UNIVERSITY OF TURKU
Faculty of Law

Sustainability Benefits and Their Pass-on to Consumers under Article 101(3) TFEU

A Study on Sustainability Benefits and the Revised Pass-On to Consumers Doctrine in the Commission's 2022 Draft Revised Guidelines for Application of Article 101 TFEU on Horizontal Co-operation Agreements

Faculty of Law
Master's thesis

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5.4.2023

UNIVERSITY OF TURKU
Faculty of Law

Abstract page

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Master's thesis

Subject: Competition law
Author(s): Oiva Pälsi
Title: Sustainability Benefits and Their Pass-on to Consumers under Article 101(3) TFEU: A Study on Sustainability Benefits and the Revised Pass-On to Consumers Doctrine in the Commission's 2022 Draft Revised Guidelines for Application of Article 101 TFEU on Horizontal Co-operation Agreements
Supervisor: Professor Jukka Snell
Number of pages: 73 pages
Date: 5.4.2023

This thesis concerns the Commission's draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements for the part of the new chapter on sustainability agreements. It is a humble legal study on the field of EU competition law. The thesis aims to assess if the treatment of sustainability agreements and the acceptance of sustainability benefits under the Article 101(3) TFEU as well as the revised pass-on to consumer doctrine in the Commission's Draft Revised Guidelines, have changed from the historical perspective, and to identify theoretical weaknesses of the proposed evaluation scheme of these benefits under the Draft Revised Guidelines. Both fundamental and technical problems concerning individual non-use value benefits and collective benefits doctrine are discussed.

The study is theoretical and is carried out mostly by legal dogmatic method. Main sources for the thesis include both primary and secondary sources of EU law, academic literature as well as written contributions to the Commission's public consultation on the draft revised horizontal guidelines.

The main findings of the thesis are that consideration of non-economic, including sustainability, benefits under the Article 101(3) TFEU regime is not a genuinely new phenomenon. Neither is the collective benefits doctrine proposed in the draft revised guidelines. The thesis also identifies issues with the non-use value benefits and considers them a faulty and meaningless design. It is also argued that the collective benefits doctrine is liable to be create unjustifiable geographical limitations to sustainability agreements' useful application and that the proposed doctrine is in conflict with the polluter pays principle prescribed by Article 191(2) TFEU.

The thesis concludes that in order to overcome the most significant issues identified with the Commission's draft revised guidelines in relation to sustainability agreements, individual non-use value benefits should be deleted from the guidelines and the definition of beneficiaries of collective benefits should be clarified and broadened. It could also be clarified that sustainability benefits that are significant enough to have a global or societal impact, can accrue to consumers in the relevant market even if the direct beneficiaries can be localized outside the EU.

Key words: EU law, Competition law, Horizontal co-operation agreements, Sustainability

TURUN YLIOPISTO
Oikeustieteellinen tiedekunta

Tiivistelmäsivu

Pro gradu-tutkielma

Oppiaine: Kilpailuoikeus
Tekijä: Oiva Pälsi
Otsikko: Kestävän kehityksen tehokkuushyödyt ja niiden siirtäminen kuluttajille SEUT 101(3) artiklan mukaisesti: tutkielma kestävän kehityksen tehokkuushyödyistä ja tarkistetusta kuluttajille siirtämisen doktriinista komission vuoden 2022 luonnoksessa tarkistetuiksi suuntaviivoiksi Euroopan unionin toiminnasta tehdyn sopimuksen 101 artiklan soveltamiselle horisontaalisiin yhteistyösopimuksiin
Ohjaaja: Jukka Snell
Sivumäärä: 73 sivua
Päivämäärä: 5.4.2023

Tutkielma käsittelee komission luonnosta suuntaviivoiksi Euroopan unionin toiminnasta tehdyn sopimuksen 101 artiklan soveltamiselle horisontaalisiin yhteistyösopimuksiin sen uuden kestävän kehityksen sopimuksia koskevan luvun osalta. Kyseessä on vaatimaton oikeustieteellinen tutkimus EU:n kilpailuoikeuden alalla. Tutkielman tavoitteena on arvioida kestävää kehitystä koskevien sopimusten kohtelua, kestävän kehityksen tehokkuushyötyjen SEUT 101(3) artiklan mukaista hyväksymistä sekä näiden hyötyjen kuluttajille siirtämistä koskevaa muutosta komission suuntaviivojen luonnoksessa historiallisesta perspektiivistä ja osoittaa ehdotetun tehokkuushyötyjen arviointijärjestelmän teoreettisia heikkouksia. Teksti käsittelee niin perustavanlaatuisia kuin teknisiäkin yksilöllisiä muita kuin käyttöarvohyötyjä sekä kollektiivisia hyötyjä koskevaan doktriiniin liittyviä ongelmia.

Tutkielma on teoreettinen ja enimmäkseen lainopillinen. Pääasiallisina lähteinä tutkielmassa ovat niin EU:n primaari- kuin sekundaarilainsäädäntö, akateeminen kirjallisuus kuin myös komission ehdottamien suuntaviivojen luonnosta koskevaan julkiseen konsultaatioon toimitetut kirjalliset näkemykset.

Tutkielman pääasialliset päätelmät ovat, ettei muiden kuin taloudellisten, mukaan lukien kestävää kehitystä koskevien, tehokkuushyötyjen huomioon ottaminen SEUT 101(3) artiklan mukaisesti ole varsinaisesti tuore ilmiö. Myöskään kollektiivisten hyötyjen huomioiminen suuntaviivoiksi ehdotetun luonnoksen mukaisesti ei sitä ole. Tutkielmassa myös tunnistetaan yksilöllisiin muihin kuin käyttöarvohyötyihin liittyviä ongelmia ja todetaan niiden olevan huonosti suunniteltu ja hyödytön tehokkuushyötykategoria. Tutkielmassa niinikään väitetään, että kollektiivisia hyötyjä koskeva doktriini on omiaan luomaan epäoikeudenmukaisia maantieteellisiä rajoituksia kestävää kehitystä koskevien yhteistyösopimusten tarkoituksenmukaiselle hyödyntämiselle ja että ehdotetun kaltainen doktriini on ristiriidassa SEUT 191(2) artiklassa säädetyn saastuttaja maksaa -periaatten kanssa.

Tutkielman lopputulema on, että selvittääkseen merkittävimmät kestävän kehityksen yhteistyösopimuksia koskevat komission suuntaviivojen luonnoksesta löydetyt ongelmat, tulisi suuntaviivoista jättää pois yksilöllisiä muita kuin käyttöarvohyötyjä koskeva tehokkuushyötykategoria, ja selkeyttää sekä laajentaa hyötyjien käsitettä. Voitaisiin myös selventää, että silloin kun saavutettavat hyödyt ovat riittäviä ollakseen tunnistettavia globaaleiksi tai yhteiskunnallisiksi, ne voivat aina siirtyä merkityksellisillä markkinoilla oleville kuluttajille, vaikka suorat hyötyjät olisivatkin maantieteellisesti EU:n ulkopuolella.

Avainsanat: EU-oikeus, kilpailuoikeus, horisontaaliset yhteistyösopimukset, kestävä kehitys

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List of Abbreviations

CJEU	Court of Justice of the European Union
EU	European Union
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

1 Introduction

1.1 Choice of Topic

The topic of this research paper is the treatment of horizontal sustainability agreements under the Commission's Draft Revised Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (hereinafter referred as Draft Revised Guidelines) [1]. The aim of the research is at finding whether the treatment of sustainability agreements, and especially the general acceptance of sustainability benefits under the Article 101(3) TFEU and the revised pass-on to consumer doctrine in the Commission's Draft Revised Guidelines, has changed from the historical perspective, and at identifying the theoretical weaknesses of the proposed evaluation scheme of these benefits under the Draft Revised Guidelines.

Sustainability and transformation toward greener technologies and practices in the European Union (EU) have for some time received increasing attention from EU's policymakers as well as businesses, even despite the challenging political and economic circumstances the whole world has to endure in these times. As a part of this ongoing sustainability development, the Commission in their Draft Revised Guidelines took into consideration the objectives of the 2019 Green Deal for the European Union as well as the United Nations' (UN) Sustainability Agenda.[2] In practice, the Commission's commitment to this end may be seen in the addition of a ninth chapter (Sustainability Agreements) to the Draft Revised Guidelines. This chapter is completely new in comparison to the existing Guidelines[3] and concerns in essence, all of the different kinds of horizontal co-operation agreements that carry a sufficient sustainability objective within them, and guidance on the possible ways these agreements could be affected by Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Because of the rather different nature of sustainability goals in comparison to the more conventional production or economic benefits that undertakings usually seek to attain by co-

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[1] Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (DRAFT), hereinafter referred as Draft Revised Guidelines

[2] Communication from the Commission, the European Green Deal, COM (2019) 640 final, UN Agenda 2030, Draft Revised Guidelines, para 3

[3] 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 2011/C 11/01, hereinafter referred as Guidelines

operation agreements, the new chapter concerning sustainability agreements in the Draft Revised Guidelines makes use also of concepts, to certain extent, new to the theory of the application of Article 101 TFEU, these being namely the notions of 'individual use value benefits'[4], 'individual non-use value benefits'[5], and lastly, 'collective benefits'[6]. These new categorizations are connected to the pass on to consumers requirement within exemption provided for by Article 101(3) TFEU, and as such, are deemed apparently vital by the Commission for the assessment of sustainability agreements within the meaning of the Draft Revised Guidelines. However, there is yet little knowledge on how these concepts are to be understood and moreover, what is their practical applicability. Consequently, these concepts provide a topical and interesting field for legal research into their meaning, actual novelty, as well as possible issues in relation to their application and their effectiveness from the perspective of sustainability objectives, the attainment of which is their proposed function.

Recalling, that the general objective of the Commission's guidelines is the practical guidance and enhanced legal certainty in relation to the application of competition rules in relation to horizontal co-operation agreements it would be in the interest of both the Commission, and especially the undertakings reflecting on sustainability co-operation, that the guidance within the guidelines be as clear and unambiguous as possible. In this regard, the Draft Revised Guidelines seem to provide less than desirable outcome. Consequently, the obscurity of the Draft Revised Guidelines in this respect presents good open grounds for both criticism and reasoned interpretation.

1.2 Research Questions

Following the reasoning in the preceding section, the research questions this paper aims to answer, are the following:

1. is the acceptance of sustainability benefits in the assessment under the Article 101(3) TFEU a novel concept?

2. is the revised pass-on to consumers doctrine in the Draft Revised Guidelines genuinely new from a theoretical and historical perspective?

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[4] Draft Revised Guidelines ch 9.4.3.1
[5] Draft Revised Guidelines ch 9.4.3.2
[6] Draft Revised Guidelines ch 9.4.3.3

3. what problems may be identified relating to the acceptance of sustainability benefits under competition law and the revised pass-on to consumers doctrine?

4. is the proposed pass-on to consumers doctrine effective from the perspective of the attainment of sustainability objectives?

1.3 Research Methods and Sources

This research will be conducted using legal dogmatic method and available judicial and academic sources, as well as contributions from the Commission's public consultation process. Because of the novelty of the Draft Revised Guidelines, which were first published for public consultation on 1 March 2022, only little academic opinion concerning the issue directly is available as of the time of writing of this paper.

However, what views are available will be used alongside opinions presented in the Commission's public consultation process, even though these do not necessarily satisfy academic standards in themselves. They, nevertheless, provide a stakeholder perspective to the issues at hand, which is paramount when evaluating the clearness or lack thereof of the guidelines in relation to the use of collective benefits concept and the understanding of how the research questions should be answered from the stakeholder's viewpoint.

1.4 Structure

This research will be structured as follows. The first main chapter after this introduction will briefly introduce the general legal context around the Article 101 TFEU, where the topic of this paper locates itself. This chapter will also illustrate what horizontal co-operation in this context refers to. The second main chapter will attend to the first two research questions of this paper, namely whether the consideration of sustainability objectives in general or the revised pass-on to consumers doctrine are new in the context of competition law. The third main chapter will address the last two research questions, namely the issues that may be identified with the acceptance of sustainability objectives as benefits under the Article 101(3) TFEU in general, and those relating to the revised pass-on to consumers doctrine. The last main chapter before the conclusion will propose practical changes to the Draft Revised Guidelines in order to overcome some of the issues discussed in this paper. The paper ends in a conclusion.

2 Horizontal Co-Operation Agreements and Article 101 TFEU

2.1 General Rules on Horizontal Co-Operation under the Article 101 TFEU

In order to assess the possible positive potential as well as eventual issues related to the collective benefits doctrine within the Draft Revised Guidelines, it is necessary to first consider what is understood by horizontal co-operation agreements in this context, and what are the contemporary rules concerning them. Sustainability co-operation may partially be a newcomer within the context of the Commission's guidelines on horizontal co-operation agreements, but it is not an exception from the viewpoint of conventional definitions and rules. Therefore, before wandering further into sustainability co-operation's perhaps more 'special' nature in form of the possibility to take into account non-economic and even collective benefits under the Draft Revised Guidelines' new rules, the following sections will attempt to provide a brief review of what is understood as horizontal co-operation agreement and what are the general competition rules applying to them. This section will briefly review the rules which will be those in the Article 101 TFEU, while the second section will attempt to clarify how horizontal co-operation agreements may be understood under EU competition law. The order of the discussion is this, since the definition of horizontal co-operation agreement draws heavily from the rules prescribed in the Article 101 TFEU.

