given a negative opinion on a part of the ambitious, multi-stakeholder supported, Energy-agreement; aimed at providing the country with substantially more

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4 Consumers were willing to pay 14 cents for the environmental effects, and 68 cents for the animal welfare effects. There were no health care benefits resulting from less antibiotics (use of antibiotics would have been curtailed by government regulation).

5 *See* on methodology: Machiel Mulder & Sigourney Zomer, *Dutch Consumers' Willingness to Pay for Broiler Welfare*, 20(2) J. Applied Animal Welfare Sci. 137–154 (2017).

6 ACM used an 'informal opinion' Akin to the old 'discomfort-letters' of the Commission these are non-binding assessments, not to be appealed in court.

7 On commensurability: Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69(1) Vand. L. Rev. 1–69 (2016).

8 The 'small step' issue is interesting: that consumers apparently were willing to pay significantly *more* for a significantly better chicken, is said to point to a flaw in the set-up of the agreement as not being a 'real' sustainability agreement. But even a small step might be hard-won. On a more general level this means that the choice on the scale of gradual introduction of changes versus a big bang introduction is also relevant in relation to competition law issues. In retrospect the question also rises whether the initiative was necessary at all: by now most supermarkets have changed towards not selling the most 'offensive' chickens (though for export they are still raised). This is brought forward as counterfactual proving that the agreement was not necessary in the first place.

9 In this case the support came from the provincial government. Also, *legally*, as ACM is an independent authority, it is not strange that it scrutinizes economic behaviour of the government (where the government acts as undertaking; which is not its role in this initiative).

sustainable energy by 2020.[10] The Minister of Economic Affairs himself had sat at the table and was involved in shaping this agreement. In another case, an agreement (referred to as a 'covenant') between the Minister of Foreign Development and the energy sector was also held against competition law. This covenant was aimed at preventing the use of 'blood-coals': coals from South American mines whose workers' fundamental rights are not generally well-protected.[11]

From these cases, as well as other Dutch and non-Dutch cases under advisement or consideration by sectors and civil society organizations,[12] the following picture emerges. Sectoral agreements, involving horizontal, but often also vertical supply-chain partners, can be aimed at protecting various sustainability interests. Increasing animal welfare, for example. Or addressing environmental concerns by lowering emissions, preventing waste (e.g. reuse of packaging or waste-materials), protecting flora or fauna by switching to different farming or exploitation methods, and achieving agricultural improvements through using less pesticides and preventing erosion. This includes protection of environments on the other side of the world (that is, from the Netherlands' point of view). Agreements might also be aimed at social protection, such as protecting the precarious position of low-skilled or low-income flexible workforce locally,[13] or by providing living wages to workers elsewhere on the globe. The commonality between these initiatives is

[10] ACM's analysis available at: ACM, *ACM Analysis of Closing Down 5 Coal Power Plants as Part of SER Energieakkoord*, https://www.acm.nl/en/publications/publication/12082/ACM-analysis-of-closing-down-5-coal-power-plants-as-part-of-SER-Energieakkoord/ (accessed 28 July 2017).

[11] The reasoning is different here, though: considering the oligopolistic energy production market ACM concluded (again in an informal assessment) that the agreement would result in a less competitive market structure. Also, it was unclear whether the measures could actually lead to the desired result (analysis at: ACM, *Advies ACM over herkomsttransparantie in de steenkolenketen*, https://www.acm.nl/nl/publicaties/publicatie/13544/Advies-ACM-over-herkomsttransparantie-in-de-steenkolenketen/ (accessed 27 July 2017).

[12] Examples in the public domain encompass: Arnold & Porter, *Fair Wear Foundation: Competition Law and Living Wages*, https://www.fairwear.org/ul/cms/fck-uploaded/documents/labourstandards/E-bookArnoldandPorter-CompetitionLawandLivingWages.pdf (accessed 27 July 2017); case-study on sustainable pine-apple growth on Fairtrade.org [not yet online]; Indonesian anti-trust investigation into sustainable palm oil: DBS Bank, *Moratorium on New Palm Oil Concessions*, https://www.dbs.com/aics/templatedata/article/generic/data/en/GR/042016/160415_insights_moratorium_on_new_palm_oil_concessions.xml (accessed 20 July 2017); Dutch covenant on responsible banking: Rijksoverheid, *Ploumen en Dijsselbloem ondertekenen met banken convenant over mensenrechten*, https://www.rijksoverheid.nl/actueel/nieuws/2016/10/28/ploumen-en-dijsselbloem-ondertekenen-met-banken-convenant-over-mensenrechten (accessed 20 July 2017); protecting the Friesian horse: *see* J. Mulder, *Finding the Public Interest, Wouters and the Case of the Friesian Horse*, http://acle.uva.nl/binaries/content/assets/subsites/amsterdam-center-for-law–economics/cr-meetings/2013/jotte-mulder—draft-the-public-interest-defense-in-cartel-offenses-paper-jm-finding-the-public-interest-eui-.pdf?1386326788166 (accessed 18 Aug. 2017).

[13] The Dutch Minister of Economic Affairs however, seems to exclude protection of precarious workers in the Netherlands from the applicability of the new guidelines (*see* below) as not relating to sustainability, *see*: Rijksoverheid, *Kamerbrief met reactie op position papers over Mededingingswet in relatie tot zzp-ers*, https://www.rijksoverheid.nl/documenten/kamerstukken/2017/04/21/kamerbrief-met-reactie-op-position-papers-over-mededingingswet-in-relatie-tot-zzp-ers (accessed 27 July 2017).

that the sustainability interests would generally be labelled 'public interests', 'non-competition' interests, or 'non-economic' interests.[14] This is a label in competition law-language, of course, because from the governments' perspective their involvement might be tied to internationally agreed upon climate change goals, or stemming from other international obligations. From the perspective of the companies involved, the initiatives follow from obligations of corporate social responsibility[15] and efforts by companies to prove that they are taking stakeholder interests seriously.[16] Thus the initiatives belong to the realm of responsible business conduct, as propagated by the United Nations, the OECD, the EU and many national governments.[17]

In general terms, the problem which surfaces is that competition law actually hinders, or is *perceived* to hinder, sustainability initiatives. However, a more precise 'location' of the problem is necessary before it is possible to conclude that there is indeed a sustainability deficit. First: clearly not all (sustainability) agreements infringe competition law. Some agreements might not lead to a restriction of competition at all. Second: only those agreements that do have a detrimental effect on consumer welfare (usually: increased consumer price),[18] but that also are genuine in their commitments to improve sustainability are problematic when considering if a sustainability deficit exists. 'Greenwashing' should, of course, continue to be prevented.[19] Third: when considering a sustainability deficit only

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[14] *See* e.g. C. Townley, *Which Goals Count in Article 101 TFEU? Public Policy and Its Discontents*, 32 E.C. L.R. 441–448 (2011); A. C. Witt, *Public Policy Goals Under EU Competition Law: Now Is the Time to Set the House in Order*, 8(3) Eur. Competition J. 443–471 (2012); S. Lavrijssen, *What Role for National Competition Authorities in Protecting Non-Competition Interests After Lisbon?*, 35(5) E.L.R. 636–659 (2010); C. Semmelmann, *The Future Role of the Non-Competition Goals in the Interpretation of Article 81 EC*, Global Antitrust Rev. 15–47 (2008); G. Monti, *Article 81 EC and Public Policy*, 39 C.M.L.R. 1057–1099 (2002). *Also see* discussion below in subs. 3.3.

[15] On corporate social responsibility generally *see*: E. Garriga & D. Mele, *Corporate Social Responsibility Theories: Mapping the Territory*, 53(1) J. Bus. Ethics 51–57 (2004) and in relation to the subject matter of this article: J. Heath, *Morality, Competition and the Firm. The Market Failures Approach to Business Ethics* (Oxford University Press 2014).

