Review Article
DOI: https://doi.org/10.22598/iele.2026.13.1.7

EXPLORING THE "DIGITAINABILITY" POTENTIAL OF SUSTAINABILITY AGREEMENTS UNDER THE COMMISSION'S GUIDELINES ON HORIZONTAL COOPERATION AGREEMENTS

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ABSTRACT[1]

The environmental footprint of AI systems and associated digital technologies is becoming an increasing concern. While trying to keep the competitive edge by adopting and relying on AI technologies, the companies may find themselves struggling to reach sustainability goals. The concept of 'digitainability' has recently been suggested to highlight the positive and negative interconnections between integration of digital technologies and AI in the business processes, and sustainability. The synergies and trade-offs between digitalisation and sustainability arguably produce a considerable impact on competitiveness as well. The aim of this paper is to explore the intersection between digitalisation and sustainable development in the competition area. It will focus on the potential of sustainability agreements between competitors to amplify the positive digitainability effects, and their compatibility with the current EU legal framework. The antitrust assessment of sustainability agreements will be analysed in the light of the Commission's Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements. Although not legally binding, their aim is to make it easier for companies to shape their future strategic decisions and cooperate in "economically desirable" ways, which includes promoting legitimate sustainability cooperation and thus contributing to the green and digital transitions. The paper will specifically evaluate several key issues in the context of

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[1] This work has been fully supported by the University of Rijeka project "AI Regulation for Sustainability" [uniri-iskusni-drustv-23-104].

sustainability agreements, primarily concerning the status of sustainability agreements under the Commission's Guidelines, the application of the 'soft safe harbour' concept, and the guidance for competition assessment of sustainability agreements under Article 101(3) TFEU. The idea is to offer some directions for companies in realising new digitainability opportunities while respecting competition regulation, and to critically evaluate the existing legal framework.

Key words: *"Digitainability", sustainability, artificial intelligence, competition law.*

1. INTRODUCTION

Digital technologies together with artificial intelligence (AI) are influencing and transforming our everyday life. There has been a constant flow of new products and services created by powerful technologies with increase of efficiency, creativity and availability. Beside positive effects, possible negative consequences may emerge in terms of misuse of big data and personal information, cartel infringements as well as abuse of big tech's dominant position.

There are numerous ideas how to approach this trend, from the European level to sector specific regulation. The process is so fast, accelerated by advanced technologies that it is difficult to follow it. It is referred to as 'digital competition', defined as "competition through digital technologies, such as internet platforms and e-commerce, software (self – learning), algorithms and big data".[2]

Digital market has some specific characteristics. Some of them include positive and negative spillovers, direct and indirect network effects, economies of scale, barriers to entry but also tipping and ecosystems effects. Positive and negative externalities are possible. Shier and Bryne give an example of an app that includes advertising that on the one hand increases profits but on the other can be tedious for the user. Positive effects can be directed toward promoting and achieving sustainable gains. For example, an online second – hand platform brings more opportunities for consumers and sellers and reduces waste.[3] Most of the time spillovers are not directly felt by parties taking part in the transaction. It is for the government and regulator to intervene in order to promote positive and minimise negative effects.[4]

[2] Wiggers, M., Struijlaart, R., Dibbits, J.: *Digital Competition Law in Europe*: Alphen aan den Rijn: Wouters Kluwer, 2023, p. 2.

[3] Shier, G., Byrne, T.: Economic principles in: Wiggers, M., Struijlaart, R., Dibbits, J. (eds.): *Digital Competition Law in Europe*, Alphen aan den Rijn: Wouters Kluwer, 2023, pp. 5-36.

[4] Ibid., p. 6.

Direct and indirect network effects create growth. Direct network effects increase value for users with more and more users joining the platform. Indirect network effects can have one-way and two-way indirect effect. The one-way indirect effect is previously mentioned situation with advertising funded platform where advertising increases value of a platform but users are not so pleased with too many ads. Two-way effect concerns a situation of online marketplaces where more sellers bring more choices and the other way around, more buyers prompt further opportunities for sellers. So, the circumstances are not so straightforward.[5]

Digital services are characterised by economies of scale because there are fixed costs for managing large platforms. The costs for managing one additional unit are insignificant. A large platform can spread its fixed costs through a large volume output. Economies of scale occur as a company's average cost of additional service reduces and volume of output increases.[6] Closely linked to economies of scale are economies of scope that happen when a company can supply a range of different products and services from a common cost base. The average costs are lower comparing to smaller rivals producing and offering less products and services.[7] The fixed costs are spread, so the platform can offer more products and services.