2.1.1 Prohibition under the Article 101(1) TFEU

In short, the rules set out in the Article 101(1) TFEU prohibit anticompetitive agreements or collaboration between two or more undertakings that has either as its object or effect the prevention, restriction, or distortion of competition and which has an appreciable effect on trade between the Member States.[7] The concepts of an 'agreement' and an 'undertaking' which are indispensable for the application of the article, will be more closely studied in the following chapter, since they for their own part, also form part of the definition of a horizontal co-operation agreement. The article in addition sets an inexhaustive list of examples, including *inter alia* price fixing, production limits, and market sharing, which may be considered restrictions to competition by object.[8]

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[7] For a more extensive explanation see for instance: Jones & Sufrin's EU Competition Law: Text, Cases, and Materials, 7th Edition, p 138, and Lorenz M, "Key Concepts of Article 101 TFEU," An Introduction to EU Competition Law Cambridge University Press 2013, p 62

[8] Jones 2019, p 220, although the list of object restrictions thereof is not exhaustive: Jones 2019, p 225 and Lorenz 2013, p 63

While the restrictions by object are generally established based on the substance of the agreement's express provisions, and intended objects, the restrictions by effect, on the other hand, are founded on the basis of the probable effects that the agreement has on the competition on the relevant market. In principal, the test to find a restriction by effect comprises of two counterfactuals: first, whether the agreement restricts inter-brand competition that would have existed without the agreement, and second, whether the agreement restricts intra-brand competition that would have existed without the contractual restraint.[9] If the agreement has no effect on competition based on this test, the restraints in question are considered ancillary to the underlying agreement and fall outside the scope of the Article 101(1) TFEU.[10]

When an agreement or joint conduct (both could be understood simply as an 'agreement' in this context)[11] fulfils these criteria, in other words, contains provisions or collaboration that either aims at or produces appreciable[12] distortion to competition on the relevant market, the agreement becomes void under the Article 101(2) TFEU, and the Commission or the national competition authorities of the Member States may take action to bring the infringement to end on the basis of Regulation 1/2003[13] and the national competition laws. The possible enforcement actions also include penalties such as fines and periodical penalty payments.[14] In addition to public enforcement, private enforcement through damages actions has also become of increasing importance and is harmonized by Damages Directive[15].

2.1.2 Exemption under 101(3) TFEU

The prohibition under the Article 101(1) TFEU is not, however, absolute. Even if an agreement fulfils the criteria set out in the article, the agreement may still not be considered an infringement provided it meet the requirements of the Article 101(3) TFEU. In principle

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[9] Jones 2019, p 240
[10] Jones 2019, p 240, the Guidelines highlight the importance of the distinction between this doctrine and that of the Article 101(3) TFEU: Guidelines para 18
[11] see section 2.2.1
[12] Appreciability is assessed on the basis of the Commission's De Minimis notice (Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union [2014] OJ C291/01)
[13] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 001 4.1.2003, p. 1)
[14] Ibid, Articles 23, 24
[15] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] (OJ L349/1)

this exemption applies when the benefits of the agreement outweigh its distortive effects.[16] In other words, agreements which restrict competition by object or effect but which, while doing so, 1) bring about benefits in production, distribution, technical, or economic progress, 2) allow consumers a fair share of the said benefits, 3) and do not include indispensable restrictions, 4) or eliminate competition, can be exempted.[17] For certain types of agreements the Commission has adopted so called block exemption regulations, which provide for exemption for the respective types of agreements in accordance with requirements set out in the block exemption regulations.[18]

The first two requirements (1. benefits, and 2. fair share of those to consumers) refer in effect to the so called 'pass-on to consumers' doctrine. This doctrine is applied when a co-operation agreement is evaluated in order to find whether the agreement is capable of bringing benefits of the nature set by the Article 101(3) TFEU "which contribute(s) 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…" The question of which kinds of benefits may be considered as falling within the meaning of the article is somewhat ambiguous and will be returned to later in this research.[19] Suffice to say that the CJEU seemingly has not limited the Commission's freedom to take into consideration different kinds of benefits, even ones that would apparently fall outside the wording of the Article 101(3) TFEU, as the range of accepted benefits, or efficiency gains as they are sometimes called, goes beyond strictly economic benefits.[20] Whether non-competition factors in general can be considered in the assessment is subject to discussion and seems to be unclear.[21] This issue will be discussed further in a later chapter.[22]

In regard to the 'fair share' that is to be passed on to consumers the situation is similarly somewhat hazy when it comes to the question of how much is a fair share, and who are the consumers that are to relish from that share.[23] The general rule however, would seem

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[16] Lorenz 2013, p 63
[17] Jones 2019, pp 207, 262
[18] Lorenz 2013, p 63, See for instance Commission Regulation (EU) 2022/2455 of 8 December 2022 amending Regulation (EU) No 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, and Commission Regulation (EU) 2022/2456 of 8 December 2022 amending Regulation (EU) No 1218/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements
[19] Jones 2019, p 266
[20] Lorenz 2013, p 122
[21] Jones 2019, p 264
[22] See Sections 3.1 and 4.1
[23] Jones 2019, p 267

to be that from the consumers point of view, the end result of the agreement, taking into account both the negative effects that the restriction to competition brings about and the benefits or efficiency gains that result from the agreement, evens out as at least neutral.[24]

Therefore, from the perspective of horizontal co-operation, the test of whether an agreement is acceptable from the viewpoint of the Article 101 TFEU, is two-stage. Firstly, it must be assessed whether the agreement is capable of appreciably distorting the competition within the EU in the meaning of the Article 101(1) TFEU and only if this is the case, whether the agreement may be saved by the Article 101(3) TFEU. There is a profound discussion on whether the focus on acceptability of co-operation agreements should primarily be based on the scope of the Article 101(1) TFEU or on the application of the Article 101(3) TFEU as an exemption.[25] This question could also be of importance when considering whether objectives not purely economic, such as sustainability, should be taken into consideration in the assessment and on whether this should take place in the relation to application of the Article 101(1) or 101(3) TFEU.

2.2 The Role of the Commission's Guidelines

The Commission has published numerous guidelines on the application of the Article 101 TFEU and its predecessors including on the application of the Article 81 EC Treaty (now 101 TFEU) beginning from 2001.[26] The purpose of the guidelines is advisory rather than legislative, as the guidelines do not in any way affect the interpretation of the CJEU when the Courts apply the law.[27] The idea behind the guidelines is to provide businesses with a tool for self-assessment of the most common types of horizontal co-operation agreements in order to find whether a given agreement falls within or outside the scope of the Article 101(1) TFEU and further, whether it may be exempted on basis of the Article 101(3) TFEU.[28]

Since the Commission, or more specifically, the Directorate-General for Competition (DG Comp) is the primary enforcer of the EU's competition policy it may be assumed that the Commission follows its own guidelines when enforcing the competition rules even if the guidelines are not binding. Therefore, the guidelines, even though not strictly binding per se,

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[24] Lorenz 2013, p 123
[25] Jones 2019, p 208
[26] Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements Official Journal C 003, 06/01/2001 P. 0002 - 0030
[27] Guidelines paras 5 and 9, Draft Revised Guidelines para 1
[28] Guidelines paras 5 and 7, Draft Revised Guidelines paras 1 and 4

may be seen as rather significant instruments, as they reflect the Commission's approach regarding the assessment of horizontal co-operation agreements under the Article 101 TFEU. It could also be argued that when departing from its own guidelines, the Commission would infringe the principles of legitimate expectations or equality which practically renders diverging from the guidelines difficult and unlikely for the Commission. Since much of the actual substance of competition rules and definitions is based on the CJEU's interpretations, the Commission's guidelines provide at least some legal certainty for businesses and other interested parties ridding them from the need to dig knee-deep in to the CJEU's caselaw themselves.

2.3 Horizontal Co-Operation Agreements

Now that the general context in which horizontal co-operation is placed within the EU competition law regime has been briefly introduced, it is possible to determine what horizontal co-operation agreements are and what would seem to define them in the said context. The Draft Revised Guidelines address the definition of sustainability agreements specifically in their respective chapter 9, where sustainability agreements are differentiated from other co-operation agreements by their pursuance of sustainability objectives.[29] The objective, however, is only one piece in the definition of a horizontal sustainability co-operation agreement.

Horizontal (neither vertical) co-operation agreements have not been positively defined in EU primary law. Instead, their definition has to be deduced mainly from the caselaw of the CJEU in relation to application of the Article 101 TFEU. Bearing this in mind, it seems horizontal co-operation agreements could generally be described as any form of agreements on any form of co-operation between two or more undertakings on the same level of the market.[30] More specifically, some authors describe horizontal co-operation agreements as "[…] efficiency-enhancing agreements entered into between companies operating at the same level in the market."[31] The idea of mentioning efficiency enhancement is apparently to make a definitional distinction between acceptable horizontal co-operation and cartels. The usefulness of such a differentiation, however, would seem questionable.

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[29] Draft Revised Guidelines paras 541-542
[30] Jones 2019, p 703
[31] J. Faull and A. Nikpay (eds.), The EU Law of Competition (3rd edn, Oxford University Press, 2014), p 884

In the Commission's terminology, horizontal co-operation agreements are capable of raising competition concerns, therefore, potentially constituting cartels. It seems to be a question of personal preference whether to refer to, for instance, the Commission's horizontal guidelines, as defining horizontal co-operation agreements (if only acceptable agreements count as co-operation agreements) or as giving guidance on the evaluation of their compatibility with the Article 101(1) TFEU (if co-operation agreements are capable of constituting cartels). The latter choice would seem more appropriate. As will be seen from the following attempt at defining horizontal co-operation agreements, the line between an acceptable co-operation agreement and a cartel can be remarkably obscure.

This rather loose general definition has evolved piece by piece in the CJEU in its caselaw, yet it remains somewhat ambiguous in regard to some of its elements. The array of practical possibilities for some form of co-operation or co-ordination arrangements between businesses is nearly limitless which, on the other hand, calls for a very broad definition. Accordingly, the Draft Revised Guidelines[32], the Guidelines[33] in force as well as the former guidelines[34] all effectively refer to horizontal co-operation agreements as being agreements or concerted practices entered into between two or more undertakings on the same level of the market, concerning co-operation.

From this broad definition of horizontal co-operation agreement, one may distinguish four separate elements: 1) an agreement 2) on co-operation 3) between undertakings 4) on the same level of the market. In addition to these, the specific sustainability focus of the co-operation agreements adds its own nuance to this general definition.

2.3.1 An Agreement

The first element of a horizontal co-operation agreement is the existence of an agreement. This ostensibly simple requirement, as is the case with most concepts within the EU law context, is not unambiguous and would in itself be sufficient basis for a number of studies. This because in the context of EU competition law, the meaning of an agreement is understood not only consisting of merely express written or oral agreements but considerably more broadly. Additionally, there is no specific definition for an agreement written in the

[32] Draft Revised Guidelines para 15
[33] Guidelines para 1
[34] Commission Notice Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001/C 3/02), hereinafter referred as 2001 Horizontal Guidelines, para 9

primary sources of EU law, even despite the fact that the Article 101(1) TFEU refers to agreements among other things. Instead, the actual definition of an agreement has to be derived mostly from the CJEU's caselaw, which takes a primarily teleological approach to the issue.[35] In view of the Guidelines and opinions both made with reference to CJEU's caselaw, any agreement between undertakings, decision by an association of undertakings or concerted practice may be considered as an co-operation agreement, regardless of its exact form.[36] An agreement in this context therefore, does not only refer to a legally binding agreements per se, but to any form of an agreement or concerted practice which resembles 'concurrence of wills' between undertakings.[37]

It is noteworthy, however, that even this broader concept, referring to agreements as even 'concurrences of wills' or 'meetings of minds', is not easily defined in practical terms for the purposes of competition law. For instance, this is well illustrated by Louis Kaplow in his article concerning horizontal agreements.[38] Especially tacit collusion and parallel conduct present a challenge in this regard,[39] as they might bear the same negative effects on competition as more expressly co-ordinated co-operation, yet they might lack any form of an actual agreement or even express sharing of information between the parties.[40] However, drawing the line between normal competitive market behaviour and tacit collusion has been proven difficult in some instances.