[16] On stakeholder theory *see*: R. E. Freeman, *A Stakeholder Theory of the Modern Corporation*, in *Ethical Theory and Business* 55–64 (T. L. Beauchamp & N. E. Bowie eds, Pearson Prentice Hall 2004); as response to M. Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. Times Mag. (13 Sept. 1970).

[17] United Nations General Assembly Resolution 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1 (25 Sept. 2015), available from undocs.org/A/RES/70/1; OECD, *Policy Framework for Investment – User's Toolkit* Ch. 7 (2011); European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee Of The Regions on a Renewed EU Strategy 2011–14 for Corporate Social Responsibility*, COM (2011) 681 final.

[18] This connotes price, quality, innovation and consumer choice (*see*: *Guidelines on the Application of Article 81(3) of the Treaty* [2004] OJ C 101, 27 Apr. 2004, at 97–118, para. 16).

[19] *See*: Case COMP/39.579 *Consumer Detergents* [2011] OJ C 193; *also see IAZ*-case, where the Court found that the real objective of an agreement was to create entry barriers to prevent parallel imports, instead of labelling for environmentally friendly washing machines (Joined Cases 96–102, 104, 105, 108, 110/82, *NV IAZ International Belgium and others v. Commission* [1983] ECR-3369, paras 23–24).

those agreements where the sustainability benefits cannot be subsumed in the internal consumer welfare argument (more on this below) are problematic. This means that problems arise when considering agreements that do lead to sustainability-benefits but where: the benefits are difficult to quantify, can only be partly quantified, or perhaps ought not to be quantified; they accrue not to the consumers paying the higher price; the benefits will occur only in the long-term and/or are more uncertain. Also problematic, but for a different reason, are agreements that might lead to benefits – possibly even quantifiable consumer welfare benefits – that outweigh the negative effects, but where cooperation is not strictly necessary.

It must be noted that to label this 'problematic', as I have done above, means taking a normative position. It does not, however, *necessarily* mean that the problem is one for competition law to solve. It might be understood as meaning that these agreements are justifiably prohibited, and that this is a problem (as moving to a sustainable economy is a necessary societal change), but not a problem to be solved by competition law. Clearly there is merit in this position (as with objections against broadening competition law for other reasons).[20] Did we not agree that the economization of competition law in the 1990s was welcome in bringing more clarity and predictability in competition law assessments? Allowing competition law to solve the sustainability issue means leaving the benefits of economization behind, and bringing it on uncertain footing.[21]

To use the label 'problematic' and point out that it is a 'sustainability deficit', which is at least *also* a problem for competition law to solve, is not to deny this merit. The conclusion that there is a sustainability deficit is also based upon the consideration and balancing of both legal and extra-legal arguments. In particular, that a competition law regime which is narrowly focused on quantifying consumer welfare is problematic in itself and will ultimately lead to a loss of legitimacy.[22] This position rests on the pressing urgency of finding sustainable solutions to long-term problems, and the insistence on the need for creative solutions that cannot

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[20] E.g. protection of privacy of consumers; *see*: Bundeskartellamt, *Bundeskartellamt Initiates Proceeding Against Facebook on Suspicion of Having Abused Its Market Power by Infringing Data Protection Rules*, Press Release (2 Mar. 2016), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html (accessed 28 July 2017); on this case R. McLeod, *Novel But a Long Time Coming: The Bundeskartellamt Takes on Facebook*, 7(6) J. Eur. Competition L. & Prac. 367–368 (2016).

[21] This ties in with the 'goals-debate'. Strongly against including public interests e.g. E. Loozen, *De onwenselijkheid van de beleidsregel mededinging en duurzaamheid*, ESB 746–750 (2015); M. P. Schinkel & Y. Spiegel, *Can Collusion Promote Sustainable Consumption and Production?*, Amsterdam Centre for Law and Economics Working Paper 2015-02 (2015); B. Baarsma, *Rewriting European Competition Law from an Economic Perspective*, 3 Eur. Competition J. 559–585 (2011).

[22] *See* A. Gerbrandy, *Toekomstbestendig Mededingingsrecht*, 3 Markt & Mededinging 102–112 (2016).

but include companies themselves,[23] but also on the EU's legal framework and the history of European competition law (see section 3). This position is furthermore supported by taking into account the wider picture of European integration: the tension between European market integration and differing levels of welfare provision by Member States, is echoed by European competition law in how it sets aside national preferences on the protection of public interests.[24]

Taking the normative position – that there is a sustainability deficit in European competition law – does not mean denying some of the problematic aspects of trying to find solutions within competition law. It is also not an open call for allowing consumer welfare to suffer as soon as companies shout 'sustainability!'. It cannot be denied that to protect the public interests involved governments (including the EU) can choose to legislate. This is often indeed a preferred route to take. However, the position discussed in this article is more nuanced: that on the basis of cases decided, cases thwarted for fear of repercussions (and the current legal uncertainty having a chilling' effect),[25] and cases in the making, there does seem to be a sustainability deficit in European competition law and that therefore possible solutions to this deficit within the competition law system itself merit attention.

3 OPTIONS FOR SOLVING THE SUSTAINABILITY DEFICIT

In this section a succinct evaluation is provided of several options for solving the sustainability deficit. There are three levels of analysis: the possibility of 'tweaking' the interpretation of Article 101 (3) TFEU (section 3.1); adapting existing legal doctrines so that sustainability initiatives are not caught by the prohibition of Article 101 (1) TFEU (section 3.2); and revisiting existential questions of competition law, which is a bit more adventurous (section 3.3).

3.1 Tweaking article 101 (3) tfeu

As is well known, Article 101 (3) TFEU contains four criteria that all need to be met for the exception to apply. In discussing the sustainability deficit in this article,

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[23] As stressed in the United Nations Sustainable Development Goal 17, co-creation/partnerships between public and private are necessary (*see*: United Nations General Assembly Resolution 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1 (25 Sept. 2015), para. 17.1).

[24] *See* A. Gerbrandy & R. Fransen, *Competition Law and Democratic Empowerment in the EU*, in *Democratic Empowerment in the European Union* (D. Levi-Faur & F. van Waarden eds, Edward Elgar Publishing, forthcoming 2017).

[25] *See* C. Van der Weide, *Sustainability and Article 101(3) TFEU the Undertaking's Perspective* (Master Thesis 2013), http://renforce.rebo.uu.nl/wp-content/uploads/2013/12/Master-Thesis-CJA-van-der-Weide.pdf (accessed 28 July 2017).

most attention is given to the first two requirements: (a) the benefits that can be taken into account and (b) the requirement to pass on benefits to consumers. I will address these two first. In subsection (3.1[c]) I will discuss the weighing and balancing exercise that is involved.

3.1[a] *Benefits*

It might be useful to return briefly to the Dutch cases before discussing the interpretation of the first exception clause. The existing guidelines for ACM on the issue of competition and sustainability (adopted in 2014) already takes into account the accrual of future benefits to consumers.[26] Future benefits were not, however, really brought forward as an issue in the two cases discussed. Rather, ACM only quantified the short-term benefits involved. Interestingly, for the Energy-agreement ACM did mention that it took into account benefits for Dutch 'society as a whole'. These benefits were the avoided health care costs from lowering the emission of noxious gasses.[27] However, as (virtually) all citizens are energy consumers and all energy consumers would pay the higher price resulting from the closing of coal-fired power plants, the group to whom the benefits accrue and 'society', is essentially the same. *Physical* health benefits, apart from avoided costs, were not considered. *Environmental* benefits (e.g. protection of the ecosystem, including its long-term effects) were also not considered separately from avoided health care costs. Neither was the wider context, for example that the closing of coal-fired power plants was part of a polder-fashioned larger agreement. In the Chicken of Tomorrow-case, ACM considered only benefits accruing to consumers who were willing to pay the higher price. In this willingness-to-pay exercise both environmental benefits and animal welfare benefits were discerned. More general health care benefits – leading to avoided health care costs – were also considered, but none resulted directly from the agreement. However, in this case, ACM did not consider *animal welfare* itself – as a value apart from consumers' willingness to pay – a benefit to be taken into account.