Barriers to entry are another typical characteristic of the digital markets. They can be legal and technical such as market position, branding and switching costs.[8] Lock-in effects represent further examples of entry barriers. Data holder may behave as an entry barrier. It raises doubts if access to data can be assessed under an essential facility doctrine.[9]

All previous peculiarities of the digital markets may cause a situation of tipping, where all users are using only one platform. So, there may be little competition *in* the market but a big competition *for* the market. Tipping is not necessarily bad, so the regulatory agencies do not usually consider it harmful by itself, provided that it does not lead to distortion of the competitive structure of the market. Some firms may not have incentive to invent and invest in new products and services. Tipping can be cross- referenced by multi-homing, as consumers can use different services simultaneously thanks to interoperabil-

5 Ibid., p. 7.

6 Loc. cit.

7 Ibid., p. 8.

8 Loc. cit.

9 See: Pošćić, A., Martinović A.: The Interplay between the Essential Facility Doctrine and the Digital Markets Act: Implicaitons to Big Data. *Acta Universitatis Carolinae – Iuridica*, 69(2) 2023, pp. 71-82.

ity. Digital markets are part of "multi-actor," and "multi-product" ecosystems where the success of the market depends on the interactions of participants and companies offering complementary products and services. The complementary parts can be reused by other businesses performing on the same markets. One example is mobile operating system with different hardware options that allows mobile app developers to create different applications. The balance between openness, control, trust and innovation must be maintained. Innovations help to improve the whole ecosystem, but certain governance and control should remain.[10]

From previous discussion it can be noticed that digitalization has become integral part of the competition law. Digital markets are increasingly taking precedence over the traditional markets. The distinction between digital and traditional market is blurred. While trying to keep the competitive edge by adopting and relying on new technologies, companies may find themselves struggling to reach sustainability goals. Sustainability issues are slowly beginning to take part in the Commission's assessment of competition cases.[11]

At first sight, digitalisation, sustainability and competition are perceived as completely different disciplines without any connectivity between them, but the next chapters will show the opposite, especially from the company perspective. Recently adopted Commission's Guidelines on the applicability of Article 101 of the Treaty on Functioning of European Union (TFEU) to horizontal co-operation agreements (Guidelines)[12] have a special chapter dealing with sustainability agreements. It is perceived as a shift towards justifying agreements that have certain benefit on nature and environment.

[10] Shier, G., Byrne, T.: *op. cit*., p. 12.

[11] CECED: Commission Decision 2000/475/EC of 24 January 1999 relating to a proceeding under Article 81 EC (Case IV.F.1/36.718 – CECED), *Official Journal of the European Union*, L 187, 26.7.2000; Court of Justice of the European Union (CJEU): Case C-385/07 P, *Der Grüne Punkt – Duales System Deutschland GmbH v. European Commission*, ECLI:EU:C:2009:456, 16.7.2009; European Commission: *Commission Decision of 8 July 2021 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40178 – Car Emissions) (notified under document C(2021) 4955 final)*, Official Journal of the European Union, C 458, 12.11.2021.

[12] European Commission: *Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, Official Journal of the European Union, C 259, 21.7.2023.

2. THE INTERSECTION BETWEEN DIGITALISATION, ARTIFICIAL INTELLIGENCE AND SUSTAINABILITY

Many companies pursue initiatives in order to increase their productivity and to balance economic, environmental and social factors. Digitalization and artificial intelligence may help companies to improve their business performance with the emphasis on sustainability initiatives. New technologies may be perceived as an enabler, as well as an impediment of the sustainable development goals. Before analysing their interaction, it is necessary to define the main terms.

There are various definitions of digitalization, such as: "use of digital technologies to change a business model and provide new revenue and value – producing opportunities; it is process of moving to a digital business"[13] or "integration of digital technologies into everyday life" as well as "the process of converting physically collected information (e.g. sensors, written information, etc.) and knowledge into a computer – readable language."[14]

Doctrine proposes simple definitions of AI systems as "intelligent machines" or "machines acting in ways that seem intelligent" to more complex and comprehensive ones, referring to AI as "an umbrella term embracing computer (machine) vision, natural language processing, virtual assistants and bots, robotic process automation, machine learning (including most advanced techniques like deep learning) and cognitive processes in organizations."[15]

The AI Act[16] opted for a definition that encompasses previously mentioned models as "a machine-based system designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments" (art. 3).