An useful illustration by Kaplow is that of two petrol stations across a street in a secluded area: When the owner of the first station decides to initiate a *de facto* pricing cartel, he can simply display her suggested 'cartel price' on her own price board and, if willing to join the 'cartel', the owner of the second station only needs to follow suit.[41] As Kaplow argues, this kind of conduct hardly appears as an agreement, but it would be economically implausible without the consent of the initiator's competitor who gains a similar advantage in profit increase, thus creating interdependence between the two.[42] In short, according to Kaplow's view, the obscurity of the concept of an agreement could theoretically best be

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[35] Lorenz 2013, p 64
[36] Guidelines para 10, Draft Revised Guidelines para 15, Jones 2019, pp 710-711
[37] Jones 2019, p 166-167
[38] Louis Kaplow, 'On the Meaning of Horizontal Agreements in Competition Law' (2011) 99 Calif L Rev 683
[39] Jones 2019, pp 653-654
[40] Petit, Nicolas, The Oligopoly Problem in EU Competition Law, Research Handbook in European Competition Law, I. Liannos and D. Geradin eds., Edward Elgar, 2013, p 260
[41] Kaplow 2011, p 692
[42] Ibid

avoided by defining agreement simply as interdependence between the undertakings, rather than anything more.[43] This approach would to some degree also seem to be supported by the ECJ's argumentation in *AEG*, where the Court considered that even apparently unilateral actions, taken in this case by the supplier in a vertical distribution system, are considered agreements where they receive even tacit acceptance from the other party and cannot be achieved without the actions of the other party.[44]

The CJEU's caselaw on parallelism as a form of concerted practice, on the other hand, is rather scarce. The decision in the case *Re Wood Pulp Cartel: Ahlström Oy v Commission* (*Wood Pulp*)[45] is commonly considered to be the most prominent one in this regard.[46] In short, the CJEU in its decision stated that where parallel conduct can be explained with any other plausible reason than collusion, it will not in itself suffice as evidence for existence of collusion.[47] Thus, reflecting on CJEU's argumentation, the existence of an agreement cannot solely be based on undertakings' parallel conduct, where any other explanation is plausible. With reference to the same caselaw the Guidelines as well as the Draft Revised Guidelines explain that substitution of risk of competition with co-operation indicates concerted practice therefore amounting to an agreement.[48] However, the CJEU's decision in *Wood Pulp* and Kaplow's example illustrate, that drawing the line between independent actions and tacit collusion amounting to an agreement is not always straightforward.

Thus, it could be concluded that the concept of an agreement in the context of EU competition law has a broad meaning, comprising also apparently collusive actions, that cannot be explained otherwise. Therefore, evidence of co-operation can be considered proving the existence of an agreement, yet the existence of an agreement does not necessarily imply the existence of co-operation (unless specifically stated in the agreement). For this reason, the element of an agreement also somewhat overlaps with that of co-operation as will be discussed in the following sub-section. Nevertheless, as stated by Jones and Sufrin, the

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[43] Ibid p 814
[44] Case 107/82, AEG-Telefunken v Commission EU:C:1983:293, para. 38 see also Jones 2019, p 170-
[45] Joined cases C-89, 104, 114, 116–117, and 125–129/85, Re Wood Pulp Cartel: Ahlström Oy v Commission, EU:C:1993:120
[46] Jones 2019, p 663-664 and Kaplow 2011, p 774, Petit 2013, pp 292-293
[47] Joined cases C-89, 104, 114, 116–117, and 125–129/85, Re Wood Pulp Cartel: Ahlström Oy v Commission, EU:C:1993:120, paras 72, 126
[48] Guidelines para 60, Draft Revised Guidelines para 15, judgment of 4 June 2009, T-Mobile Netherlands and Others, C-8/08, EU:C:2009:343, paragraph 26; judgment of 31 March 1993, Wood Pulp, C-89/85, C-104/85, C-114/85, C-116/85, C117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraph 63

existence of an agreement is not in doubt in many of the cases concerning a violation of the Article 101(1) TFEU.[49]

2.3.2 On Co-Operation

The second element of the definition is that of co-operation. Naturally, in order to be considered a co-operation agreement, the agreement has to concern some form of co-operation. However, as is with most of the theoretical concepts related to EU legislation, no exact definition for co-operation exists. Seemingly, there is also no specific definition for the concept in contract law due to the endless practical possibilities contractual freedom provides for co-operation. Clearly not all agreements concern co-operation even if the existence of co-operation implies the existence of an agreement as stated in the previous section.

While the Commission structures its guidelines concerning horizontal co-operation generally using the most common types of co-operation agreements as the backbone, therein setting examples of forms of co-operation, the lists remain variable and inexhaustive. The most common types, and the ones that the Commission's Guidelines specifically address, are namely, information exchange, research and development agreements, production agreements, purchasing agreements, agreements on commercialisation, and standardisation agreements.[50] Adding to these categories of co-operation are standard terms and naturally also the sustainability agreements on the Draft Revised Guidelines, although sustainability agreements are always assessed in tandem with one of the other types.[51] The meaning of the concept however, cannot be limited merely to these example types of functional co-operation.

The CJEU on the other hand, seems only to use the exact term seldomly, albeit that the prohibition in the Article 101(1) TFEU practically refers to anticompetitive co-operation on the level of the EU single market. As discussed above, the Article 101(1) TFEU practically only relates to agreements that either aim or have the effect of substituting competitive risk with some form of co-operation.[52] However, owing to the wording of the article, the concept of an agreement and what may constitute a restriction to competition either by object or effect

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[49] Jones 2019, p 166
[50] Guidelines Ch 2-7
[51] Draft Revised Guidelines Ch 8-9
[52] See Section 2.1.1 and Guidelines para 60, Draft Revised Guidelines para 15, judgment of 4 June 2009, T-Mobile Netherlands and Others, C-8/08, EU:C:2009:343, paragraph 26; judgment of 31 March 1993, Wood Pulp, C-89/85, C-104/85, C-114/85, C-116/85, C117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraph 63

receive more attention in the methodology of the CJEU, compared to the concept of co-operation itself. Despite this, it is clear that only agreements that incorporate some form of co-operation are capable of infringing the prohibition in the article.[53]

However, not all prohibited anticompetitive conduct appears so clearly as co-operation. The link between the concept of co-operation and prohibition under the Article 101(1) TFEU may become less apparent in relation to vertical restraints, which are evaluated on fundamentally the same grounds, yet do not appear as co-operation per se. A good illustration of this is provided by Hviid in his interesting take on a centennial Irish milk co-operative court case in the light of modern-day competition law.[54] Examples from the ECJ's caselaw would be for instance *AEG*[55] and *Ford*[56], concerning terms in distribution agreements. Interestingly, while co-operatives, such as at issue in Hviid's article, and distribution systems both could be argued to concern forms of co-operation, the Commission, in its terminology, seems to only refer to horizontal arrangements directly as co-operation.[57] The ECJ on the other hand, at least in *Delimitis*, acknowledged distribution arrangements to also establish co-operation.[58]

The terminology employed by the CJEU, and the Commission thus renders it difficult to define what exactly is understood as co-operation. In essence, any conduct that is capable of infringing the Article 101(1) TFEU has to be co-operation, but clearly not all co-operation fulfils this characterization. The practical usefulness of such an extremely broad definition is questionable. What may be concluded regarding the concept of co-operation is perhaps that the term should be understood broadly, without exact demarcation between co-operative and other express contractual purposes but rather with a view to the scope of the Article 101(1) TFEU and to especially what is considered as a potential restriction to competition by object or effect as well as to the concept of an agreement for the part that its existence may be established by parallel or collusive conduct.[59]

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[53] Jones 2019, p 139
[54] Morten Hviid, 'The Treatment of Horizontal Agreements Aimed at Solving Incentive Problems' (2020) 65 The Antitrust Bulletin 340
[55] Case 107/82, AEG-Telefunken v Commission EU:C:1983:293
[56] Cases 228 and 229/82, Ford Werke AG and Ford of Europe Inc v Commission EU:C:1984:80
[57] Compare Guidelines ch 5 and Guidelines on vertical restraints Ch 8.2.2
[58] Case 234/89, Delimitis v Henninger Bräu ECLI:EU:C:1991:91 para 11
[59] Here again we see the overlap between the concepts of 'an agreement' and 'co-operation', see section 2.2.1

2.3.3 Between Undertakings

The third element to the definition of a horizontal co-operation agreement is that its parties are both 'undertakings'. The term undertaking is fundamental to EU law in many respects although is not defined in the primary sources of EU law. According to well established caselaw, most prominently in *Höfner*[60] however, an undertaking is considered as "[…] entity engaged in an economic activity, regardless of the legal status of the entity […]"[61] Thus, the concept of an undertaking is closely tied to another concept, that being economic activity. Economic activity as a concept of EU competition law on the other hand, presents problems and ambiguities sufficient to provide basis for countless, most likely inconclusive, academic works.

Similar to the concept of an undertaking, economic activity is, unsurprisingly, defined primarily by CJEU's caselaw. To be brief, the basic rule could be characterized in accordance with a line of ECJ's decisions in as being the following: if the activity consists of offering goods or services on the market and could potentially be carried out by a private entity in order to seek profits, the activity is economic.[62] This general idea seems to be widely recognized among academics, although not without criticism.[63] However, there are significant exceptions to this rather abstract definition. Most notably the exercise of public powers[64], and activities based on social solidarity[65] are not considered as economic activities.[66] In addition, purchasing goods or services is not considered an economic activity provided that the buyer is not an undertaking (i.e., not itself engaged in economic activity).[67] Especially the scope of the exception based on solidarity is particularly difficult to define, and seems to have moved alarmingly far from the fundamentals of the *Höfner*[68] ruling after the ECJ's decision in

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[60] Case C-41/90, Höfner and Elser v Macrotron GmbH EU:C:1991:161 see also FENIN v Commission EU:C:2006:453, para 25
[61] Case C-41/90, Höfner and Elser v Macrotron GmbH EU:C:1991:161 para 21
[62] Case C-118/85 Commission v Italy [1987] EU:C:1987:283 para 7, Cases C-180–184/98, Pavlov EU:C:2000:428, paras 74-5 Case C-475/99, Firma Ambulanz Glöckner v Landkreis Südwestpfalz EU:C:2001:577 para 19
[63] For instance, see: Jones 2019, p 143, Vassilis Hatzopoulos, 'The Economic Constitution of the EU Treaty and the limits between economic and non-economic activities', 2012, 6 European Business Law Review, p 990, and Erik Kloosterhuis 'Defining non-economic activities in competition law' European Competition Journal 2017
[64] For instance, see: C-364/92 SAT Fluggesellschaft mbH v. Eurocontrol ECLI: EU:C:1994:7
[65] For instance, see: Cases C-159–160/91, Poucet et Pistre v Assurances Générales de France EU:C:1993:63, and Cases C-264, 306, 354, and 355/01, AOK Bundesverband v Ichthyol-Gesellschaft Cordes, Hermani & Co EU:C:2004:150
[66] Jones 2019, p 144, Hatzopoulos 2012, p 982
[67] Case C-205/03 P, FENIN v Commission EU:C:2006:453, Jones 2019, p 147
[68] Case C-41/90, Höfner and Elser v Macrotron GmbH EU:C:1991:161

Dôvera, a state aid case where even profitable activities were considered non-economic based on their connection to a solidarity-based national health insurance scheme and certain limitations on how the profits could be further used.[69]

Another relevant issue in this context to consider is the question of whether the co-operating undertakings are considered separate entities or as a single entity for the purposes of the Article 101(1) TFEU. The concept of an undertaking does not necessarily refer to a single natural or legal person but is understood more as a single 'economic unit', therefore rendering potentially even multiple companies as a single undertaking.[70] An example from the CJEU's caselaw may be found in *Viho,* where the Commission and the Courts rejected complaint about a distribution scheme between a parent company and its fully owned subsidiaries, since these had no real autonomy.[71] Again, as with other elements discussed prior to that of undertaking, it can be observed that this concept leaves some room for interpretation and criticism. However, for the purposes of defining a horizontal co-operation agreement, it suffices to say that it has to be between two entities that count as undertakings. Thus, co-operation of conducted between an undertaking and, for instance, a public authority would not meet this requirement.

2.3.4 On the Same Level of the Market

The last element of the definition of horizontal co-operation agreement is that of the horizontality. Luckily, unlike most of the elements discussed before, the concept of horizontality is rather clearly established already by the Commission in its Guidelines and well as the Draft Revised Guidelines. Horizontality refers to the requirement that the agreement and co-operation has to exist between operators on the same level of the market. This would be in comparison to verticality, where the agreement would be between up- and downstream operators, such as manufactures and distributors for example.

In effect the horizontality refers not only to competitors and potential competitors but, according to the Guidelines, also to non-competitors who are active on the same product

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[69] Joined Cases C-262/18 P and C-271/18 P European Commission and Slovak Republic v Dôvera zdravotná poist'ovňa, a.s. [2020] EU:C:2020:450, The author has made an humble attempt to bring up some of the problems related to the implications of this judgement in his earlier works: Oiva Pälsi, *Defining Economic Activity in EU Competition Law in Public Health Care Context – Existence of Profitable Solidarity*, master's thesis, Lund university, faculty of law (2021)
[70] Guidelines para 11, Draft Revised Guidelines para 12, Jones 2019, p 151
[71] C-73/95 P, Viho Europe BV v Commission EU:C:1996:405

market although in other geographical market.[72] Noteworthy is, however, that the Draft Revised Guidelines do not mention other than actual or potential competitors, leaving out the undertakings placed on different geographical markets.[73] The Guidelines also define what is understood as a potential competitor. The Guidelines as well as the Draft Revised Guidelines characterize a potential competitor to another undertaking as an undertaking, that "[…] in the absence of the agreement, in case of a small but permanent increase in relative prices it is likely that the former, within a short period of time, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active."[74] It is also stressed that this evaluation has to be realistic, rendering a mere theoretical opportunity to enter the market insufficient.[75]

Therefore, in order to be considered horizontal, a co-operation agreement has to be between entities that operate on the same product and geographical market or have a realistic potential to do so in a relatively short period of time. It is not unclear why the Draft Revised Guidelines have dropped the reference to non-competing companies operating on the same product market but different geographical market, in comparison to the Guidelines. After all, such a situation would anyhow seem closer to horizontal than vertical one, even if co-operation between non-competitors does not present as significant competition concerns compared to that between actual or potential competitors.