In reaction to the political discussion that followed these cases, in 2015 the Dutch Minister of Economic Affairs drafted new guidelines on the application of

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[26] *See*: https://www.rijksoverheid.nl/documenten/besluiten/2014/05/08/beleidsregel-mededinging-en-duurzaamheid (accessed 28 July 2017).

[27] Calculating these benefits using a prevention cost-method and damage costs methodology. ACM, *Analysis by the Netherlands Authority for Consumers and Markets (ACM) of the Planned Agreement on Closing Down Coal Power Plants from the 1980s as Part of the Social and Economic Council of the Netherlands' SER Energieakkoord* (2013), https://www.acm.nl/en/download/publication/?id=12082 (accessed 28 July 2017).

the national equivalent of Article 101 (3) TFEU.[28] The Minister focused on: (a) broadening the scope of the assessment to take into account the wider context of a single agreement, and (b) widening the scope of benefits that can be taken into account to include 'benefits to society'. Both the Commission and ACM reacted to the draft guidelines by stating – in essence – that they went beyond the scope of Article 101 (3) TFEU.[29]

The Commission's reaction is in line with its economic theory-based interpretation of European competition law in which protection of consumer welfare is considered its overriding goal. But it is important to remember that before embarking on the road to a 'more economic approach', the Commission interpreted this benefits requirement in a relatively broad manner. In particular, it considered industrial policy concerns, social policy concerns and environmental concerns under this heading.[30] Furthermore, it took into account these benefits using a fairly low burden of proof.[31] The more economic approach, however, brought about a narrower approach: the relevant benefits to consider in a competition law assessment now relate only to economic efficiencies and exclude other policy considerations.[32] The Commission's current interpretation of Article 101 (3) TFEU's first clause means that if benefits cannot be subsumed under the notion of economic efficiencies then they are excluded from consideration.[33]

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[28] To be found on: https://www.internetconsultatie.nl/mededingingenduurzaamheid (accessed 28 July 2017).

[29] Original in English: Rijksoverheid, *Mededinging en Duurzaamheid*, https://www.rijksoverheid.nl/documenten/kamerstukken/2016/06/23/mededinging-en-duurzaamheid (accessed 28 July 2017).

[30] In the *ACEA*-case e.g. the Commission found that an agreement between car manufacturers reducing CO2 did not infringe Art. 101 (1), *see*: European Commission, *XXVIIIth Report on Competition Policy* 1998 (SEC (99) 743 final), 56 and 151 (1998). Other agreements were exempted under 101(3): *see* EACEM in EC, *XXVIIIth Report on Competition Policy*, 56 and 152 (1998); *CECED* [2000] OJ L 187, at 52; *Carbon Gas Technologie* [1983] OJ L 376, at 19–20; *Exxon/Shell* [1994] OJ L 144, at 32; *Duales System Deutschland* (DSD) [2001] OJ L 319, at 18–19; Case T-289/01, *DSD v. Commission* (Der Grüne Punkt); *Philips/Osram* [1994] OJ L 378/37, at 42; *Assurpol* [1992] OJ L37/16, at 22–23. Note that several of these cases required commitments to be made by the parties. *See* for an in-depth discussion Witt, *supra* n. 14. A Dutch example can be found at ACM, *NMa Approves Collective Levy System for White and Brown Goods*, https://www.acm.nl/en/publications/publication/6002/NMa-APproves-Collective-Levy-System-for-White-and-Brown-Goods/ (accessed 28 July 2017).

[31] *See* Witt, *supra* n. 14, at 463.

[32] Guidelines Article 81(3), *supra* n. 18, paras 48–72.

[33] Though its first 'new' guidelines on horizontal cooperation still contained a section on environmental agreements (*Commission Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Co-Operation Agreements*, [2001] OJ C 3, 6 Jan. 2001, paras 192–194) this section was abandoned with the 2010 guidelines. The Commission has explained this is not to be seen as a change of its policy (Commission, *Competition: Commission Adopts Revised Competition Rules on Horizontal Cooperation Agreements – Frequently Asked Questions* 4 (2010), http://europa.eu/rapid/press-release_MEMO-10-676_en.htm (accessed 28 July 2017).

This recent position has been criticized and wider notions of welfare have been proposed.[34] It can also be questioned whether this narrow interpretation is actually in line with the case law of the Court of Justice (the Court). The Court has, it seems, not fully embraced the consumer welfare approach – at least not as a single, overriding imperative.[35] Another argument for doubting the validity of the Commission's approach lies in taking the so-called cross section clauses, and the wider constitutional context, of the European Treaties seriously.[36] For example, the cross section clauses specifically include a reference to environmental protection. Though the impact of these clauses is uncertain (both for Article 101 (1) and Article 101 (3) TFEU), it has been argued that they function as important general reference points for EU law, including for European competition law.[37] The Commission, however, has reiterated the point made before: the interests covered by these cross section clauses can be taken into account in a competition law assessment only when they are subsumed under the four conditions of Article 101 (3).[38]

In the meantime, the Dutch Minister of Economic Affairs has settled for guidelines with slightly less far-reaching changes.[39] Now, under the first exception clause, ACM is charged with also taking into account long-term benefits, benefits for society as a whole, and benefits of all component parts of a complex agreement.[40] The latter addition could have real impact; though ACM might also brush it aside and consider that existing case law already points out that the

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34 E.g. Baarsma & Rosenboom, *supra* n. 3, point to broadly accepted definitions of welfare.

35 *See* Case C-52/09 *Konkurrensverket v. TeliaSonera Sverige AB*, para. 22 (not yet reported); *see also* Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para. 42; Joined Cases C-501, 513, 515 and 519/06 P *GlaxoSmithKline et al v. Commission* [2009] ECR I-9291, paras 63, 64; Case C-8/08 *T-Mobile Netherlands BV et al v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 38; T-86/95, *Compagnie Maritime Belge and others v. Commission* [2002] ECR II-1011, para. 343; Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision* I [1996] ECR II-649. On this point also Witt, *supra* n. 14, at 464; Baarsma & Rosenboom, *supra* n. 3, at 412–413.

36 This is an argument where competition law is placed in a wider constitutional context, with reference to Arts 2 en 3 VEU, the cross-section clauses, and the coming into force of the Charter. Early in this line: D. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the 'New' Europe*, 42(1) Am. J. Comp. L. 25–84 (1994); D. Gerber, *Law and Competition in Twentieth Century Europe* (Clarendon Press 1998). On plurality of goals *also see* H. Vedder, *Competition Law and Environmental Protection in Europe: Towards Sustainability?* (Europa Law Publishing 2003); G. Monti, *EU Competition Law from Rome to Lisbon: Social Market Economy*, in *Aims and Values in Competition Law* 27–66 (C. Heide-Jørgensen, C. Bergqvist, U.B. Neergard & S. Troels Poulsen eds, DJØF Publishing 2013).

37 *See*: S. Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2012).

38 Guidelines Article 81(3), *supra* n. 18, at para. 42. On this point further: N. Rosenboom, *How Does Article 101 (3) TFEU Case Law Relate to EC Guidelines and the Welfare Perspective?*, SEO Economic Research Working Paper (2013).