Although the concept of sustainable development has a longer history, it is the Brundtland Report, *Our Common Future*, that popularized the idea of sus-

[13] Lichtenthaler, U.: Digitainability: The Combined Effects of the Megatrends Digitalization and Sustainability. *Journal of Innovation Management*, 9(2) 2021, p. 68.

[14] Mondejar, M., et al.: Digitalization to achieve sustainable development goals: Steps towards a Smart Green Planet. *Science of the Total Environment*, 794 2021, p. 2.

[15] European Parliament: State of the art and future of artificial intelligence, 2019.

[16] European Parliament and Council of the European Union: Regulation (EU) 2024/1689 of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), Official Journal of the European Communities, L 2024/1689, 12.7.2024.

tainable development in its true sense.[17] Initially, sustainable development focused on an ecological perspective, but it soon expanded to include social and economic dimensions. Today, sustainable development implies economic and social development that is consistent with the protection of planetary boundaries and with the principle of intergenerational equity, the idea that today's development should not jeopardize the opportunities of future generations.[18] Every discussion about sustainability includes UN Sustainable Development Goals[19] that lists 17 sustainable development goals with 169 targets, all interlinked and interdependent.

Sustainability and digitalization are the cornerstones of the future – oriented Europe according to the European recovery plan from 2020 adopted after the COVID -19 pandemic.[20] Digitalization may have positive as well as negative effects on sustainability. The concept of sustainability consists of three components: social, economic, and environmental - creating a broad spectrum where AI can potentially have negative impacts. While there is great excitement about the potential impact of AI on the economic component, where AI plays a significant role in optimizing industrial processes and making them more efficient, there is, on the other hand, strong concern about its effects on the social and environmental components of sustainability. In recent years there has been a lot of discussion about mining, water cooling and increasing

[17] World Commission on Environment and Development: *Brundtland Report of the World Commission on Environment and Development, Our Common Future*, Oxford: Oxford University Press, 1987, p. 16. See: Klarin, T.: The Concept of Sustainable Development: From its Beginning to the Contemporary Issues. *Zagreb International Review of Economics & Business*, 21(1) 2018, pp. 67-94.

[18] United Nations Conference on Trade and Development: *Digital Economy Report 2024: Shaping an Environmentally Sustainable and Inclusive Digital Future*, Geneva: United Nations Publications, 2024, p. 3.

[19] United Nations General Assembly: *Transforming Our World: The 2030 Agenda for Sustainable Development*, Resolution A/RES/70/1, adopted on 25 September 2015, New York: United Nations, 25.9.2015.

[20] European Commission: *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - Europe's Moment: Repair and Prepare for the Next Generation*, COM (2020) 456 final, Brussels, 27.5.2020; European Commission: *Communication from the Commission - The EU budget powering the recovery plan for Europe*, 27.5.2020 COM (2020) 442 final, Brussels, 27.5.2020; Council of the European Union: *Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis*, Official Journal of the European Union, L series (Legislation), L 433I, 22.12.2020, pp. 23-27.

need for the critical raw materials[21] for the production of electrical appliances with a high electronic component, together with electronic waste, creating a large environmental footprint. Moreover, environmental consequences of mining are frequently intertwined with social impacts and can have a ripple effect on human rights. Maybe before developing any AI system, we should ask ourselves whether it is worth the environmental costs that we will be locked into for decades?[22]

2.1. THE "DIGITIANABILITY" CONCEPT

The intersection between digitalisation and sustainability has attracted more attention since 2020 with the emergence of the "digitianability" concept.[23] Lichtenthaler developed the concept by creating a matrix that distinguishes four different types[24] according to the level of digitalization and sustainability. According to it, the first category involves limited level of sustainability and digitalization. Companies are aware of and acknowledge the relevance of digitalization and sustainability, but they do not focus on the topics related to sustainability and digitalization; they are more oriented on financial then social and environmental aspects. The second group are companies that have established typical sustainability initiatives but without any level of digitalization. The third group covers companies that started to pursue digital initiatives in recent years. They rely on new technologies and AI in the collection and analysis of data and are strongly focused on digitalization, but sustainability issues are left aside. One example is General Electric that uses AI in the engineering and development of existing and new innovative products and services. The last group would cover companies focusing on the potential in combining high levels of digitalization with sustainability. Siemens is a company that combines a cloud-based solution for energy efficiency analytics, so the customers can integrate big data collection and processing. On the other hand, it allows Siemens customers to reduce costs and optimize energy consumption based on new technologies.

Lichtenthaler distinguishes three trends in companies' performance. One refers to the so-called digital sustainability. Those are companies with established

[21] Blengini, G., et al.: *Study on the EU's list of critical raw materials (2020) – Final report*, Brussels: Publications Office of the European Union, 2020.