[72] Guidelines para 1
[73] Draft Revised Guidelines para 17
[74] Guidelines para 10, Draft Revised Guidelines para 17
[75] Guidelines para 10, Draft Revised Guidelines para 17

3 Sustainability Agreements and the Revised Pass-On to Consumers Doctrine

3.1 Sustainability Objectives in the Draft Revised Guidelines and Before

Having introduced the general context of EU competition law in relation to horizontal co-operation and having made an attempt at defining the concept of a horizontal co-operation agreement, it is time to turn to the question on how are horizontal sustainability co-operation agreements treated under the new Draft Revised Guidelines in comparison to the existing doctrine? This section aims to scrutinize the approach taken on sustainability agreements in the new Draft Revised Guidelines to establish the changes to the existing doctrine both on paper and in practice. It is noted that there is little fundamentally new in the Commission's approach when compared to their historical stance, and that substantive differences are primarily related to the guidance on the pass-on to consumers doctrine, which will be discussed in more detail in the following section.

The aim of this section is to evaluate the developments presents in the Draft Revised Guidelines through a historical perspective. The fundamental question of whether or not sustainability objectives or any other non-economic objectives should be considered under the Article 101(3) TFEU will be discussed in a subsequent part of this paper.[76]

3.1.1 Sustainability Objectives in the Draft Revised Guidelines

Defining the sustainability element is only necessary in relation to sustainability co-operation agreements, which naturally, have to pursue a sustainability objective. The concept is only introduced under the Draft Revised Guidelines and thus there is little direct guidance in form of caselaw for its definition. Instead, the definition of sustainability objective in the context of the Draft Revised Guidelines would seem to derive primarily from the Article 3 TEU, the United Nation's (UN) sustainable development goals[77] and those set by the Commission's own European Green Deal[78] agenda.

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[76] See Section 4.1
[77] The UN 2030 Agenda for Sustainable Development
[78] 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. The European Green Deal COM/2019/640 final

This element, unlike the rest, is seemingly a new one in the context of horizontal guidelines, as the current Guidelines do not refer in any way to sustainability objectives of any form. Whether it is a genuinely new in the wider context of horizontal guidelines will be scrutinized more closely in the following sections of this research. Suffice to say, that the basis for considerations by the Commission for objectives and benefits other than what strictly could be interpreted as 'promoting technical or economic progress' under the Article 101(3) TFEU has been available already for some time.[79]

The Draft Revised Guidelines refer to the concept broadly as "[…] the ability of society to consume and use the available resources today without compromising the ability of future generations to meet their own needs."[80] A more specific explanation is also given the Commission, that the concept comprises, yet is not limited to "addressing climate change (for instance, through the reduction of greenhouse gas emissions), eliminating [sic] pollution, limiting the use of natural resources, respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutrious [sic] food, ensuring animal welfare, etc."[81] Therefore, it would seem that in principle any objective, be it environmental or social, identified by either the Treaties, the UN, or the Commission as a sustainability goal would be considered as an acceptable objective for a sustainability agreement in this context.

The sources mentioned in the Draft Revised Guidelines all list numerous goals or objectives and values which could be considered to amount to sustainability objectives in the meaning of the Draft Revised Guidelines. However, most of the objective are very general in nature and thus appear rather vague in any legal sense. For instance, the Article 3 TEU mentions sustainable development both within and outside the EU as well as improving the quality of the environment, eradication of poverty and protection of human rights. The Green Deal, on the other hand, focuses more on the environmental aspects of sustainability and is the basis for a package of different EU actions, including legislation. Nevertheless, the objectives of the Green Deal remain for the most part as open for interpretation as those set by the Article 3 TEU in the legal sense. Whether the different instruments implementing the Green Deal, such as the Draft Revised Guidelines for some part, are more exact remains to be seen.

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[79] See Section 2.1.2 and Lorenz 2013, p 122, Jones 2019, p 264
[80] Draft Revised Guidelines para 543
[81] Draft Revised Guidelines para 543

Considering that the UN agenda alone identifies 17 different sustainability goals among them ending poverty, and hunger worldwide, as well as reducing inequality within and between countries, the definition of a sustainability objective certainly is a broad one. The practical limitations to the objectives effectively addressable by horizontal co-operation will be scrutinized in a later section.[82]

3.1.2 CJEU and Commission decisions

Firstly, it should be recalled that the possibility for the Commission to consider sustainability objectives as part of their assessment of a co-operation agreement under the Article 101(3) TFEU is in principle, nothing new. It has been recognized already well prior to the publishing of the Draft Revised Guidelines that the Commission is not limited strictly to considering only benefits of economic nature in relation to the requirement of efficiency gains[83] under the Article 101(3) TFEU.[84] The Court of First Instance did most notably in the case of *Métropole Télévision*[85] state that the Commission "[…] is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant the exemption under Article [101(3)]."[86] Therefore, it would seem that the CJEU has allowed for quite a significant margin of discretion for the Commission when it comes to consideration of benefits even of environmental or social nature in the context of the efficiency gains requirement under the Article 101(3) TFEU.

The fact that the CJEU has in its caselaw accepted considerably broader interpretation of the promotion of technical or economic progress under the Article 101(3) TFEU than what strict textual interpretation would perhaps allow, would in itself seem to challenge the idea of the novelty of sustainability co-operation's acceptability under competition rules. At the very least the Court of First Instance's 's argumentation in *Métropole Télévision*[87] demonstrates that the CJEU might not be as likely to disregard a variety of objectives of public interest from the ambit of the efficiency gains requirement under the Article 101(3) TFEU as the Commission itself. Admittedly, it was the Commission that initially resorted to factors outside

[82] See Section 4.3
[83] See Section 2.1.2 for the cumulative requirements for the exemption under 101(3) TFEU
[84] Lorenz 2013, p 122, Jones 2019, p 267
[85] Joined cases T-528, 542, 543, and 546/93, EU:T:1996:99
[86] Joined cases T-528, 542, 543, and 546/93, EU:T:1996:99 para 118
[87] Joined cases T-528, 542, 543, and 546/93, EU:T:1996:99

of the strictly economic sphere in this case and even before,[88] yet the CJEU admitted that this indeed was acceptable.[89] However, owing to the Commission's political nature, it is perhaps morelikely to alter its views more frequently than the CJEU which, in theory at least, shouldbe more bound by its own interpretations and practices. Admittedly, the CJEU too can reverse itself in practice, yet the high legal expectations given rise to by its precedents would seem to render any radical changes less likely. Naturally, the Commission as well can only manoeuvre within the confines warranted by the CJEU.

The broad scope for consideration provided by the CJEU in *Métropole Télévision*[90] has also arguably been employed by the Commission in a few instances already before the decision was made the CJEU, as has been noted by academics.[91] Already in 1977, the CJEU demonstrated willingness to accept benefits arguably from outside of the economic and technical sphere of progress referred to in requirements of the Article 101(3) TFEU. This took place in the decision in Case 26/76 *Metro v Commission* (*Metro I)*[92], where the CJEU accepted considerations related to the stabilizing effects on the labour market of the agreement in question, as being efficiency gains in the meaning of the Article 101(3) TFEU.[93] Arguably, the positive approach taken by the CJEU in *Metro I*[94] on a benefit having perhaps more of a socio-economic than strictly economic nature could be seen as an opening through which also other such policy objectives, such as sustainability objectives, could be accepted as fulfilling the efficiency gains criterion of the Article 101(3) TFEU. However, it is worth noting, that while the CJEU did not disregard positive effects on the labour market as benefits within the meaning of the efficiency gains criterion, provision of employment was considered by the CJEU to enhance the general conditions for productions, thus rendering the benefit at least indirectly connected to the purely economic considerations of improving production.

In 1994 in the case of *Exxon/Shell*[95] the Commission considered that the co-operation agreement in question would afford for reduction in use of raw materials, their cost, the amount of plastic waste, and health and environmental hazards caused by transport of

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[88] Joined cases T-528, 542, 543, and 546/93, EU:T:1996:99 paras 112, 114 see also Case 26/76 Metro v Commission ECLI:EU:C:1977:167 para 43
[89] Joined cases T-528, 542, 543, and 546/93, EU:T:1996:99 para 118
[90] Joined cases T-528, 542, 543, and 546/93, EU:T:1996:99
[91] See for example: Lorenz 2013, p 122, Jones 2019, p 267
[92] Case 26/76 Metro v Commission ECLI:EU:C:1977:167
[93] Case 26/76 Metro v Commission ECLI:EU:C:1977:167 para 43
[94] Case 26/76 Metro v Commission ECLI:EU:C:1977:167
[95] COMP/33.640 [1994] OJ L144/20

ethylene.[96] The Commission further argued that the agreement was all the more justified as "[…] the limitation of natural resources and threats to the environment are of increasing public concern."[97] The Commission in *Exxon/Shell*[98] referred to these benefits as 'technical and economic progress' owing to respective requirement in the Article 101(3) TFEU although the subsequent CJEU decision in *Métropole Télévision* would also seem to allow the Commission to base its assessment more directly in public interest. In comparison to the CJEU's decision in *Metro I*[99] the Commission in *Exxon/Shell* seems to have given somewhat more intrinsic value to environmental protection, although without reference to any

Perhaps more notably, at least in regard to environmental benefits, the Commission considered pollution reduction as being a benefit in its own right in *CECED*[100]. In this case the Commission exempted under the Article 101(3) TFEU an near industry wide agreement between washing machine producers and importers, that had the aim of restricting the manufacture and importation of washing machines in the least energy efficient category. The agreement was considered to have a restrictive object as it restricted the members' autonomy to produce and import the said machines, but the restriction was seen as acceptable because of the individual economic and collective environmental benefits arising from it. Even though the Commission still in *CECED*[101] referred to environmental benefits broadly as being 'contributions to economic and technical progress' as it ought to in light of the Article 101(3) TFEU, it seems that there was less hesitation in accepting collective environmental benefits as the main efficiency gain produced by the agreement in comparison to *Exxon/Shell*[102] six years prior, where these appeared to be considered more as a positive extra. Even in *CECED*[103] the Commission considered also benefits other than those connected with environmental aims, practically dividing the individual benefits to consumers and collective ones for the environment similarly to what appears to have been the basis for both the 2001 Horizontal Guidelines as well as the Draft Revised Guidelines.[104]

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[96] COMP/33.640 [1994] OJ L144/20 paras 67-68
[97] COMP/33.640 [1994] OJ L144/20 para 71
[98] COMP/33.640 [1994] OJ L144/20
[99] Case 26/76 Metro v Commission ECLI:EU:C:1977:167
[100] COMP/36.718 [2000] OJ L187/47 paras 55-56
[101] COMP/36.718 [2000] OJ L187/47
[102] COMP/33.640 [1994] OJ L144/20
[103] COMP/36.718 [2000] OJ L187/47
[104] See COMP/36.718 [2000] OJ L187/47 paras 52-54 and 55-57 respectively.

This choice made by the Commission over 20 years ago would seem to introduce the system presented already in a less exact form in the 2001 Horizontal Guidelines and now more extensively explained as the 'new' pass-on to consumers' doctrine in the chapter 9 of the Draft Revised Guidelines. It seems likely that consideration was given to both individual and collective benefits in *CECED* because both were present. However, the decision left unanswered the question of whether the collective environmental benefits in that situation would have been sufficient for the fulfilment of the efficiency gains requirement by themselves.

3.1.3 The 2001 Horizontal Guidelines and Environmental Agreements

Despite the fact that at least certain environmental and arguably also other sustainability objectives have or could have been considered as acceptable benefits under the Article 101(3) TFEU already prior to the new Draft Revised Guidelines, the draft seems mostly to have been noted for the inclusion of 'sustainability agreements' within its framework.[105] In light of comments made by the contributors during the public consultation on the Draft Revised Guidelines it seems that many of the contributions raised the inclusion of the sustainability agreements to the framework to high regard.[106] This is perhaps to be expected in the light of general attitudes toward sustainability actions embraced by many modern businesses and other entities private and public alike, as well as the fact that the present Guidelines do not address the issue of sustainability agreements in any apparent way.