39 To be found at: https://zoek.officielebekendmakingen.nl/stcrt-2016-52945.html (accessed 28 July 2017).

40 *Beleidsregel van de Minister van Economische Zaken van 30 september 2016* nr. WJZ/16145098, http://wetten.overheid.nl/BWBR0038583/2016-10-06 (accessed 28 July 2017).

conditions of Article 101 (3) need to be applied in their legal and economic context.[41] Apart from the guidelines, the Minister proposes to continue a dialogue with 'Brussels', both at D-G Comp, but also at other institutions of the European Union, in a mission to provide 'more room' for sustainability initiatives.[42]

The argument presented here is that the benefits that can legally be taken into account under the first clause of Article 101 (3) TFEU are wider than those outlined in the Commission's guidelines. Though it has changed its policy, this has not led to a different interpretation by the Court of Justice. Arguments on why a broader range *ought* to be accepted have been put forward in section 1 (see also section 3.3). Both views are contested, and accepting these arguments does bring with it a level of uncertainty as to the scope of these benefits. There is no clear guidance by the Court on this point. And thus an apparent paradox surfaces, which often confuses the discussion on competition law and sustainability. It seems that it is not, and never has been, impossible to take into account positive effects, for example on the environment (though it has become more difficult) *and*, at the same time, it is true that the Commission's interpretation of benefits does not always address the public interests at stake in many sustainability initiatives. Confusion in this discussion could be lessened by delineating more precisely the situations where the sustainability deficit arises but legal certainty for now remains elusive.

3.1[b] *Passing on of Benefits to Consumers*

The second requirement is that a 'fair share' of the benefits must accrue to consumers. The first issue of dispute here is based on the Commission's view that the consumers to whom benefits accrue must be in the same market as those bearing the costs.[43] This excludes *direct* benefits of increased labour protection, human rights protection or of providing living wages to workers elsewhere on the planet. It also excludes environmental benefits or ecological protection that takes place, for example, in the Amazon rainforest. However, these benefits *do* accrue to the relevant consumers if they are willing to pay for increased protection elsewhere. In this respect, environmental benefits close at home may also present difficulties. Accounting for the protection of birds that are non-cuddly, non-edible, and really of no economic use at all, for example, would be difficult unless

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41 T-168/01 *GlaxoSmithKline Services v. Commission* [2006] ECR II-2969, para. 276. The Court in appeal added that it is necessary to consider the 'specific structural features of the … sector in question', Joined Cases C-501, 513, 515 and 519/06 P *GlaxoSmithKline et al v. Commission* [2009] ECR I-9291, paras 101–104. *See also* below.

42 *See*: Rijksoverheid, *supra* n. 29.

43 Guidelines Article 81(3), *supra* n. 18, at para. 43.

consumers were willing to pay. On this point the older decisions on Article 101 (3) TFEU (referred to above), taken by the Commission before the turn towards an economic approach, were seemingly less strict .

A second issue of contestation is whether (and how) to take into account benefits that accrue to future consumers. Economic analysis usually does not look very far into the future. Future benefits are less certain, and can be less easily calculated.[44] The traditional approach to undertaking cost-benefit analyses is to apply a discount for future benefits, based on assumptions about the increased wealth of future generations, and to reflect inherent uncertainties of the future. The conceptual foundation of this methodology is that the value of money spent or invested now is much greater than the value of that same amount of money spent in the future (the so-called investment approach). This might make sense when talking about brick & mortar investments, but may be less relevant when combatting the future effects of global warming through environmental measures in the present.[45]

These points – 'here and there', 'now and then' and 'only when willing to pay' – ran through both the Dutch political discussions and the debate between the Dutch politicians, ACM and the Commission. In reshaping the guidelines, the Minister of Economic Affairs had aimed at including the consideration of 'benefits for society as a whole' in its interpretation of the second requirement. This would have included benefits elsewhere. There seemed to be support for this position within civil society organizations and the Social and Economic Council. However, it was a stretch too far for the Commission, who held this to be against Article 101 (3) TFEU.[46] The final guidelines do urge ACM, however, to take into account future benefits to consumers under the second exception clause (but in this they are the same as the 2014 guidelines).[47]

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[44] The Commission does mention future consumers in its guidelines (paras 87–88), in the sense that it takes into account that some benefits have a time lag. It has been argued that though there is nothing in the decisions of the Commission that prevent future benefits from being taken into account, the standard of proof is too high, compared to present benefits. This may make it harder for future interests to be considered. *See*: C. Townley, *Inter-Generational Impacts in Competition Analysis*, 32(11) E.C.L.R. 580–590 (2011).

[45] The practice of discounting and the relevant rate in relation to environmental policy has undeniably been a hot topic of discussion amongst the economist community of late. *See*: Duncan Purves, *The Case for Discounting the Future*, 19(2) Ethics, Pol'y & Envtl. 213–230 (2016); Arrow et al., *Determining Benefits and Costs for Future Generations*, Sci. 341 (2013); Simon Dietz, Ben Groom & William A. Pizer, *Weighing the Costs and Benefits of Climate Change to Our Children*, 26(1) Fut. Child. 133–155 (2016); T. Barker, *The Economics of Avoiding Dangerous Climate Change. An Editorial Essay on the Stern Review*, 89 (3–4) Climate Change 173–194 (2008).

[46] *See* Commission, *supra* n. 29. The Minister then moved this to its interpretation of the *first* requirement.

[47] S*upra* n. 40. The 2016 guidelines however, mention both 'quantitative and qualitative' benefits to be taken into account.

A pivotal issue – if we discard Treaty amendments, or a very radical interpretation of 'consumer', as not very plausible in the short-term – might be hidden in the notion of 'fairness'. It is not just that there must be benefits, but that the share for consumers is 'fair'. Older decisions of the Commission again seem to be not very strict on this point,[48] but the Commission now holds that the consumer welfare benefits must *at least* outweigh the consumer welfare loss.[49] But it is not immediately clear why that ought to be necessary. 'Fair' can have different meanings. Why would it not be fair that the (on average relatively wealthy Dutch) consumer pays slightly more for a light summer garment, if that increase in price has real income and wider welfare effects at the garment's point of origin? Why would the protection of species depend on a complete compensation of the price-increase in the willingness to pay of consumers? Notions of fairness might also take into account the relative impact of positive and negative effects; or consider very long-term views. Global notions of fairness (or justice) are, of course, not foreign to the sustainability discourse.[50] Neither are they foreign to law in general, which ultimately rests on concepts of justice and fairness. And though it is not generally included in the competition discourse, there might be overriding normative reasons for considering fairness within a competition law assessment.[51]

3.1[c] *Weighing and Balancing*

Tweaking the interpretation of whom to consider as recipients of benefits is one thing; discussing fairness is another. How to weigh benefits and detrimental effects

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48 Baarsma & Rosenboom, *supra* n. 3, at 419 point out that in 'in none of these decisions [EACEM, CECED, DSD, *see supra* n. 30, AG] were the environmental benefits subsumed into direct cost savings for the individual consumer. Rather the main reason for exemption was the overall cost benefit for society as a whole'.

49 Guidelines Article 81 (3), *supra* n. 18, at para. 85.

50 *See* on these issues: T. Nagel, *The Problem of Global Justice*, 33(2) Phil. & Pub. Aff. 113–147 (2005); O. Langhelle, *Sustainable Development and Social Justice: Expanding the Rawlsian Framework of Global Justice*, 9 (3) Envtl. Values 295–323 (2000). Elsewhere we have tried to use a notion related to global fairness in competition law by basing competition law on the capability approach: R. Claassen & A. Gerbrandy, *Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach*, 12(1) Utrecht L. Rev. (2016).