[22] See: Robbins, S., Wynsberghe, A.: Our New Artificial Intelligence Infrastructure: becoming Locked into an Unsustainable Future. *Sustainability*, 14(8) 2022, p. 9.

[23] Lichtenthaler, U., *op. cit.*, p. 64-80.

[24] Ibid., p. 68 and on.

sustainability programs that complement them with digital solutions. They try to enhance their programmes by introducing novel digital solutions. Typical example is smart parking. The second trend is the one that enables sustainable digitalization where companies are focused on extension of established business activities. The sustainable improvements will be achieved through digital transformation. Programs for the improvement of digital solutions have been supplemented by sustainability gains. The last trend refers to empowering balanced digitainability. They combine and merge both disciplines. The purpose is to establish new strategies from the beginning and to foster sustainability relying on digital solution. The concept of balanced digitainability considers high digital performances with financial, environmental and social goals. The combination of AI for sustainability is one of the examples. Google's Deep Mind has reduced the energy required for cooling by up to 40 percent.[25]

The development and utilisation of new technologies have raised the question of using those technologies in the implementation of sustainability development goals. AI has numerous benefits to companies' performances but there are also some downsides as well. There is a gap in examination of mutual relationship between the AI and sustainability.[26] Digital sustainability is seen as "an effort of developing and deploying smart technologies to secure sustainable economic growth while considering and integrating the SDGs."[27]

3. THE CONVERGENCE BETWEEN COMPETITION LAW AND "DIGITAINABILITY"

Generally, the competition law is seen as a discipline that is almost passive in relation to sustainability concerns.[28] The competition law is promoting economic growth with more innovative products. We are producing and consuming more and more products that cause environmental concerns. The concept of "greening competition"[29] or green antitrust has been developed. The idea is to put sustainability issues into competition assessment. It can be seen as a paradox. More production brings more consumption, new products and services, but on the other hand, resources are reduced. There are also certain crossovers

[25] Ibid., p. 71.

[26] See: Pošćić, A.: The Intersection between Artificial Intelligence and Sustainability. *EU and Comparative Law Issues and Challenges Series (ECLIC)*, 8 2024, pp. 748-768.

[27] Mondejar, M., et al., *op. cit*., p. 3.

[28] Persch, J.: The Output / Sustainability Paradox – a pro – enforcement perspective on sustainability in EU competition law. *The Competition Law Review*, 15(2) 2023, pp. 139-140.

[29] Ibid., p. 140.

between those disciplines. The competition law can be a tool for a more active promotion of sustainability requirements. Companies' initiatives are often more focused on increasing efficiency, which implies more consumption and higher CO_2 emissions. On the other hand, they should also concentrate on preservation of the environment. The lack of clarity can have a chilling effect. Clear rules are needed, so that businesses are motivated to promote sustainable initiatives. Sustainable digital transformation should be encouraged.

It is necessary to provide more room for sustainability efficient agreements in competition law. The proponents of this proposal argue that the sustainability deficit has to be overcome.[30] Sustainability is often alleged to pursue public goals and competition is more focused on economic goals. So, how to reconcile them and put everything into the digitalization perspective? Digitalization can bring benefit in opening the path to big data that can be reflected positively on society and the environment.

Many authors exploring the way how to "adjust" competition rules to certain agreements promoting sustainability issues. Persch proposes a stricter enforcement of competition law that will contribute to more sustainable economy. He calls this approach output – sustainability paradox. He explains it in the following terms: as more consumption leads to more CO_2 emissions, more advanced societies produce more environmental damage. Innovation allows to lower the CO_2 emissions but the growth in output results in net increase in greenhouse emissions.[31] Further he explains that although we produce goods with less CO_2 emissions, the total CO_2 emissions increase significantly. It is followed by the increase of GDP. So, companies decrease their carbon intensity but, at the same time, increase their carbon footprint.[32]

The distinction between horizontal and vertical agreements may be of significance. Persch distinguishes agreements concerning the use of technologies and demand - increasing horizontal agreements.[33] Agreements concerning the use of technologies can restrict competition as was case in the *AdBlue*[34]. The Commission fined car manufactures for restricting competition in emission

[30] Gerbrandy, A.: Solving a Sustainability-Deficit in European Competition Law. *World Competition*, 40(4) 2017, pp. 539-562.

[31] Persch, J., *op. cit.*, p. 143.

[32] Ibid., p. 146.

[33] Ibid., p. 149 and on.