Nevertheless, for all its parts the sustainability element is not entirely new even in the context of the Commission's guidelines. It may be recalled that the Commission's first horizontal guidelines from the year 2001 contained a chapter on environmental agreements.[107] In those guidelines the Commission defined as environmental agreements "those by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives in particular those set out in Article 174 (now the Article 191 TFEU) of the Treaty."[108] Interestingly, however, it seems not many of the stakeholders or other contributors to the public consultation held by the Commission considered the new

[105] Draft Revised Guidelines Chapter 9
[106] See for instance: Unilever, European Commission Consultation on Draft Horizontal Cooperation Guidelines: Unilever Response on Sustainability Agreements, Zalando, Zalando's contribution to the Public Consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines, April 2022
[107] 2001 Horizontal Guidelines chapter 7
[108] 2001 Horizontal Guidelines para 179

chapter in the Draft Revised Guidelines on sustainability agreements as revival of the old environmental agreements-chapter from the 2001 horizontal guidelines but rather as a completely new approach. Only a very few entities that saw it fit to take part in the public consultation, and evidently better acquainted with sustainability issues, such as the national authorities of the Netherlands, welcomed the sustainability agreements not as a novel addition but as revised reappearance of the environmental agreements chapter as was in the previous guidelines.[109] The view taken by the Dutch Ministry of Economic Affairs and Climate Policy and few others seems considerably more accurate compared to the mainstream of contributions that, albeit offering justified criticism, considered the sustainability agreements chapter as a genuine novelty.[110] However, it is, on the other hand, understandable for the sustainability agreements chapter, although not in fact entirely unprecedented, to be conceived as such since the present Guidelines do not directly address environmental or sustainability issues other than those considered under standardization agreements.[111]

Since the present Guidelines do not address the issue of sustainability other than marginally, it is arguably more appropriate to compare the proposed approach of the Draft Revised Guidelines not to the present but rather to the prior guidelines from 2001. A closer comparison between the respective chapters in the Draft Revised Guidelines, the existing Guidelines, and the previous ones from 2001 indeed would seem to reveal the lack of any fundamental change in the Commission's approach. Of course, any drastic evolution would be out of place within the context of Commission's guidelines since they are not meant to supersede or mend binding EU legislation but merely aid in its interpretation and provide for the means of self-assessment. Judging from the Guidelines in force for now, in the Commission's view the exclusion of the environmental agreements as an independent category of co-operation agreements in the guidelines was done since the chapter mostly addressed environmental standards.[112] This claim by the Commission's seems nevertheless, only partially true as the chapter did refer to other possible forms of co-operation as well.[113]

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[109] Ministerie van Ekonomische Zaken en Klimaat, Response of the Dutch Ministry of Economic Affairs and Climate Policy on the public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal guidelines 2022
[110] See for example: Public Consultation on the Draft Revised Horizontal Block Exemption Regulations and Horizontal Guidelines, Submission of Castrén & Snellman Attorneys Ltd, Helsinki 26 April 2022
[111] Guidelines chapter 7
[112] Guidelines para 18, see reference
[113] 2001 Horizontal Guidelines paras 179-181

Instead of the dedicated chapter, the conventional guidelines simply direct readers with environmental agreements in mind to respective chapters of the Guidelines based on the co-operation's form (standardisation, R&D, commercialisation, etc.).[114] Technically this is approach does not seem far from the one adopted by the Commission in the Draft Revised Guidelines, where sustainability agreements are to be assessed under the respective chapter of the guidelines based on the co-operation's form as well.[115] Thus, it seems that neither the principal idea of accepting sustainability or at least environmental aims and benefits as legitimate from the Commission's perspective, nor the technical choice to primarily assess these agreements under the relevant chapters of the guidelines on the basis of the co-operation's type, are novelties.

Nevertheless, development on paper seems to have been notable when it comes to the scope of sustainability agreements. This is due to the fact that in comparison to the 2001 guidelines, the Draft Revised Guidelines address not only environmental but also a broader scope of sustainability objectives. The fundamental idea has, however, remained the same. As stated previously, the 2001 horizontal guidelines referred broadly to the Treaties as well as the EU's and the Commission's policies in relation to environmental objects based primarily in the Articles 2 TEU and 174 TEC (now Articles 3 TEU and 191 TFEU respectively). Similarly, the Draft Revised Guidelines refer to principally the same basis in the Article 3 TEU in the relation to sustainability objectives.[116] In contrast to the 2001 horizontal guidelines however, the Draft Revised Guidelines do not make reference to the Article 191 TFEU (Article 174 TEC), which seems somewhat odd considering that the article directly states objectives on the EU's policy on the environment.[117]

Whether the choice to omit the reference to the Article 191 TFEU is done in order to stress the nature of the new sustainability agreements as being broader than that of the environmental agreements in the previous 2001 guidelines or for other reasons seems unclear. A less desirable, although arguably possible, reason for the omission would be the fact that the Article 191 TFEU unlike the Article 3 TEU, the sole basis referred to in the Draft Revised Guidelines, clearly states that environmental damage should be rectified at the source.[118]

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[114] Guidelines para 18, see reference
[115] Draft Revised Guidelines para 547
[116] Draft Revised Guidelines para 542
[117] Article 174(1) TEU/191(1) TFEU
[118] 3(2) TEU

Incidentally, the Commission in its *CECED*[119] decision made reference to the Article, pointing out that reduction in use of electricity does not tackle the damage at its source but may nevertheless be taken into consideration.[120]

As subsequent sections of this research aim to highlight, this principle of rectification at the source does not entirely coincide with the Commission's supposed present interests and views and may be the reason for the lack of a reference to the Article 191 TFEU in the Draft Revised Guidelines. It is, however, interesting to note that while the Draft Revised Guidelines make no reference to the Article 191 TFEU even where this would seem similarly plausible as was in 2001.

3.1.4 Conclusion

The sustainability objectives or benefits in the context of horizontal guidelines admittedly are more significantly present in the Draft Revised Guidelines, than what they have been previously. Regardless, it may still be recalled that the sustainability objectives, especially environmental objectives, were to some extent included already in the 2001 Horizontal Guidelines in form of environmental agreements chapter. Moreover, the guidance on environmental agreements in the 2001 horizontal guidelines seemed largely to be based on the same caselaw and practice of both the CJEU and the Commission as that incorporated in the new sustainability agreements chapter of the Draft Revised Guidelines.

On paper, the scope of acceptable sustainability objectives has broadened tremendously in comparison to the 2001 horizontal guidelines, not to mention the current ones, which do not give any significant guidance on the topic. Nevertheless, it seems that the CJEU would have allowed the Commission to give consideration to a broader variety of objectives in the public interest, including presumably sustainability objectives, already in the decision in *Métropole Télévision*,[121] before the turn of the millennium. The issue of whether or not sustainability objectives should be considered under the Article 101(3) TFEU, however, remains open and is further discussed later on.[122]

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[119] COMP/36.718 [2000] OJ L187/47
[120] COMP/36.718 [2000] OJ L187/47 para 55
[121] Joined cases T-528, 542, 543, and 546/93, EU:T:1996:99
[122] See Section 4.1.2

3.2 Revised Pass-On to Consumers Doctrine

In addition to the seemingly, although not historically, new consideration given to sustainability objectives as legitimate benefits, the Draft Revised Guidelines provide in Chapter 9 on sustainability agreements an apparently new pass-on to consumers doctrine. It seems that this is done in order to better address the somewhat special nature of sustainability agreements the benefits of which do not necessarily fit well in the efficiency gains and pass-on to consumers criteria of the Article 101(3) TFEU in the strict sense of the Article's wording.[123] The 'new' pass-on to consumers doctrine seems, however, largely to be based on the Commission's assessment of benefits in the case of *CECED,*[124] where it separated in its argumentation individual benefits received by directly by the consumer purchasing the product in question, that being a washing machine, and the collective benefits to the environment that the agreement would bring about in ridding the washing machine market from a significant amount of the least environmentally friendly types of machines.[125]

The following sections will aim to introduce and critically assess the scope of the three-fold system presented in the Draft Revised Guidelines and subsequently evaluate whether this seemingly new system is in fact a novel development from the perspective of CJEU and Commission caselaw or whether it is simply new on paper in the form of the horizontal guidelines.

3.2.1 Individual Use Value Benefits

The Draft Revised Guidelines separate individual benefits into two categories on the basis of whether the benefits affect the use value of the product in question or not.[126] The first category of consumer use value benefits refers to benefits that actually improve the product's use value in the usual sense by lowering the price, improving the quality, or in any other way positively affecting such characteristics of the product that directly render it better for the consumer in the conventional understanding of the word.[127] The individual use value benefits therefore, seems to represent in a way the most conventional and simplest notion of consumer

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[123] Draft Revised Guidelines Chapter 9.4.3, The issue of the wording of the Article 101(3) TFEU will be further discussed in Section 4.1
[124] COMP/36.718 [2000] OJ L187/47
[125] COMP/36.718 [2000] OJ L187/47 paras 52-57
[126] Draft Revised Guidelines paras 590-93 and 591-600 respectively.
[127] Draft Revised Guidelins para 590

benefits, referring to improvement in the product itself or its pricing from the consumer welfare's perspective.

On the other hand, benefits which arise from any other characteristics of the product, such as its sustainable origin, that do not however, directly improve the product's use value may under the Draft Revised Guidelines be considered as non-use value benefits if the consumers are still willing to pay for the external benefit.[128] Further, when the consumers no longer are willing to pay for the external benefits, such as lessened pollution, the benefits may yet be considered as collective benefits in certain circumstances.[129] Therefore, it would seem that the Commission's intention has perhaps been to broaden the notion of consumer benefit to clearly include certain positive externalities in addition to direct benefits. In the context of horizontal guidelines, this goal would admittedly be reached to some extent by this proposed system, since in comparison to earlier guidance this new doctrine is expansive. For instance, the current Guidelines do not directly mention a possibility to give consideration to positive externalities created by an agreement as benefits,[130] even when such an opportunity clearly has been presented by the CJEU's and the Commission's very own practice already in *Métropole Télévision* and *CECED* to name a few cases.[131]

However, in comparison with, again, the 2001 Horizontal Guidelines, the distinction between individual and collective benefits does not seem quite so new. As discussed earlier, the old guidelines, unlike the current ones, did contain a chapter on environmental agreements wherein the Commission stated that the environmental benefits may accrue to consumers individually or aggregately.[132] While this certainly dismisses any claims of the genuine novelty of taking into consideration environmental or other sustainability benefits within the context of the Article 101(3) TFEU, it is noteworthy that the 2001 Horizontal Guidelines did not however, distinguish between individual use and non-use value benefits, as the Draft Revised Guidelines do. Whether this was for a reason will be evaluated further on.

Within the proposed pass-on to consumers doctrine, the individual use value benefits could thus be understood as referring to benefits perhaps in their most traditional form in the context of the pass-on to consumers doctrine under the Article 101(3) TFEU. If the consumer

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[128] Draft Revised Guidelines para 594
[129] Draft Revised Guidelines paras 592, 601
[130] Only such indication is provided in the para 329 of the Guidelines.
[131] Joined cases T-528, 542, 543, and 546/93, EU:T:1996:99 and COMP/36.718 [2000] OJ L187/47
[132] 2001 Horizontal Guidelines para 193

product becomes qualitatively better or less expensive from the consumer's point of view as a result of the agreement, a use value benefit for the individual consumer is present. Naturally, the qualitative improvements may take multiple forms in the product and its use. Nevertheless, there would seem to be two distinguishing features of this category of benefits. Firstly, there would seem to be the need for the benefit to be directly connected to the product and its consumer use, in contrast to collective benefits where the efficiencies gained need not be attained by the consumer directly, and secondly, the benefit should not be subject to preference, in comparison to non-use value benefits.