51 On the notion of fairness in competition law: T. J. Horton, *Fairness and Antitrust Reconsidered: An Evolutionary Perspective*, 44(4) McGeorge L. Rev. 823–863 (2013); E. D. Hughes, *The Left Side of Antitrust: What Fairness Means and Why it Matters*, 77(2) Marq. L. Rev. 265–306 (1994); D. J. Gerber, *Fairness in Competition Law: European and U.S. Experience*, Kyoto Conference on Fairness and Asian Competition Laws (5 Mar. 2004), https://archive.kyotogakuen.ac.jp/o_ied/information/fairness_in_competition_law.pdf (accessed 18 Aug. 2017); G. Amato, *Antitrust and the Bounds of Power. The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing 1997); C. Ahlborn & A. J. Padilla, *From Fairness to Welfare*, in *European Competition Law Annual 2007* (C. D. Ehlerman & M. Marquis eds, Hart Publishing 2008); M. E. Stucke, *Should Competition Policy Promote Happiness?*, 81(5) Fordham L. Rev. 2575–2644 (2013).

is certainly another point of discussion.[52] An assessment under Article 101 (3) necessarily requires a form of balancing of the benefits against detrimental effects. The benefits need to be weighed against the consumer welfare loss that made the agreement infringe Article 101 (1) TFEU in the first place. The acceptable method of balancing involves a quantification exercise; more precisely, a quantification of effects on consumer welfare. This method brings clarity and immediate insight. But there are also pitfalls.

An important question is whether the benefits always need to be quantified (expressed in monetary terms) to 'count'. Not all effects lend themselves equally well to monetization. That, however, should not mean discarding them from an assessment immediately. Protection of human rights, for example, might be difficult to express in consumer welfare terms, but is welfare-enhancing nonetheless.[53] And also from a moral point of view, it might be questioned whether we ought to want to quantify all benefits.[54] The issue here is not so much that there *is* a qualitative difference between – say – avoided health care costs and improved health, just as there is a qualitative difference between the quantified expression of being willing to pay for improved labour conditions or animal welfare and the improvement itself, but whether this is relevant for competition law.

Considering the above, and following the normative position that there is a sustainability deficit, I would suggest that it is. If both the scope and recipients of benefits are widened, then a weighing process that not only relies on quantification, but also on qualification of the interests involved is necessary.[55] The relative *importance*, weight or gravity, of the non-quantified benefits might outweigh the quantified consumer welfare loss. Even when perfectly quantified benefits do not outweigh quantified consumer welfare loss, this ultimately does not tell us much about whether the interests that are now protected are not *intrinsically* more important than a higher price.[56] This is not a new thought in economics, where use is made of different models that include a wider range of benefits and negative

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[52] Art. 101 (3) TFEU also requires a necessity-test and remaining competition. Some argue for a relaxed proportionality test; others advocate a more stringent necessity-test. The latter would, e.g., include whether the same result could not be reached through legislation (Kingston, *supra* n. 37, at 280; C. Townley, *Article 81 and Public Policy* 312 (Hart Publishing 2009)). Taking into account the parallels with Art. 106 (2) TFEU – both sustainability agreements and services of general economic interest aim at goals that are non-economic – the proportionality test involved in that assessment might also give us an idea of how to shape it to fit sustainability agreements. Note that the necessity-test is also a reality check: considering the context of the coals market ACM concluded that the arrangements of the blood-coal covenant would never lead to the benefits claimed.

[53] On this point e.g. Baarsma & Rosenboom, *supra* n. 3.

[54] In general *see*: M. J. Sandel, *What Money Can't Buy. The Moral Limits of Markets* (Allen Lane 2012).

[55] The Dutch 2016 guidelines also urge for taking into account both quantitative and qualitative (future) benefits.

[56] The discussion on the notion fairness, of course, is tied to this point.

effects than those that are easily expressed in monetary terms.[57] A social cost benefit analysis for example would include indications of non-monetized values as well, so as to allow a decision-maker to weigh these values.[58] Thus, the relative weight for the recipient of the benefits, and the relative costs to those shouldering the loss, becomes a factor to take into account on a case-by-case basis. However, accepting both the wider range of benefits, and that this involves a weighing exercise does raise new problems, not the least is to whom this exercise should be entrusted.[59] Importantly, however, it must be recalled that this type of reasoning is certainly not new to law, where balancing conflicting norms and case-specific circumstances – even at the level of conflicting fundamental rights – are often pivotal to reaching acceptable outcomes.[60]

3.2 Adapting existing legal doctrines and the economic and legal context

In the previous section the necessity of tweaking the interpretation and scope of the exception of Article 101 (3) TFEU was considered. Applying Article 101 (3) TFEU, however, is only necessary if an agreement is caught by Article 101 (1) TFEU. As to the prohibition itself, the Court has consistently held that any agreement must be considered carefully, both with regards to the content of the agreement and to its legal and economic context, before reaching a conclusion on whether it constitutes an infringement of Article 101 (1) TFEU. Thus, already in the *STM*-case it was held that a seemingly restrictive clause must be scrutinized in its context as 'it may be doubted whether there is an interference with competition

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57 E.g. Feuillette et al refer to three types of methods: cost-based (e.g. avoided damages cost); revealed preference methods (e.g. travel-cost method) and stated preference methods (e.g. willingness-to-pay surveys) (at 79–80). As part of modern cost-benefit analyses, economists are increasingly using different valuation methods to capture and quantify non-monetary (or non-market) benefits: S. Feuillette, H. Levrel, B. Boeuf, S. Blanquart, O. Gorin, G. Monaco, B. Penisson & S. Robichon, *The Use of Cost–Benefit Analysis in Environmental Policies: Some Issues Raised by the Water Framework Directive Implementation in France*, 57 Envtl. Sci. & Pol'y 79–85 (2016); D. Pearce, *Cost-Benefit Analysis and Environmental Policy*, 14(4) Oxford Rev. Econ. Pol'y 84–100 (1998); D. Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108(2) Yale L.J. 377–406 (1998).

58 *See* Fairtrade.org on pineapples (not yet online).

59 There are several ways of looking at this point: one is to include the legitimizing effect of the governance mechanism involved (*see* e.g. J. Mulder, *Social Legitimacy in the Internal Market – A Dialogue of Mutual Responsiveness* (diss. Florence), (European University Institute 2016); and Gerbrandy, *supra* n. 22. Another is to think of 'delegating' legitimacy to undertakings (*see*: R. Claassen & A. Gerbrandy, *Doing Good Together*, forthcoming); or enhancing the legitimacy of decision making procedures at the level of the competition authorities (A. Gerbrandy, *Addressing the Legitimacy Problem for Competition Authorities Taking into Account Non-Economic Values: The Position of the Dutch Competition Authority*, Eur. L. Rev. 769–781 (2015)).

60 E.g. *See* R. Alexy, *Constitutional Rights, Balancing, and Rationality*, 16(2) Ratio Juris 131–140 (2003) and on proportionality e.g. M. Klatt & M. Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012).

if the said agreement seems really necessary for the penetration of a new area for the undertaking'.[61] Though some confusion can be said to have arisen in relation to the object/effect dichotomy, the Court has since reiterated this sentiment (including in the notorious/famous *Cartes Bancaires* case).[62] This notion of scrutinizing content and the economic and legal context has both led to a generally agreed upon list of clauses that are seen as object-infringements (but content and context remain important even so),[63] and requiring a counterfactual analysis to establish whether agreements have a negative effect on competition. It has also led to several – somewhat loosely related – legal doctrines and concepts developed in the case law of the Court whereby certain agreements are kept outside the scope of, or are not prohibited by, Article 101 (1) TFEU. In this section I will consider several of these doctrines in relation to the sustainability deficit, namely: (a) the case law on ancillary restraints, (b) the Wouters-doctrine (or 'regulatory ancilliarity' or the 'inherent restrictions doctrine'), and (c) the case law on solidarity. I will further include (d) the doctrine of useful-effect, developed by the Court to scrutinize anti-competitive *government* behaviour, as this has been considered by the Dutch Minister of Economic Affairs as a defence against over-application of competition law.