[34] European Commission: *Commission Decision of 8 July 2021 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40178 – Car Emissions) (notified under document C(2021) 4955 final)*, Official Journal of the European Union, C 458, 12.11.2021.

cleaning systems for new diesel passenger cars by agreeing on Ad Blue tank sizes and common understanding on the average estimated AdBlue – consumption. This agreement can lower prices and result in higher output but with negative effects on sustainability. Demand – increasing horizontal agreements aim to increase the consumers' willingness to pay. One example are joint advertising campaigns aimed to coordinate certain industry.

Holistic and inclusive sustainable development can be achieved only by alignment with digitalization process. We have to explore all the opportunities that derive form new technologies and harness their possibilities in order to achieve sustainability goals.

Tegmark warns that "the more intelligent and powerful machines get, the more important it becomes that their goals are aligned with ours."[35] Gupta and Rhyner explore how the opportunities of digital world can be promoted to achieve sustainability issues. They propose mindful use of digitalization in order to balance the benefits and risks of using digitalization to support sustainability initiatives.[36]

There is a need to find a way in which competition tools can be used to promote and not to discourage companies' initiatives. This paper will try to show possible directions in which companies can promote sustainability goals without trying to escape competition rules.

3.1. PRIVATE SUSTAINABILITY INITIATIVES UNDER THE COMPETITION OVERSIGHT

In 2019 the European green deal has been adopted with the aim to transform the EU in the wealth society with competitive economy without net emissions of greenhouse gases in 2050. All European policies should contribute to this aim.[37] Competition law as one of the policies is focused on removing barriers to trade and guaranteeing free competition. Environmental issues are becoming part of competition appraisal. Proposals how to achieve the transition to a "greener" competition law have been developed.[38] The main

[35] Max Tegmark on the Power, Steering and Destination of AI – keynote at Internet dagarna 2018, 22.11.2018, <https://vqab.se/2018/11/max-tegmark-on-the-power-steering-and-destination-of-ai-keynote-at-internetdagarna-2018/>, last accessed on 15/11/2024

[36] Gupta S, Rhyner J.: Mindful Application of Digitalization for Sustainable Development: The Digitainability Assessment Framework. *Sustainability*, 14(5) 2022, p. 2.

[37] Pezza, A.: The European Green Deal: Shaping environmentally friendly policies under Article 101 TFEU. *Market and Competition Law Review*, 4(2) 2020, p. 140.

[38] Ibid., p. 141.

concept is how to foster private sustainability agreements without infringing competition law.

One way would be to exclude the agreement from the scope of application of Article 101 (1) TFEU.[39] According to the well-developed case law, certain agreements are excluded from the scope of the article 101 (1) TFEU. The first case was *Albany*[40] where the agreements between organisations representing employers and working conditions were outside the application of Article 101 (1) TFEU. Later in *Wouters*[41] the Court assessed the agreement between members of the Bar of the Netherlands and accountants and concluded that not every agreement between the companies or every decision of an association of companies that restrict the freedom of action of the parties necessary falls within the ambit of Article 101 (1) TFEU. There has been a debate in doctrine whether this balancing approach could also be extended to non-economic justifications such as the environment. Pezza gives an example of an agreement aiming at protecting the environment or decisions taken by private bodies that pursuit environmental protection.[42]

Another way would be to exempt anticompetitive environmental agreements under the Article 101 (3) TFEU. Article 101 (3) TFEU requires four cumulative conditions for the exemption: the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the company-concerned restrictions which are not indispensable to the attainment of these objectives and afford such companies the possibility of eliminating competition in respect of a substantial part of the products in question.

The focus of this paper is on the improvement of production or technical progress and the fair share to consumers because the authors find them most difficult to prove. It needs to be shown that a sustainability agreement improves production or distribution of goods or promotes technical and economic progress. The doctrine distinguishes two approaches in the assessment. A narrow interpretation is focused only on efficiency gains, for example, a reduction in costs or the development of a new or improved product. Broad interpretation

[39] Treaty on the Functioning of the European Union, consolidated version, *Official Journal of the European Union*, C series (Information and Notices), C 202, 7.6.2016, pp. 47-200.

[40] Court of Justice of the European Union (CJEU): Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, ECLI:EU:C:1999:430, 21.9.1999.

[41] Court of Justice of the European Union (CJEU): Case C-309/99, *J.C.J. Wouters and Others v. Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2002:98, 19.2.2002.