In essence, this category of individual benefits appears to coincide strictly with what is usually understood as constituting consumer benefit in form of price or direct qualitative efficiencies.[133] Compared to the current Guidelines, the Draft Revised Guidelines provide a more detailed explanation of the nature of the use value benefits probably not because a clearer explanation would be needed for this category of benefits per se, but because it is imperative in order to distinguish between this form of individual benefit and the non-use value benefit. In substance, there seems to be nothing new in this specific category of benefits, rather it is the categorization itself, which is novel to the guidelines. As argued previously, it is conceivable that, in broader terms, the notion of qualitative consumer benefit could have included also those qualities that are external to the product itself, as long as they are objective efficiencies.[134]

3.2.2 Individual Non-Use Value Benefits

Individual non-use value benefits, in contrast to use value benefits discussed afore, refer, according to the Draft Revised Guidelines, to consumer benefits that are subject to some preference, or in other words, might be conceived as benefits by some consumers, yet not necessarily by others.[135] A distinction is, therefore, drawn by the Commission between efficiencies in cost and quality that could be perceived as purely economic, or in some sense undeniable, objective advantages from a consumer's point of view, and those which may be

[133] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (Article 101(3) TFEU Guidelines), Official Journal C 101, 27/04/2004 P. 0097-0118, hereinafter referred as Article 81(3) Guidelines, paras 83-104, Lorenz 2013, p 122
[134] See Section 3.1, also Lorenz 2013, p 124
[135] Draft Revised Guidelines paras 594-96

considered as positive qualities by some consumers but which do not objectively improve the product itself or its cost effectiveness.[136]

Further, the Commission proposes that it is the consumer's willingness to pay for the product that should be observed in order to demonstrate their will to make the altruistic choice on the product.[137] Therefore, when the consumer no longer is willing to pay for the benefit external to the product, it can no longer be considered as an individual non-use value benefit. Instead, it may be then assessed whether the benefit would qualify as a collective benefit.[138] The consumer's willingness to pay as a parameter for the non-use value benefit's existence has received rather justifiably harsh criticism in and outside the Commission's public consultation on the Draft Revised Guidelines, which will be more closely discussed in a subsequent section.[139]

Unlike the rather conventional notion of use value benefits, this category appears to be an entirely new one by the way in which it is defined in the Draft Revised Guidelines. The current Guidelines nor the 2001 Horizontal Guidelines include such a notion, although this may well be because of the flawed design of this category owing to the willingness to pay parameter. At least the author is not aware that the CJEU or the Commission would have in their decisional practice referred to such a category of consumer benefit, that would be external to the product and that would have necessitated altruistic choice by the consumer. Thus, the distinction appears a novel one, although one might argue, as demonstrated before by the CJEU's and the Commission's own caselaw, that benefits perhaps intended to belong to this category in accordance with the proposed new doctrine, could potentially have in principle been accepted already before.[140]

The distinction between the individual use and non-use benefits is, however, interesting for a number of reasons. One being the fact that the categorization does not seem necessarily well justified from an economic point of view. The Commission itself points out that this category of individual benefits does not differ from the use value category from an economic perspective.[141] This is because it is of no consequence which qualities of a product

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[136] Draft Revised Guidelines para 596
[137] Draft Revised Guidelines paras 597-600
[138] Draft Revised Guidelines para 601
[139] See Section 4.2.1
[140] See Joined cases T-528, 542, 543, and 546/93, EU:T:1996:99 and COMP/36.718 [2000] OJ L187/47 and previous Sections
[141] Draft Revised Guidelines para 597

affect consumer's choice, as long as one makes one's choice based on that quality. If a consumer considers the sustainability of a given product to be of intrinsic value, thus subjectively improving the quality of a product by itself, even where objective properties of the product, or its price do not improve, or even become less attractive, the sales of such a sustainable product may yet match or prevail over those of lesser sustainability even if the less sustainable ones are less expensive or better in some other respects. Therefore, the practical difference between the proposed use and non-use benefits appears to be minimal. If a consumer is willing to pay specifically for a benefit external to the product, it would seem that that benefit could be considered a qualitative efficiency. Even if the product itself is otherwise identical to one not, for instance, produced in a sustainable manner. Both would seem to fit within the meaning of 'efficiency gains' as interpreted by the Commission in its Article 81(3) TFEU Guidelines.[142]

Another interesting point is the notion of non-use value benefits as only including unselfish value choices. The Draft Revised Guidelines suggest that the notion of non-use value benefits refers only to altruistic choices of consumers.[143] It would seem, that the Commission's aim has been to broaden the possibilities for sustainability co-operation by allowing agreements that bring external benefits that, in essence, may negatively affect the direct consumer experience of the product, yet which may still be perceived as positive changes over conventional products by sustainability-aware consumers. In principle, the reference to altruistic choice would seem an appropriate mean to this end. Nevertheless, even so it remains somewhat unclear, how are external benefits that do not necessarily have a negative effect on the product itself from the consumer's point of view to be dealt with?

To illustrate this dilemma, one could hypothesize an agreement that would bring external benefits without negatively affecting the price or other qualitative characteristics of the product in question, thus precluding the necessity for an altruistic choice by the consumer, as one would not have to tolerate degradation of the product to acquire the external benefit. How should this external benefit now be categorized under the proposed pass-on to consumers doctrine? If the benefit is not directly connected to improved consumer experience (is external to the product), it does not count as a use value benefit, but similarly if the obtainment of the benefit does not necessitate altruism from the consumer (does not

[142] Article 81(3) Guidelines paras 63-72, Lorenz 2013, p 122
[143] Draft Revised Guidelines para 601

negatively affect the consumer experience) it would not seem to count as a non-use value benefit either.

The problem seems perhaps artificial, which it of course in the context of this paper, is, yet it maybe serves to demonstrate the risks related to such exclusive positive definitions. Naturally, this potential dilemma in practice is likely to be mitigated by the fact that few restrictive agreements that would not have a negative effect on the product market to the detriment of the consumer would fall within the scope of the Article 101(1) TFEU in the first place,[144] and if they did, for instance because of a restriction by object, such restrictions would not necessarily be indispensable for the purposes of the Article 101(3) TFEU in any case. For instance, an agreement between fast fashion clothing industry competitors to commonly reduce production capacity in order to reduce waste of resources in overproduction would presumably count as a restriction by object, reduction of capacity being typically identified as an objective restriction. Although, the agreement would not necessarily negatively affect the consumer prices of the products it would, as likely, not be indispensable to meet the objective of limiting the waste of resources, as the same objective could probably be reached also by individual action given that the lack of negative effect on consumers would not place individually acting competitors at a disadvantage in the market.

Thus, it seems questionable whether the fact that certain positive externalities would seem to be outcast from the scope of the notion of individual non-use value benefits within the meaning of the Draft Revised Guidelines presents a likely problem from a practical point of view. Nevertheless, it is interesting that the Commission would decide on a defining feature between individual use and non-use value benefits, that leaves a remarkable cap between them for the positive externalities that do not require the consumer to endure any negative effects on the product. That is, where the attainment of such external benefits still would, in fact, require horizontal co-operation.

All in all, the individual non-use value benefits category would appear to be a somewhat new development at least on paper. In essence it, nevertheless, seems that the distinction between the individual use and non-use benefits in the Draft Revised Guidelines is somewhat artificial and not necessarily warranted from an economic or practical point of view. The aim of the distinction is, perhaps, simply to highlight the fact that not only quality

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[144] Gerbrandy, Anna. ‘Solving a Sustainability-Deficit in European Competition Law’, World Competition 40, no. 4 (2017): 539–562. p 543

enhancements on actual product can be perceived as benefits. This would have seemed to have been the case already previously. As argued before, however, in broad terms the qualities of a product which might steer value-oriented consumers to make altruistic choices could be considered qualitative efficiencies just as any other, although this approach significantly divides opinions.[145]

3.2.3 Collective Benefits

Finally, the revised pass-on to consumers doctrine has a category of collective benefits.[146] This category refers, according to the Draft Revised Guidelines, to benefits that do not accrue to individual consumers based on their consumption of the product in question, but which have a positive effect on a larger group of people including those who do not use the product.[147] In essence, it seems that the Commission's idea has been to more clearly allow consideration to efficiencies that are external to the product itself, where these will benefit the consumer only as a member of a broader part of the society, or in other words, collectively. The major difference between collective and individual benefits would therefore appear to be linked to the relevancy, or lack thereof, of the consumer choice. While both categories of individual benefits require the benefit to be either direct improvement on the product from a consumer welfare perspective (use value benefits)[148], or at least capable of being perceived as such by altruistic consumers (non-use value benefits),[149] the collective benefits on the contrary seem to be defined by the fact that the benefit should impact consumers regardless of their choice.

However, the Draft Revised Guidelines underline that the beneficiaries of the collective efficiency gains should still remain overlapping with the group of the actual consumers of that consume the product.[150] In this regard the Commission requires a 'substantial' overlap between the group of beneficiaries outside the relevant product market and the consumers within that market.[151] This requirement is made with reference, among others, to the CJEU's decision in *GlaxoSmithKline*[152] and *MasterCard*[153] where the referred

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[145] See Section 3.1 and Section 4.1
[146] Draft Revised Guidelines paras 601-608
[147] Draft Revised Guidelines para 601
[148] See Section 3.2.1
[149] See Section 3.2.2
[150] Draft Revised Guidelines paras 602-603
[151] Draft Revised Guidelines para 602
[152] GlaxoSmithKline Services and Others v Commission, T-168/01, EU:T:2006:265 paras 248, 251
[153] MasterCard Inc, C-382/12 P, EU:C:2014:2201 para 242

paragraphs point to the possibility of giving consideration to benefits appearing on a different relevant market compared to the disadvantages created by the restriction, and the requirement that the group of consumers benefitting from the agreement should be substantially the same as the one on which the negative effects emerge. It appears, therefore, that the Commission wants to highlight the fact that even if sustainability benefits external to the product and its use can be accepted as collective benefits, this is only possible when these efficiencies can largely be felt also by the consumers on the relevant product market.

This limitation is further illustrated in the Draft Revised Guidelines by use of examples. The Commission, firstly, notes that less polluting fuel is considered to bring collective benefits, as it positively affects the consumers using it the same way by providing cleaner air, than those people outside the relevant market who also breathe the same air.[154] However, secondly, the Commission points out that where the benefit, for instance lessened soil pollution or water consumption, is localized outside the relevant product market, these benefits cannot be accepted as collective ones since the group of beneficiaries is not substantially the same with the that of the consumers on the relevant market.[155] This limitation apparently deduced by the Commission from the CJEU's *MasterCard*[156] ruling has received quite stiff criticism in the public consultation process, as it seems inevitably to lead to rather unjustified geographical and practical limitations to the employment of the collective benefits doctrine.[157] These will be discussed more closely in the following sections.[158]

The collective benefits thus seem to represent those positive externalities, for which one the one hand, consumers are not willing to voluntarily pay extra for, and on the other hand, which still substantially accrue to the consumers on the relevant market even when the part of the beneficiaries where outside that market. In essence, however, the sustainability efficiencies that may be considered collective benefits would appear to be similar to those that can be considered individual non-use value benefits. The difference between the two would appear to be the consumer's willingness to pay for the benefit or, in regard to collective benefits, the lack thereof, as well as the requirement, or lack thereof, of the substantially overlapping markets.

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[154] Draft Revised Guidelines para 604
[155] Draft Revised Guidelines para 604
[156] MasterCard Inc, C-382/12 P, EU:C:2014:2201 para 242
[157] See for example: Unilever, European Commission Consultation on Draft Horizontal Cooperation Guidelines: Unilever Response on Sustainability Agreements
[158] See Section 4.2

As said earlier, the concept of collective benefits would seem to derive from the Commission's own decision in *CECED*[159] in the year 2000, where it took into consideration individual and collective environmental benefits separately.[160] Thus, the notion of collective benefits itself, unlike the distinction between individual use and non-use value benefits, is really not anything new. Furthermore, the 2001 Horizontal Guidelines did give some guidance in relation to assessment of benefits of this nature, although referring them as benefits on an 'aggregate' level rather than collective.[161] In relation to the weight given to this matter in 2001, the Draft Revised Guidelines however, are far more extensively developed. The present Guidelines on the other hand, lack any direct reference to possibility of assessing efficiencies gained collectively. To some extent it could be argued then, that the notion of collective benefits in its form presented in the Draft Revised Guidelines is new, although it evidently has been employed by the Commission itself already in the year 2000.[162]

All in all, the Draft Revised Guidelines present four cumulative criteria for collective benefits to be taken into account, namely that the parties to the agreement claiming collective benefits should:

1. describe the benefit and provide evidence of its occurrence,

2. define the beneficiaries,

3. demonstrate the substantial overlap between beneficiaries and the consumers on the relevant market, and

4. demonstrate what part of the benefits occurring outside the relevant market accrue to the consumers in the relevant market.[163]

This guidance was not present in the 2001 Horizontal Guidelines not to mention the current ones. Regardless of its novelty, the criteria, especially requirements 3. and 4. here, seem to leave certain ambiguities. One unclarity noted by at least Inderst and Thomas, is the apparent lack guidance on the impact of non-consumer beneficiaries on the overall assessment.[164] For

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[159] COMP/36.718 [2000] OJ L187/47
[160] Ibid paras 52-54 and 55-57 respectively.
[161] 2001 Horizontal Guidelines para 193
[162] COMP/36.718 [2000] OJ L187/47
[163] Draft Revised Guidelines para 606
[164] Roman Inderst, Stefan Thomas, Sustainability Agreements in the European Commission's Draft Horizontal Guidelines, Journal of European Competition Law & Practice, Volume 13, Issue 8, December 2022, Pages 571–577, p 5

another, it does not become clear in general from the Draft Revised Guidelines, what is supposed to be the practical difference between requirements 3. and 4., namely the overlap of consumers on the relevant market and the beneficiaries and that of the accumulation of benefits from outside of the relevant market to consumers within it.