3.2[a] *Ancillary Restraints Doctrine*

The notion of *ancillary restraints* arises in circumstances where there is a subsidiary anti-competitive clause, which is necessary and proportional to a broader agreement that is (in itself) not anti-competitive, and as a result the subsidiary clause is not caught by Article 101 (1) TFEU.[64] The case law is not without difficulties, but the following general notion seems uncontested: this doctrine will apply when taking into account the overall legal and economic context of the agreement under scrutiny if the counterfactual (i.e. the situation without the agreement) would lead to less competition. Thus, this would include circumstances where a subsidiary non-compete clause is necessary to the sale of a business, or to clauses restricting

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61 Case C-56/65 *Société Technique Minière (LTM) v. Maschinenbau Ulm GmbH* [1966] ECR 235, 250.

62 E.g. in Case C-234/89 *Delimitis v. Henninger Bräu* [1991] ECR I-935; Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services Ltd (ENS) and Others v. Commission* [1998] ECR II-3141 and Case T-328/03 *O2 (Germany) v. Commission* [2006] II-1231. *See also*: Case C-67/13 P *Cartes Bancaires v. Commission*, ECLI:EU:C:2014:2204, paras 49–58.

63 *See* esp. Case C-209/07 *Beef Industry Development (BID) and Barry Brothers* [2008] ECR I-08637 and Case C-67/13 P *Cartes Bancaires v. Commission*, *supra* n. 62.

64 Case C-42/84 *Remia BV v. Commission* [1985] ECR 2545, paras 19 and 20; Case 161/84 *Pronuptia* [1986] ECR 353, paras 15–17, Case C-250/92 *Gottrup-Klim v. Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641; Case C-382/12 P *MasterCard and Others v. Commission*, ECLI:EU:C:2014:2201, paras 89–95.

membership to competing cooperatives for farm supplies when such clauses are necessary to the functioning of the cooperative.[65]

In relation to sustainability agreements, the applicability of the concept is, as far as I am aware, untried; though it has been pointed towards recently in literature.[66] Considering the Chicken of Tomorrow-case, this omission is not surprising: it would be difficult to argue that the anti-competitive clauses were of subsidiary nature. However, one must wonder whether using the ancillary restraints doctrine for analysis of the Energy-agreement might have led to a different outcome. As mentioned, ACM assessed only a *part* of the overall Energy-agreement (the closing of coal fired power plants). The overall agreement included a comprehensive road map to transitioning to green energy, including substantial efforts relating to innovation, job creation and investments. Clearly, the aim of this overall agreement was not anti-competitive. Arguing that success of the overall agreement might falter without closing down the coal-fired power plants might have led to a consideration of those clauses as ancillary restraints. It must be noted, however, that it is not clear whether this could be accepted on the basis of the current case law of the Court (and subsequent Notice of the Commission in which guidelines are formulated).[67] But it might be a useful tool to consider in relation to multi-stakeholder, multi-facetted sustainability agreements.

3.2[b] *Wouters Doctrine*

It has been difficult to conceptually fit the Wouters doctrine within the broader case law of the Court. Some have taken the Wouters doctrine to be related to the ancillary restraints doctrine. The difference is, however, that the Wouters doctrine is used to assess the necessity of certain anti-competitive clauses to fulfil a *non-economic purpose* for which the agreement is set up.[68] Others see the Wouters case law as bringing a distinctive new concept to competition law;[69] possibly bringing it in line with the free movement case law of the Court.[70] It

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65 Case C-42/84 *Remia BV v. Commission* [1985] ECR 2545; Case C-250/92 *Gottrup-Klim v. Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641.

66 Baarsma & Rosenboom, *supra* n. 3, at 420–421. *See also* the reaction of the Social and Economic Council on 26 Jan. 2016, https://www.ser.nl/~/media/db_adviezen/2010_2019/2016/reactie-beleidsregel-mededinging-duurzaamheid.ashx (accessed 28 July 2017).

67 Case T-112/99 *Métropole télévision (M6) and Others v. Commission* [2001] II-2459; Case 161/84 *Pronuptia* [1986] ECR 353; Guidelines Article 81(3), *supra* n. 18.

68 'Regulatory ancilliarity', according to R. Whish & D. Bailey, *Competition Law* 120–127 (Oxford University Press 2003).

69 *See*: E. Loozen, *Professional Ethics and Restraints of Competition*, 31(1) Eur. L. Rev. 28–47 (2006); E. Kloosterhuis, *Wouters: All in the Family?*, 3 Markt & Mededinging 113–117 (2016) (in Dutch); J. W. van de Gronden, *De ontwikkeling van de Wouters-doctrine en de rol van doelstellingen van algemeen belang in het EU-mededingingsrecht*, 11 SEW 523–528 (2015).

70 E.g. Monti, *supra* n. 14, at 1088.

did not help that the *Wouters* case itself was, for a long time, only a single judgment of the Court. Whilst it has recently been endorsed by several other judgments, its scope remains unclear.[71] The Dutch Minister of Economic Affairs discarded the Wouters doctrine as being too inchoate for policy-making purposes, but it still might provide a promising lead in closing the sustainability deficit in competition law.

In the *Wouters* case itself, the Court held that though the Dutch Bar Association's prohibition of partnership between law firms and accountants was anti-competitive, its regulatory interference was – considering the overall context – nonetheless outside the scope of Article 101 (1) TFEU. Its aim, the Court recalls, was to safeguard the integrity of the legal profession. This case – and its progeny – thus apparently allows for a balancing between economic interests and non-economic interests. It is promising for sustainability agreements: these initiatives pursue a public interest, and in any case the restrictions on competition ought to be inherent in obtaining the sustainability goals for them to be acceptable. However, the *Wouters* line of cases ultimately also requires involvement of a public authority in the restrictive agreement. It is precisely because there is government involvement that the restriction on competition by private parties can be allowed; it is the public interest, as defined by public authority, that necessitates the restriction. This might prove to be a stumbling block for sustainability initiatives. In the Dutch cases discussed throughout this article, elements of the government charging the market parties with self-regulation might be discerned. On the other hand, such agreements might often take the form of self-regulation between private parties.

The involvement of a public authority as a legitimizing factor is an element also present in the case law relating to solidarity and in the useful effect doctrine. I will therefore return to this point after setting out these doctrines in relation to the sustainability deficit, and will question its continued validity in the context of the relationship between the public realm and the private realm (see section 3.3).

3.2[c] *Solidarity*

Considering solidarity in the context of competition law might, at first glance, seem a less obvious candidate for solving the sustainability deficit than both ancillary restraints and the Wouters doctrine. However, because the concept of solidarity is fundamental both to European integration and to the sustainability

[71] Case C-519/04 P *Meca-Medina v. Commission* [2006] ECR I-6991; Case C-136/12 *Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato (AGCM)*, ECLI:EU:C:2013:489; Case C-184/13 *API and Others*, ECLI:EU:C:2014:2147.

discourse it might provide a bridge – at least on a theoretical level – between the two discourses.[72]

First to be considered is the case law of the Court relating to the concept of an undertaking.[73] Though the core of the concept of an undertaking – an entity engaged in economic activity, providing goods or services on a market[74] – is uncontested, at its fringes it is much more interesting. The Court has held that *entities* are not undertakings if they fulfil a social function that is predominantly based on solidarity.[75] In a well-known line of cases relating to sickness-funds and pension-funds the Court considered that, within certain limits (which I will come back to), some entities that appear to be undertakings should not be subject to competition law. These exceptions are based on considerations of solidarity. The pivotal point seems to be that wealth transfers take place from one group (the healthy, the young, the affluent) to another group (the ill, the old, the poor).[76] In other words, a regime of competition law does not fit because the market-logic does not hold. Second, the Court has also developed a line of case law in which *activities* relating to the conclusion of collective labour agreements are held outside the scope of competition law.[77] The reasoning here is based primarily on the place that the Treaty accords to the social dialogue, and the 'nature and purpose' of these agreements.[78] This is, however, linked to the notion of solidarity: the Treaty values social dialogue because its purpose is to protect weaker parties from being exploited by the more dominant one.[79] Thus, a tentative conclusion is that the

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72 *See* on the notion of solidarity in the EU more generally: A. Sangiovanni, *Solidarity in the European Union*, 33(2) Oxford J. Legal Stud. 213–241 (2013).