[42] Pezza, A., *op. cit.*, p. 151 and 152.

would also entail a consideration of wider benefits in the public interest. Most authors agree that narrow interpretation is relevant in terms of cost reductions and dynamic efficiency. Article 101 (3) TFEU does not specify which gains are relevant.[43] The case law of the Court and the Commissions' decisions may be helpful.

In the old *CECED* decision the environment topics were considered an issue that contributed to improving production or distribution or to promoting economic or technical progress.[44] The case concerned an agreement where almost all European producers and importers of washing machines aimed at stopping production and importation of less efficient washing machines. The Commission has taken environmental gains as relevant under Article 101 (3) TFEU. Later in *DSD*[45], the case concerned exclusivity clause included in the agreements concluded by the company responsible for the collection and recovery of sales packaging in Germany. The Commission exempted the agreement from Article 101 TFEU as "it provided for practical steps to implement environmental objectives….'"[46] The early approach supported wider interpretation.

With the modernisation process, the Commission has started to narrow down its approach. The Guidelines on the application of Article 81 (3) from 2004[47] state that only four conditions are relevant. An economic assessment of weighing pro and anti-competitive effects of the agreement is required.[48] Although Gjendemsjø rightly observes the Commission cannot deviate from the established case law, everything leads to the conclusion that the Commission's position has changed.[49]

Parties must submit evidence that an agreement produces economic efficiency. This approach has been further confirmed by the Horizontal Cooperation

[43] Gjendemsjø, R.: Sustainability Agreements and Article 101 (3) TFEU, in: Hancher, L., Herrera Anchustegui, I. (eds.): *Research Handbook on EU Competiton Law and the Energy Transition*, Cheltenham: Edward Elgar Publishing Limited, 2024, p. 146.

[44] CECED: Commission Decision 2000/475/EC of 24 January 1999 relating to a proceeding under Article 81 EC (Case IV.F.1/36.718 – CECED), *Official Journal of the European Union*, L 187, 26.7.2000.

[45] DSD: Commission Decision 2001/837/EC of 17 September 2001 relating to a proceeding under Article 82 EC (Cases COMP/34.493 – DSD and COMP/37.366 – DSD), *Official Journal of the European Union*, L 319, 4.12.2001.

[46] Pezza, A., *op. cit*., pp. 155-156.

[47] European Commission: *Communication from the Commission- Guidelines on the application of Article 81(3) of the Treaty*, Official Journal of the European Union, C 101, 27.4.2004.

[48] Pošćić, A.: *Europsko pravo tržišnog natjecanja i interesi potrošača*, Zagreb, Narodne novine d.d., 2014, pp. 88 and on.

[49] Gjendemsjø, R., *op. cit,* p. 150.

Guidelines from 2011.[50] Environmental costs must prevail on concrete consumer efficiency. Practically, the first condition is fulfilled if the environmental agreement reduces CO2 emissions, even though it might lead to an increase of costs for consumers.[51]

The second condition requires that consumers must receive a fair share of the reasoning benefit. It is important to understand the category of consumers that is covered. The view has changed over time, from the broad interpretation that recognized even benefits not accrued to individual purchaser as in *CECED* case, to the definition that covers only customers of the parties to the agreement and subsequent purchasers. The benefit must be shown for the consumers in the relevant market.[52] Concrete quantitative and qualitative benefits must be materialized. The problem with sustainability initiatives is that certain benefits are not shown at the outset. Delayed benefits may be questionable. It means that the consumers affected and benefits must be the same. So, it is difficult to demonstrate and measure concrete benefits, especially benefits accrued to the individual consumer.

Following the adoption of the new Guidelines, it is not necessary to demonstrate how the effects of the agreements pass to consumers anymore, as there is a special category covering sustainability agreements. There is no need to assess environmental effects of the agreement in economic terms. The point of view is shifting, so that companies contributing to sustainability goals may be exempted from the antitrust assessment. Companies are afraid of taking sustainability initiatives because of fear of competition interventions.[53] This approach is in line with the concept of green antitrust.

Despite the strong commitment to promote green antitrust, there are also authors that think differently. Veljanovski[54] suggests that competition law should

[50] European Commission: Communication from the Commission — Guidelines on the applicability of Article 101 of the European Commission: *Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, Official Journal of the European Union, 11, 14.1.2011.

[51] Pezza, A., *op. cit.*, p. 158.

[52] See: Court of Justice of the European Union (CJEU): Case C-382/12 P, *MasterCard Inc. and Others v. European Commission*, ECLI:EU:C:2014:2201, 11.9.2014.