The examples provided by the Commission seem to mix these two separate and cumulative requirements together somehow.[165] When demonstrating the collective effect of less polluting fuel on the consumers, the Commission refers to users of the fuel as part of the group of beneficiaries since they enjoy the less polluted air similarly to all other 'citizens', who are the general group of beneficiaries.[166] However, when illustrating a situation which is falling outside the definition of collective benefit, the Commission, in their sustainable cotton example, state that as the benefits are created outside the relevant market (the cotton is not grown on the same location where the relevant consumers reside) the benefits are unlikely to accrue to the consumers on the relevant market.[167]

While the first example relating to cleaner air seemed to make reference to the requirement of overlap between beneficiaries and consumers, the second one appeared to refer to that of accumulation of benefits outside the relevant market to consumers within the relevant market, which the Commission found absent in its example. Neither of these examples therefore seems to take into consideration both of the requirements, which is odd considering that the criteria proposed is cumulative. The fuel example leaves unanswered the question of how the benefits affecting beneficiaries other than the consumers on the fuel market, namely the other 'citizens', influence the overall assessment.[168] On the other hand, in the cotton example, it seems that the Commission equates these requirements with each other when arguing that since the environmental benefits occur only where the cotton is grown, there is likely no substantial overlap between the beneficiaries and the consumers in the relevant market, and further, that therefore these benefits are not likely to accrue to the consumers on the relevant market.[169] It remains unclear, if the benefits could still, in some other way, accrue to consumers in the relevant market even without the overlap of these groups, and how this situation should be assessed. Similarly, in another example, obviously a

[165] Draft Revised Guidelines para 604
[166] Ibid
[167] Ibid
[168] Inderst 2022, p 5
[169] Draft Revised Guidelines para 604

scenario based on the *CECED* ruling, the Commission again equates these two criteria when stating:

"The reduction in water consumption leads to less water pollution. As users of washing machines make up the overwhelming majority of the overall population, a share of these environmental benefits accrues to the consumers in the relevant market that are affected by the agreement."[170]

In this example, the Draft Revised Guidelines do not even consider whether there is an overlap between the beneficiaries and the consumers in the relevant market, but only whether the environmental benefits gained accrue to the consumers on the relevant market in general. The reasoning itself seems logical, yet it does not seem exactly to follow the criteria set up in the Draft Revised Guidelines. Therefore, it is difficult to say what is meant to be the difference between these two requirements.

The line of thought illustrated by these examples would seem to imply, that while being separate criteria, there can be no accumulation of benefits from outside of the relevant market to consumers within it, if there is no substantial overlap between beneficiaries and consumers on the relevant market. In principle it would seem that this reasoning puts in question the meaningfulness of the whole requirement of accruement of the benefits from outside of the relevant market to consumers within it, as the Commission apparently negates any potential use of the accumulation criterion by connecting it to the overlap of beneficiaries and consumers on the relevant market criterion. Furthermore, one could reasonably inquire would it not be logical for any benefit occurring outside the relevant market accruing to the consumers inside the relevant market to render the consumers in that market also beneficiaries themselves? In conclusion, it appears that the Draft Revised Guidelines have managed to, while providing significantly more extensive guidance on the collective benefits doctrine compared to their predecessors, add up requirements derived from a source of CJEU caselaw in *MasterCard* in a way that they seemingly negate each other while attempting, instead, to complement each other.[171] It would seem more appropriate to consider the overlap of the beneficiaries with consumers in the relevant market and the accruement of benefits from outside the relevant market to the consumers in it not always as cumulative but instead alternative requirements. This would also seem to better fit the meaning the criteria had

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[170] Ibid para 621
[171] MasterCard Inc, C-382/12 P, EU:C:2014:2201 paras 242-243

originally in *MasterCard.* The practical implications of this rather restrictive approach will be scrutinized further in the following sections.[172]

The collective benefits are therefore not an entirely novel concept within the context of either the application of the Article 101(3) TFEU in general or even in that of the horizontal co-operation guidelines, yet the guidance on it as well as its definition is by far the furthest developed in the Draft Revised Guidelines. To conclude on the revised pass-on to consumers doctrine in general, it would seem that the proposed categorisation of sustainability benefits to consumers does not necessarily significantly broaden the historical scope of acceptable benefits but serves to distinguish certain types of benefits from each other in a new way. While the use value benefits, and arguably also the non-use value benefits are in the core of classical economic and consumer welfare efficiencies, the collective benefits represent the broader understanding of benefits, including non-economic ones, for as long as they can be transmitted also to the consumers on the relevant market.

[172] See Sections 4.2 and 4.3

4 Issues with Sustainability Benefits and the Revised Pass-on to Consumers Doctrine

4.1 Fundamental Issue of Non-Economic Benefits under the Article 101(3) TFEU

Having in the previous sections introduced and assessed the novelty of the sustainability objective's acceptability as efficiency gains under the Article 101(3) TFEU, as well as that of the revised pass-on to consumers doctrine, it is proper to move on to evaluation of these developments from both fundamental and practical perspectives. This section will deal with the more fundamental question that relates to acceptance of sustainability objectives as efficiency gains under the Article 101(3) TFEU. The subsequent section will assess the more practical side of the issues presented by the proposed pass-on to consumers doctrine especially from the perspective of its effectiveness in relation to different sustainability goals.

4.1.1 Wording of the Article 101(3) TFEU

Sustainability benefits as efficiency gains under the Article 101(3) TFEU present certain interpretive difficulties. Fundamentally the core of the problem may be seen already in the wording of the Article, which provides for the possible exemption when an agreement "[…] contributes to improving the production or distribution of goods or to promoting technical or economic progress […]"[173] The wording would not easily seem to lend itself for an interpretation allowing sustainability benefits to be considered among 'contributions improving production, distribution or technical or economic progress'. It is readily apparent, that a strict textual interpretation of the wording of the Article would only seem to refer to cost and other direct economic qualitative efficiencies. A different outcome would be difficult to deduce relying only on the wording of the Article.[174]

However, as explained previously, the CJEU has allowed such an interpretation already in the case of *Métropole Télévision,* whereby the Commission is, in essence, free to base its evaluation in relation to the exemption under the Article 101(3) TFEU on any benefits

[173] Article 101(3) TFEU
[174] Chris Townley, Which goals count in Article 101 TFEU? Public policy and its discontents: the OFT's roundtable discussion on article 101(3) of the Treaty on the Functioning of the European Union, E.C.L.R. 2011, 32(9), 441-448, 442, see also, Aleksander Maziarz (2014) Do Non-Economic Goals Count in Interpreting Article 101(3) TFEU?, European Competition Journal, 10:2, 341-359, p 341

of public interest.[175] This, perhaps more teleological, interpretation has been employed also by the Commission in a number of instances, for example also in the *CECED*[176] case, to which many references have been made in this paper. Moreover, for instance Townley estimates, that between the year 1993 and first of May 2004 in the Commission's own decisions relating to the Article 81(3) EC [now 101(3) TFEU], consideration given to benefits other than those of strictly economic nature, in other words, public policy goals, was decisive in more than 32 percent.[177] Therefore, it does not seem, that the wording of the Article has stopped neither the CJEU or the Commission from treading over the limits of 'purely' economic notion of benefits in the past. Further, the Commission's Draft Revised Guidelines quite clearly illustrate the Commission's approval of sustainability goals as benefits in the meaning the Article 101(3) TFEU in principle.[178]

Thus, it seems clear that, although not necessarily the most straightforward interpretation, the CJEU's teleological take on the meaning of the benefits requirement under the Article 101(3) TFEU overrules the stricter textual interpretation which would definitely put into question the acceptance of other than strictly economic efficiencies. The exact wording of the Article 101(3) TFEU would, therefore, not necessarily seem to be a limiting factor in defining benefits to be taken into account under the Article in practice. In fact, this is not surprising considering the CJEU's usual interpretative disposition. As demonstrated in Section 2 in relation to definition of a horizontal co-operation agreement, the CJEU commonly gives a rather broad meaning to the wording of the Treaties and the Article 101 TFEU would not seem to be an exemption.[179]

Nevertheless, this interpretation apparently has divided opinions to some extent even between the different institutions of the EU.[180] The Commission itself in its Article 81(3) EC Guidelines stated that consumer welfare is the principle aim of the Article [now 101(3) TFEU], seemingly contradicting the CJEU's approach.[181] The Commission that made that statement in 2004 of course is not entirely the same that choose to give consideration to non-economic benefits in a number of cases before 2004 nor is it the one we have supposedly

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[175] See Section 3.1
[176] COMP/36.718 [2000] OJ L187/47
[177] Townley, C 2009, Article 81 EC and Public Policy, Bloomsbury Publishing Plc, London pp 5-6
[178] Draft Revised Guidelines paras 542-543, see also Section 3.1
[179] See Section 2.3, also Lorenz 2013, p 64
[180] Townley 2011, p 442
[181] Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97 para 13, see also Townley, 2011, p 442

embracing sustainability co-operation today. Unfortunately, law makers would not appear to make for the most reliable and coherent law enforcers. This fact would, to some extent, seem to be visible also in the Draft Revised Guidelines, where the Commission, although certainly accepting sustainability benefits in principle, appears to actually be holding back their potential application in ways unwarranted by the CJEU's stance.[182] It should be recalled that the guidelines are not hard law and as such, their prescription can be tested to some extent. However, the reception of the Draft Revised Guidelines by many of the companies and other interest groups in the public consultation demonstrates that even though not law, the guidelines may be understood restrictively and the willingness of companies to risk the Commission's interpretation may be limited, if the guidelines relay a narrow enough image of the possibilities for sustainability co-operation.

The Draft Revised Guidelines, as mentioned, take in principle a firm stance on accepting non-economic benefits, namely sustainability benefits, under the Article 101(3) TFEU.[183] A textual interpretation of the Article would not seem to support such an approach, yet this resolution is warranted by well-established caselaw of the CJEU, which, relying on a teleological interpretation, gives a broader meaning to benefits. Thus, the fundamental problem presented by the wording of the Article 101(3) TFEU would not seem to create any serious argument capable of undermining the Commission's choice to clearly include sustainability benefits within the ambit of the benefits requirement under the Article 101(3) TFEU in the Draft Revised Guidelines. To employ a strictly textual interpretation of the Article would imply dismissing at least thirty years' worth of the CJEU's and the Commission's caselaw, which renders this argument rather void in practice, although in principle there is a point to it.

While this issue of words seemingly has no practical bearing on the justification of the sustainability benefits doctrine in the Draft Revised Guidelines in the present circumstances, it would perhaps seem appropriate for the Member States anyways to revise the wording of the Article to better converge with its actual meaning. This would be of course, whenever the Treaties are re-opened again.

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[182] See Section 4.2
[183] Draft Revised Guidelines paras 542-3

4.1.2 Competition Law as a Sustainability Policy Instrument

Even the broader teleological interpretation of the Article 101(3) TFEU will, however, present some difficulties and divides opinions. Ultimately the issue is whether or not non-economic objectives, or benefits, should play any role in the field of competition law. This discussion is linked to both the previously considered wording of the Article 101(3) TFEU,[184] as well as to the historical developments relating to sustainability objectives in the Commission's and the CJEU's practice.[185]

As stated before, the Commission has underlined in its Article 81(3) Guidelines that the primary goal of the Article [now 101(3) TFEU] is to enhance consumer welfare.[186] The previous section illustrates that this would also seem a justified approach when relying merely on the wording of the Article.[187] On the other hand, multiple other articles in the Treaties set very different public policy goals, some of which seem to be less compatible with the Commission's consumer welfare objectives than others. In relation to sustainability policies, one could mention at least Article 3 TEU, and Articles 11 and 191 TFEU, which clearly include public policy goals connected to enhancement of the environment, sustainable development, social progress, etc. Such articles have been called 'policy-linking articles' in academic literature, as they appear to imply that policies established within them are to be promoted in actions based on other Treaty articles.[188] Besides academic opinion, also the Treaty itself requires consistency between its policies and activities as according to the Article 7 TFEU. In the situation at hand, the issue is, therefore, whether due to these policy-linking clauses, policies based on, for instance, Articles 3 TEU, and 11 and 191 TFEU should be taken into account when applying the Article 101(3) TFEU exemption?

The interplay between the sustainability objectives presented by, among others, these policy-linking clauses, which usually are labelled as non-economic, and the (economic) consumer welfare goal of the Article 101 TFEU as the Commission understands it, seems tricky. A clear answer to whether or not non-economic benefits or objectives should be considered under the Article 101(3) TFEU is not easily reached even with a teleological interpretation. The discussion on the objectives of competition law in the EU has been as

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[184] See Section 4.1.1
[185] See Section 3.1
[186] Article 81(3) Guidelines, para 13, Lorenz 2013, p 64
[187] See Section 4.1.1, see also Townley 2011, p 442 and Maziarz 2014, p 341
[188] Townley 2009, p 48

extensive as it has been inconclusive.[189] It is not conceived as entirely apparent, if the inclusion of sustainability aims within the competition field of law actually does enhance the convergence of the Treaty articles and thus, the attainment of the multiple goals presented by the Treaties, justifying a teleological interpretation from a systemic point of view. Other options would seem to include the interpretation that the protection of economic competition in itself is integral part of the Treaty framework and should not be compromised by mixing other policies with competition. Apparently, the support for a pluralistic view on the objectives of competition law has been somewhat limited.[190]

Indeed, also in the public consultation of the Draft Revised Guidelines, some comments were made on this issue, referring to the Commission opening the Pandora's box by accepting vague sustainability benefits as justification for an exemption under the Article 101(3) TFEU.[191] There is an apparent fear of 'green or ethics-washing' being enabled by the inclusion of sustainability benefits under the Article 101(3) TFEU.[192] In addition, in relation to social sustainability objectives the European Trade Union Confederation (ETUC), while considering the principles of Article 3 TEU to be binding on competition law in general, argued for an restrictive approach on horizontal social sustainability agreements between competitors.[193] The reason for this being the risk of horizontal co-operation undermining the effectiveness of collective bargaining, allowing 'sustainability-washing' and at its worse, enabling competitors to unilaterally to fix working conditions and wages.[194] These opinions appeared as a minority among the contributions, but clearly cannot be dismissed.