73 *See* on the concept of undertaking extensively, O. Odudu, *The Meaning of Undertaking Within Article 81 EC*, 7 Cambrigde Y.B. Eur. Legal Stud. 211–241 (2004–2005); V. Hatzopoulos, *The Concept of 'Economic Activity' in the EU Treaty: From Ideological Dead-Ends to Workable Judicial Concepts*, College of Europe Research Paper in Law 06/2011, Brugge (2011).

74 Case C-41/90 *Höfner and Elser v. Macrotron* [1991] I-1979.

75 Case C-159/91 *Poucet and Pistre v. AGF and Cancava* [1993] I-637; Case C-218/00 *Cisal v.* INAIL [2002] ECR I-691; Joined Cases C-264, 306, 354, and 355/01 *AOK-Bundesverband and Others* [2004] I-2493; Case C-437/09 *AG2R Prévoyance v. Beaudout Père et Fils SARL* [2011] ECR I-973.

76 On these cases e.g. N. Boeger, *Solidarity and EC Competition Law*, 32(3) Eur. L. Rev. 319–340 (2007); A. Winterstein, *Nailing the Jellyfish: Social Security and Competition Law*, 20(6) Eur. Competition L. Rev. 324–333 (1999).

77 Case C-67/96 *Albany* [1999] I-05751.

78 *See* Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens' Handelsonderneming BV*, ECLI:EU:C:1999:434, paras 58–61 (the nature of the collective agreement is that it is the 'outcome of collective negotiation between employers and employees'; its purpose that it 'seeks generally to guarantee a certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration'). *Also see* Case C-219/97 *Drijvende Bokken* [1999] I-6121, paras 47–51. Discussion by S. Evju, *Collective Agreements and Competition Law. The Albany Puzzle, and Van der Woude*, 17(2) Int'l J. Comparative Lab. L. & Indus. Rel. 165–184 (2001).

79 B. Bercusson, *European Labour Law* (2d ed., Cambridge University Press 2009) (e.g. 'Collective bargaining and social dialogue within Member States is regarded as reflecting a balance of power between labour and capital, exercised traditionally through industrial conflict', at 522); Evju, *supra*

underlying rationale of both lines of cases lies in the idea that solidarity-based activities or solidarity-based entities do not conform to market-logic.

However, this does not make the relevance for solving the sustainability deficit immediately clear. The next step in the argument is the following. If the pivotal point is that solidarity-logic pushes aside market-logic (and thus: competition law), it must be shown that sustainability-agreements are also primarily based on solidarity-logic. This might be fairly obvious for some agreements, for example those aiming to provide a living wage for workers in low-income countries. It is less immediately obvious for other types of sustainability agreements in which one would have to argue for the much shakier concept of solidarity between generations (in e.g. ecological protection agreements).[80]

There are several differences with the lines of cases referred to. The first is the legitimizing factor of public authority involvement, which I will return to below. The second is that sustainability agreements are concluded between companies, and these companies conform to market-logic in the sense that they are (presumably) profit-making entities. It is only to a *part* of their activities that the solidarity-logic overrules the market logic. Here it must be remembered, however, that the notion of undertaking is a 'relative concept'.[81] If it can be shown that the price-increase as result of the agreement cannot lead to extra profit,[82] might this lead to the 'splitting-off' of the sustainability-related activities?

3.2[d] *Useful Effect Doctrine*

The useful effect doctrine requires *Member States* to uphold the useful effect of European competition rules. They ought not to stimulate cartels, nor delegate regulatory powers to market parties without there being sufficient accounting for public interests through public oversight.[83] Similar to the doctrines discussed above, the useful effect doctrine also upholds the dichotomy between state and

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n. 78, at 165 ('It is in the nature and purpose of collective agreements to provide protection for workers against competition on terms and conditions of work.'); S. Smismans, *The European Social Dialogue Between Constitutional and Labour Law*, 32(2) Eur. L. Rev. 341–364 (2007).

80 A different link, though tenuous, might lie in the notion that collective labour agreements are necessary to protect labour from becoming commodified; a similar idea exists against commodification of land, thus establishing a connection to protection of the ecosystem and environment. *See* D. Ashiagbor, *Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration*, 19(3) Eur. L.J. 303–324 (2013).

81 As mentioned by the Advocate General in Joined Cases C-264, 306, 354, and 355/01 *AOK-Bundesverband and Others* [2004] I-2493, *Opinion of AG Jacobs*, para. 46.

82 On the issue of profit making in relation to the concept of undertaking *see* Odudu, *supra* n. 73.

83 Case C-13/77 *NV GB-Inno-BM SA v. ATAB* [1977] ECR 2115; Case C-267/86 *Van Eycke v. ASPA NV* [1988] ECR 4769; Cases C-67/96, 115–117/97 and 219/97 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751; Case C-202/04 *Cipolla and Others* [2006] ECR I-11421; Case C-437/09 *AG2R Prévoyance v. Beaudout Père et Fils SARL* [2011] ECR I-973.

market. Thus, it is allowed to charge private parties with regulatory activities, but only where the state has the ultimate decision-making power.

It is interesting to note that this doctrine of useful effect has been shaped by the Dutch Minister of Economic Affairs into an *ex ante* defence against European competition law prohibiting sustainability initiatives.[84] In a legislative proposal the Minister has suggested that when market-parties come forward with a (well-developed) idea for sustainability-aimed cooperation, they can refer their initiative – which is *not yet an agreement* – to the Minister. The Minister will perform a public interest test and can decide to regulate the issue by legislative decree.[85] This would make the initiative binding on *all* market parties.[86] Thus, the initiative starts as a form of self-regulation, but then moves into the political realm and, while the parties need to show that there is support for the initiative (including from civil society and consumer organizations), the Minister will undertake the public interest test and weigh negative and positive effects himself. In very carefully drafted language the proposal seems to (expect to) steer clear of infringing the useful effect rules. There is no rubber-stamping of an agreement as there is no agreement. There is also no delegation of regulatory powers as it is the Minister taking the ultimate decision to regulate on the issue.[87]

This is not to say that all doubts are erased on whether this complies with the current framework on useful effect set down by the Court (and there is a grey area in which market parties will have to confer, maybe undertake joint studies, and share information to be able to shape a proposal to the Minister and yet not stray into the dangerous area of sharing sensitive information). There is also the matter of how to deal with an initiative that encompasses non-Dutch companies. And there is worry that this will come to nothing because there will inevitably be some dissidents; raising the issue of whether there is 'enough' support for an initiative. Finally, there are concerns relating to the removal of certain positive aspects of self-regulation: speed and flexibility instead of a fixed legal decree. Nonetheless it is an interesting and quite revolutionary step in this ongoing debate.

3.3 Revisiting fundamentals of competition law

It is clear from the above that 'fitting' sustainability interests into a competition law framework is not easily possible without a reinterpretation of existing doctrines. Competition law's history, however, shows that it can be flexible. It is also clear

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84 *See*: https://www.internetconsultatie.nl/ruimte_voor_duurzaamheidsinitiatieven/details.