[53] Schinkel, M. P., Treuren, L.: Green Antitrust: Friendly Fire in the Fight against Climate Change, in: Holmes, S. Middelschulte, D. Snoep, M. (eds.): *Competition Law, Climate Change & Environmental Sustainability*, New York: Concurrences (Institute of Competition Law), 2020, p. 2.

[54] Veljanovski, C.: The case against green antitrust. *European Competition Journal*, 18(3) 2022, p. 502.

remain focused on protecting competition rather than to promote green antitrust. He reminds that competition law does not prohibit cooperation between rivals, such as setting voluntary standards, or research and development. He argues that there is always Article 101 (3) TFEU that allows agreements if they generate sufficient efficiency gains with fair share transferring to consumers.[55] The Commission is more focused on hard core cartels and does not prosecute cooperative agreements. Proponents of green antitrust say that fair share to the consumer tests blocks and deters cooperation over sustainability in public interest.[56] According to Veljanovski, the case of green antitrust is exaggerated. It is about a situation where firms cooperate in anticompetitive cooperation over standards on sustainable products and processes. He further claims that there is no evidence so far showing that antitrust rules have deterred industry from sustainability efforts. Furthermore, there is no evidence that firms engaged in anticompetitive practice will produce more innovation than when they act independently.[57] Schinkel and Treuren argue that green antitrust is "a sympathetic but counterproductive attempt to solve the global climate crisis."[58]

3.2. SUSTAINABILITY AGREEMENTS UNDER THE COMMISSION'S GUIDELINES ON THE APPLICABILITY OF ARTICLE 101 OF THE TFEU TO HORIZONTAL CO-OPERATION AGREEMENTS

As seen from the previous discussion, there was a need to reinterpret the traditional competition doctrine. The Court has opened the door to setting more goals in competition law. The broad interpretation has insisted on including sustainability initiatives in the competition assessment. New Horizontal Guidelines[59] have clarified the Commission's position.

The Guidelines have added a separate chapter on sustainability agreements. The Guidelines define them as "any horizontal cooperation agreement that pursues a sustainability objective, irrespective of the form of the cooperation."[60] Those agreements will be under competition scrutiny only if they entail restrictions of competition by object or lead to appreciable actual or

[55] *Loc. cit.*

[56] Ibid., p. 509.

[57] Ibid., pp. 512-513.

[58] Schinkel, M. P., Treuren, L., *op. cit.*, p. 21.

[59] European Commission: *Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, Official Journal of the European Union, C 259, 21.7.2023.

[60] Ibid., para. 521.

likely negative effects on competition. The Guidelines explicitly stress that agreements restricting competition cannot escape prohibition from Article 101 (1) TFEU raising sustainability objectives. The aim is to provide criteria to assess agreements that pursue sustainability goals. The guidelines have two-fold purpose. First, they set up a safe harbour for sustainability standardisation agreements and secondly, they specify consumer benefits under the so-called "fair share" gain of the prohibited agreements.

Before going into details of the assessment of sustainability agreements, it must be stressed that not all sustainability agreements raise competition concerns, especially if they do not trigger parameters such as "price, quantity, choice or innovation."[61]

The Guidelines cover special subcategory of sustainability standardisation agreements, i.e. those concluded between competitors in order to provide rules, guidelines or specific characteristics for certain products or process, for example, to replace non-sustainable products with sustainable ones, to harmonize packaging materials, to buy only materials that have been produced in sustainable manner or to create a label that meets certain requirements.[62] Usually, they have positive effects on competition, but there might be some negative ones in the form of price coordination, foreclosure of alternative standards, discrimination or exclusion of some competitors.[63] Sometimes they may be a cover for price fixing or limitation of quality.

The Guidelines outline six cumulative conditions for the sustainability standardisation agreements to escape prohibition from Article 101 (1) TFEU. Those are: the procedure for developing sustainability standard must be transparent, any obligation must not be imposed on the company not willing to participate in the agreement, a company participating in the agreement can, other than binding requirements, apply higher standards, the parties must comply with the safeguard clause (prohibition of exchanging sensitive information) and apply non-discriminatory access to the outcome of the standard setting process. The last one requires that the sustainability standard must satisfy at least one of two conditions: it must not lead to significant increase in the price or the reduction in the quality of the products or the combined market share of the participating companies must not exceed 20% on any relevant market affected by the standard.[64]

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61 Ibid., para. 527.