85 The Minister will involve his/her colleagues depending on the subject matter of the initiative.

86 The Minister notes that in this way not only competition law problems may be resolved, but also coordination problems of first-mover disadvantage problems.

87 The proposal also considers free movement rules and expects that any infringement will be excepted.

that solving the sustainability deficit by focusing on Article 101 (3) TFEU means diverging from the European Commission's current economic focus. Both of these points tie to the debate on the goals of competition law. It is clear that the Court has endorsed the Commission's policy choice, in the sense that it accepts that the protection of consumer welfare is one of the goals of European competition law. Thus, the Commission may use an assessment which focuses on consumer welfare as a starting point, at the very least for deciding on its enforcement priorities. However, as indicated above, the Court has not endorsed consumer welfare to be the *only* point of reference for a competition law assessment. As indicated above, there are other reasons for accepting a pluralist conception of the goals of competition law. Opening this door to widen the scope of competition law provides the foundation for quite a few of the options presented above.

Clearly, a pluralist conception of goals is not a generally held position.[88] The extensive discussion needs no repeating here. It is important to note, however, that it encompasses both a *descriptive* component – 'what are the current goals of European competition law' – and a *normative* component – 'what ought to be the goals of European competition law'. Though even the notion of consumer welfare is not terribly clear,[89] the debate is most fierce on the normative component. The distinction is relevant also because the question of whether there is a sustainability deficit in current competition law has a descriptive and a normative component. Therefore, to those adhering to the normative position that the consumer welfare paradigm is the correct paradigm for today's competition law, the approaches discussed above might not make sense.[90] But without accepting this wider notion of what competition law is trying to achieve, it will be difficult to fully solve the sustainability deficit.

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88 *See*: T. Prosser, *The Limits of Competition Law: Markets and Public Services* (Oxford University Press 2005); O. Budzinski, *Monoculture versus Diversity in Competition Economics*, 32(2) Cambridge J. Econ. 295–324 (2008); A. Gerbrandy, *Competition Law and Private-Sector Sustainability Initiatives. Government Action or Private Initiatives in Reaction to Science's Call for Sustainability*, in *Law & Governance. Beyond the Public-Private Law Divide?* 81–104 (A. L. B. Colombi Ciacchi et al. eds, Eleven International Publishing 2013); W. Kerber, *Should Competition law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law*, in *Economic Theory and Competition Law* (J. Drexl, L. Idot en J. Moneger eds, Edward Elgar 2009); I. Lianos, *Some Reflections on the Question of the Goals of EU Competition Law*, in *Handbook In EU Competition Law: Substantive Aspects* 1–85 (I. Lianos en D. Geradin eds, Edward Elgar 2013); O. Andriychuck, *Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process*, 6(3) Eur. Competition J. 575–610 (2010).

89 K. J. Cseres, *The Controversies of the Consumer Welfare Standard*, 3(2) Competition L. Rev. 121–173 (2007); L. Kaplow, *On the Choice of Welfare Standards in Competition Law*, Harvard Law School Discussion Paper No. 693 (2011); L. Lovdahl Gormsen, *The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC*, 3(2) Eur. Competition J. 329–344 (2007); V. Daskalova, *Consumer Welfare in EU Competition Law: What Is It (Not) About?*, 11(1) Competition L. Rev. 131–160 (2015).

90 Generally on this point: T. Kuhn, *The Structure of Scientific Revolutions* (Chicago University Press 1970).

A fundamental objection against this widening relates to the concept of the division of tasks and powers between the private and the public sphere: it is the government's role to legislate on public interests and therefore there can be no place in competition law for accepting a situation where private parties decide what public interests to pursue (while limiting competition). Several of the doctrines discussed above also rest on this classic conception of the roles of governments and private parties. The rationale for accepting that European competition law is not applicable (or for a restrictive practice not to be covered by the prohibition), lies precisely in governments' involvement. This government interference provides legitimacy.

However, there is, firstly, a practical reason for why this objection must be (at least to some extent) rejected. One can agree to the idea that it is best if the government (the EU or Member States) regulates on the public interests at issue, but this does not completely solve the sustainability deficit. Clearly, if the government has regulated, the need for sustainability initiatives recedes. However, government regulation is not always possible. Some problems are greater than a single government can tackle. More importantly, self-regulation is on the rise precisely because it brings great benefits. It is inherently flexible and adaptable, and generally preferred over government regulation by businesses themselves. There is also a more fundamental reason for rejecting this objection against widening the scope of European competition law. The neat division of tasks that it is based on is under pressure. The relationship between the public and the private has changed; and with it, the conception of their respective roles.[91] One of the origins of this shift is the increased focus on corporate social responsibility. That has led to a changing perception of the duties of firms. Firms are conceptualized, by some at least, as ethical entities and corporate citizens.[92] Another element is the retreat of government involvement in the provision of

[91] *See* a.o. M. Moran, *Understanding the Regulatory State*, 32(2) Brit. J. Pol. Sci. 391–413 (2002); J. Gingritch, *Making Markets in the Welfare State. The Politics of Varying Market Reforms* (Cambridge University Press 2011); S. I. Benn & G. F. Gaus, *The Liberal Conception of the Public and the Private*, in *Public and Private in Social Life* (S. I. Benn & G. F. Gaus eds, Croom Helm 1983); J. Weintraub, *The Theory and Politics of the Public/Private Distinction*, in *Public and Private in Thought and Practice. Perspectives on a Grand Dichotomy* (J. Weintraub & K. Kumar eds, The University of Chicago Press 1997); A. Stark, *Drawing the Line. Public and Private in America* (The Brookings Institution 2010); P. Pattberg, *The Institutionalization of Private Governance. How Business and Nonprofit Organizations Agree on Transnational Rules*, 18(4) Governance 589–610 (2005). On liberalization: G. Majone, *The Rise of the Regulatory State in Europe*, 17(3) W. Eur. Pol. 77–101 (1993). On the rise of self-regulation: F. Cafaggi, *New Foundations of Transnational Private Regulation*, 38(1) J. L. & Soc'y 20–49 (2011); J. Gond, N. Kang & J. Moon, *The Government of Self-Regulation. On the Comparative Dynamics of Corporate Social Responsibility*, 40(4) Economy & Soc'y 640–671 (2011).

[92] A. Carroll, *The Four Faces of Corporate Citizenship*, 100–101(1) Bus. & Soc'y Rev. 1–7 (1998); J. Moon, A. Crane & D. Matten, *Can Corporations be Citizens? Corporate Citizenship as a Metaphor for Business Participation in Society*, 15(3) Bus. Ethic Q. 419–453 (2005).

goods and services. It seems somewhat circular, but this changing balance is both one of the factual reasons why the sustainability deficit has come to the fore (see section 1) and one of conceptual bases for accepting that competition law needs to adapt. This includes adapting the case law of the Court in the direction(s) discussed above, and by finding alternative sources of legitimacy for accepting sustainability initiatives.[93]

4 CONCLUDING REMARKS

In this article I have tried to substantiate the position that there is a sustainability deficit in European competition law. And though the 'size' of the deficit must not be exaggerated – not all sustainability initiatives will be anti-competitive to start with – civil societies, governments and businesses currently face perceived and real hurdles. This article has also endeavoured to show that there are both legal-internal and legal-external arguments to support the normative position that competition law needs to adjust and that we must try to solve the sustainability deficit. Building upon that position, an overview of the possibilities nascent in European competition law has been used to show where opportunities to allow for genuine sustainability initiatives exist and where changes, small or more substantive, might be necessary. In this way the sustainability deficit in European competition law might be resolved.

[93] *See supra* n. 60.