62 Ibid., para. 538-541.

63 Ibid., para. 547.

64 Ibid., para. 549.

It is important to stress that the agreement not satisfying the safe harbour does not automatically restrict competition within the meaning of Article 101 (1) TFEU. It means that any agreement and also sustainability agreement that restricts competition according to Article 101 (1) TFEU can be exempted according to the Article 101 (3) TFEU if it fulfils four conditions: agreement must contribute to improving the production or distribution of goods or contribute to improving technical or economic progress such as using less polluting production or distribution technologies, better quality products or improved conditions of production or distribution, it must not impose restrictions on competition that are not indispensable to the benefits generated by the agreement, although cooperation agreements may not be necessary to attain sustainability benefits and the consumers must receive a fair share of the benefit.[65]

Efficiency gains must be concrete and easily verifiable. The Guidelines define consumers in a broad way, as all direct and indirect customers of the products. In other words, producers that use product as input as well as wholesalers, retailers and of course final consumers are covered. The sustainability advantage must be shown to the particular consumers of products covered by that agreement.[66] They distinguish individual use value benefit, collective benefits and any or all types of benefits. The individual use value benefit is directly connected to the use of a particular product and has direct benefits to consumer either in the improved quality of the product or price decrease.[67] There might also be indirect benefits to consumers, so that the consumer is willing to pay more for a certain sustainable product. In order to take collective benefits into consideration, the market cover of the agreement must be significant.[68] The benefits must be clearly identifiable and materialised. There must be transparent and quantitative gains shown. The Guidelines also address the time frame in which benefits must be materialised. The longer the time frame, the greater the benefits must occur. The Guidelines follow the Commission's practice requiring full compensation for the consumers.

The introduction of the special chapter dealing with sustainability agreements is seen as a step forward in the application of the more flexible approach to private initiatives directed towards sustainable gains. The practice calls for the test cases, so that companies may know in advance what is expected of them. It will encourage them to cooperate on sustainability issues. There could be potential problems with different regulations and authorities because those are

[65] Ibid., para. 557 and on.

[66] Ibid., para. 569.

[67] Ibid., para. 571.

[68] Ibid., para. 86.

non – binding documents. Even without them, there is always a way to apply Article 101 TFEU, but only in cross border situations affecting trade between Member States. Clear rules are needed as we are waiting for the first Commission's decisions.

4. CONCLUSION

This article tries to combine two megatrends of digitalization and sustainability in the context of competition law. The aim is to show possible paths for businesses promoting sustainability initiatives in the competitive market. The new Guidelines have helped companies by giving them more clarity to cooperate and promote sustainable initiatives in the market. Now there is a way to conclude horizontal agreements in line with competition rules.

Following the adoption of the Guidelines initial assessments can be made. Sustainability agreements are not a distinct category of horizontal cooperation agreements. The agreement promoting sustainable objective cannot escape the prohibition of Article 101 (1) TFEU if it has potential or actual negative effects on competition. Sustainability initiatives cannot be an "excuse" for cartels. On the other hand, if the sustainability agreement affects one or more parameters of competition, it can call for the safe harbour from the Guidelines. If this is not possible, it will have to show, in line with Article 101 (3) TFEU, that the benefits for consumers outweigh the negative effects. In the situation of collective benefits, it will be difficult to show that the consumers in the relevant market substantially overlap with the beneficiaries in the relevant market. This is seen as a rather narrow interpretation. Perhaps it is to be regretted that benefits for consumers outside the relevant market are not taken into account.

Besides some clarification, the Commission's approach has not changed. There is still a need to prove economic efficiency (not benefits according to Guidelines!) for a particular consumer. But we know that sustainable benefits are not perceived at the outset and are not immediately materialised for a particular consumer. What about collective benefits to consumers? It seems that collective benefits will be relevant only if they overlap with benefits for consumers in the relevant market. The sustainability benefits must accrue to the consumers of the product covered by that agreement.[69] The Commission is slowly changing its approach in considering also collective benefits, but only if the traditional requirements are met: there must be a certain overlap between the consumers of the relevant market and the beneficiaries of the collective benefit.[70]

[69] Ibid., para. 569.

[70] Gjendemsjø, R., *op. cit*, pp. 154-155.

The Guidelines are a soft law instrument. Although there is a safe harbour for certain agreements, one cannot think that Commission is changing and loosening its position towards possible prohibited agreements. As Sauter says, green antitrust can bite.[71] The application of competition law must always take into consideration Treaty principles. We are still waiting for the first case to clear the Commission's position.

The Guidelines are a welcome move forward in promoting green competition policy in a way to facilitate cooperation to meet sustainable goals in line with competition law. While we are waiting for the first decision, maybe it is time for the Commission to provide informal guidelines regarding novel or unresolved questions on individual sustainability agreements.[72]

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