It has been pointed out, for instance, by Gerbrandy that there appears to be a lack of coordination between the policy aims of competition law and sustainability action even on national level.[195] EU institutions would not seem to be immune to this discrepancy either.[196] To some extent, at least the Commission's own instability regarding this question has become evident in the ways in which it has reshaped its views on considering sustainability or even

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[189] Gerbrandy 2017, p 560
[190] Gerbrandy 2017, p 560
[191] CDC (Cartel Damage Claims), Contribution to the public consultation of the draft revised Horizontal Cooperation Guidelines of the European Commission 26 April 2022
[192] Ibid, Joint Response on the Horizontal Guidelines' Chapter 9 - Sustainability Agreements by Fair Wear, ISEAL, AIM, and the Fair Trade Advocacy Office, Brussels, 03 May 2022, p 2
[193] ETUC Submission to Commission Consultation on the draft revised Horizontal Guidelines, 26 April 2022, pp 1-2
[194] Ibid
[195] Gerbrandy 2017, p 541
[196] Townley 2011, pp 441-442

environmental benefits. All the way through the Commission's decision in *CECED* to the 2001 Horizontal Guidelines, the Article 81(3) Guidelines, the present Horizontal Guidelines, and now the Draft Revised Guidelines, even the Commission's very own standing has been subject to change. This may be observed even by a simple comparison of the obviously *CECED*-based example used in each of the horizontal guidelines.

In 2001 Horizontal Guidelines, the Commission referred to overall environmental benefits as independently sufficient, without affixing them to any directly economic benefit.[197] However, in the present Guidelines, the very same example is portrayed in a considerably different manner. The environmental benefits, presumably still the same, are not described at all and instead the environmentally more friendly products are considered "[…] more technically advanced, offering qualitative efficiencies in the form of more washing machine programmes which can be used by consumers."[198] This quite artificial connection of environmental benefits to qualitative efficiencies in form of 'more washing machine programmes' perhaps stands as testament to the Commission's own unwillingness to commit to a clear choice on the matter. The reliance on such technicalities, however, cannot probably be upheld forever. As demonstrated in the previous Chapter, the Commission's approach in the Draft Revised Guidelines, albeit considerably more developed compared to previous horizontal guidelines, is in principle not new, rather it is something that the Commission seemingly buried for the duration of the current Guidelines.[199]

Faull and Nikpay state as well, that the *CECED* decision by the Commission clearly departed from the principles laid out by the Article 81(3) Guidelines, on the point that the benefits environmental benefits did not accrue to consumers on the relevant market.[200] Further, it could be argued that the CJEU in *Metro I* judgment only allowed non-economic factors to be considered when they have a bearing on an economic factor.[201] Therefore, it would seem that there is a somewhat profound conflict of interests between some of the public policy goals of the EU and its competition policy, as well as even conflict between different articles of the Treaties.[202] These discrepancies have been a topic for discussion for a long time.[203] The opinions on the matter seem to be divided into two opposites, one embraced

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[197] 2001 Horizontal Guidelines para 198
[198] Guidelines para 329
[199] See Section 3
[200] Faull 2014, p 312
[201] Ibid p 311
[202] Jones 2019, p 28
[203] Townley 2009

allegedly by 'economists' and another mounted, by at least certain, 'lawyers', the latter being seemingly more holistic in their views.[204] As argued by Townley, however, the all-economic interpretation on the Article 101(3) TFEU benefits would seem to better fit in an economics handbook, than in a legal argument.[205] Also Faull and Nikpay as well have stated that economics have proven to be an imperfect guide for competition law purposes.[206] A certain tension between economic and holistic legal views would seem to be present in the discussion.

That is not say that all economists would of the same mind and even less that every lawyer would agree on the issue. Maziarz points out that even within the field of economics, academics and theories are not in full agreement on the question of what part non-economic factors should play in competition law.[207] If the answer is not clear even in the field of economics, it most certainly is not any clearer in the judicial sense either. Indeed, there have been also support for the competition law's single economic goal approach in order to keep the field of competition law 'simple and pure'.[208] Besides, the question is not made any less obscure by the fact that from a judicial point of view the issue may be linked not only directly to the question of which objectives, efficiencies, or benefits count under the Article 101(3) TFEU, but just as well to each of the pass-on to consumers doctrine's conceptions of 'consumers' or 'relevant markets' as well. This is so, since even if certain non-economic benefits could be subsumed under the requirements of the Article 101(3) TFEU in principle, for instance stabilisation of the labour market as in *Metro I*[209]*,* they still should also pass-on to consumers on the relevant market. Undoubtedly, many non-economic benefits may at some point translate also into economic benefits in one way or another, just as in *Metro I,* but who are the consumers that eventually receive those benefits, and on which market?

The problem, therefore, similarly to that relating to the wording of the Article 101(3) TFEU, would seem to remain regardless of which approach is taken on its interpretation. If and when non-economic objectives are allowed to be taken into consideration, in effect adopting the competition law as an instrument for policies other than only competition, it may

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[204] Townley 2011, 443-444
[205] Ibid p 444 (see footnote 41)
[206] Faull 2014, pp 3-4
[207] Maziarz 2014, p 345
[208] See for instance: Edith Loozen, Strict competition enforcement and welfare: A constitutional perspective based on Article 101 TFEU and sustainability, 56 C.M.L.Rev. 1265 (2019), and Okeoghene Odudu, The Wider Concerns of Competition Law, 30 Oxford J. Leg. Stud. 599 (2010)
[209] Case C-26/76 Metro v Commission ECLI:EU:C:1977:167

be considered in some way to compromise the meaningful enforcement of the competition rules, as was argued by certain private entities in the Commission's public consultation of the Draft Revised Guidelines.[210] If, on the other hand, EU policies and objectives arising from different articles of the Treaties should not be taken into account under the Article 101(3) TFEU, that would inevitably seem to result in obvious lack of coherence of the EU's objectives.

As previously mentioned, the Draft Revised Guidelines, in relation to sustainability objectives, refer to the goals set by Article 3 TEU, however, omitting any mention to the Articles 11 or 191 TFEU.[211] The Commission thus, would seem to somewhat distance itself in the Draft Revised Guidelines from its strictly economic approach in the Article 81(3) Guidelines. As noted in the previous Chapter, this is a new development from the perspective of the current Guidelines, although not historically, compared to the 2001 Horizontal Guidelines.[212] It would seem, therefore, that the Commission is prepared to at least make an attempt to remedy this lack of coordination by its Draft Revised Guidelines. Another perspective, of course, would be that the Draft Revised Guidelines merely deepen the obscurity of the Commission's will in this regard, as they now do not appear consistent with the Article 81(3) Guidelines. However, the fact that the Commission seems to be, again, veering towards a broader understanding of benefits under the 101(3) TFEU exemption, does not mean that the choice would be unanimously accepted or perfectly justified, even though the change of heart seems to be warranted by the CJEU's interpretation.[213] Whether competition policy is an appropriate field for sustainability action, still remains a valid fundamental question. Ultimately it would seem more appropriate in the light of the Treaties and their policy-linking clauses to strive for the coherence of EU policies even within the sphere of competition law. This approach would appear systemically supported by the existence of policy-linking clauses despite the possible discrepancy between them and the text of the Article 101(3) TFEU.

Nevertheless, it is not the aim nor the ability of the author of this paper is not to provide an immediate answer to this long running dilemma of which benefits or goals do count under the Article 101(3) TFEU doctrine. Instead, the aim is merely to evaluate whether the

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[210] CDC (Cartel Damage Claims), Contribution to the public consultation of the draft revised Horizontal Cooperation Guidelines of the European Commission 26 April 2022
[211] Draft Revised Guidelines para 542
[212] See Section 3.1
[213] See Section 4.1.1 and 3.1, Joined cases T-528, 542, 543, and 546/93, EU:T:1996:99, para 118

developments present in the Commission's Draft Revised Guidelines are genuinely new, and whether they seem effective for the attainment of their proposed objective. To this end, it would seem that the inclusion of sustainability objectives in the Draft Revised Guidelines may be either criticised or commended based on each of the respective sides to this decades-long discussion. A number of far more deserving academics, such as Townley[214], Marziarz[215], and Kingston[216] to name a few, have argued in support of including non-economic benefits into the scope of efficiencies under the Article 101(3) TFEU doctrine. On the other hand, there is also stiff opposition to the so called 'multi-goals approach' within the academic field.[217] A positive approach would indeed seem justified from a systematic point of view, considering the many different aims of the EU Treaties and their coherence.[218] However, even academics endorsing the broad interpretation of benefits stress that the application of the narrower single goal approach is liable to only partially limit the possibilities of companies to take up sustainability co-operation.[219] It is to recalled, that not all sustainability co-operation falls within the ambit of 101(1) TFEU in the first place.[220]

The position of the Commission and the CJEU would seem to remain ambiguous on the subject.[221] It appears that the Commission in the Draft Revised Guidelines is willing to accept non-economic (sustainability) goals per se, in essence embracing the multi-goals approach. However, as argued earlier, one of the problems relating to this choice is the fact that the issue of non-economic benefits under the Article 101(3) TFEU is not merely connected to acceptance of those benefits under the first benefits-condition of the Article, but also to the following pass-on to consumers-condition. It is there, where the Commission's commitment to accept non-economic benefits under the Article 101(3) TFEU would seem to falter. These issues will be discussed in the following section.

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[214] Townley 2011
[215] Maziarz 2014
[216] Kingston S, "Why Environmental Protection Goals Should Play a Role in EU Competition Policy: a Legal Systematic Argument," Greening EU Competition Law and Policy (Cambridge University Press 2011)
[217] See for instance: Loozen 2019, and Odudu 2010
[218] Townley 2009, p 252, Kingston 2011
[219] Gerbrandy 2017, p 543
[220] David Wouters, Which Sustainability Agreements Are Not Caught by Article 101 (1) TFEU?, Journal of European Competition Law & Practice, Volume 12, Issue 3, March 2021, 257–270
[221] Maziarz 2014, p 358

4.2 Issues relating to the Revised Pass-on to Consumers Doctrine

Moving on from the more fundamental issues relating to the inclusion of sustainability benefits into the benefits-requirement under the Article 101(3) TFEU in general, the new pass-on to consumers doctrine in the Draft Revised also present certain difficulties, which will be discussed here. Luckily perhaps, these seem to be more of a practical nature. Although for the most part commending the Commission's approach on sustainability co-operation, the contributors to the public consultation brought up various issues related to the practical usefulness of the newly added benefit-categories within the pass-on to consumers doctrine. The problems identified by the contributors were in relation to both the individual as well as the collective benefits doctrine.

These issues relate to the usefulness of the individual and collective benefits categories, as defined in the Draft Revised Guidelines, overall as well as from the perspective of different sustainability objectives. This section will discuss the practical deficiencies of the revised pass-on to consumers doctrine based, *inter alia,* on the public consultation comments. The effect of these issues on the effectiveness of the doctrine from the sustainability objectives perspective will be scrutinized in the subsequent section.[222]

4.2.1 Individual Non-Use Value Benefits and Their Indispensability

It has been noted by many of the contributors to the public consultation, that the individual non-use benefits suffer from a seemingly rather obvious design flaw. Namely, the fact briefly referred to at a previous part of this paper,[223] that any efficiencies fitting within the definition of individual non-use value benefits would appear never to be indispensable in the meaning of the subsequent requirement of the Article 101(3) TFEU exemption. This issue was brought up in a number of opinions in both the public consultation.[224]

The issue quite simply appears to be that the use of the willingness-to-pay requirement effectively undermines all the potential non-use value benefits that otherwise could be established under the Draft Revised Guidelines. When utilizing the consumers' willingness to

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[222] See Section 4.3
[223] See Section 3.2.2
[224] See for instance: Unilever, European Commission Consultation on Draft Horizontal Cooperation Guidelines: Unilever Response on Sustainability Agreements, ICC Global Competition Commission, ICC comments on the revised Research and Development Block Exemption Regulation ("R&D BER") and the revised Specialisation Block Exemption Regulation ("Specialisation BER", together the "HBERs") and Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements ("HGL") paras 123-4

pay as a parameter for the existence of a non-use value benefit, the Commission seems to have ignored the fact that if a consumer is willing to pay extra for the 'altruistic' choice, there is no market failure to attend to with a horizontal co-operation agreement anymore. When a product has a market, albeit for altruistic reasons, there is a market and companies could in fact compete in this market with whoever is capable of producing the most 'altruistically' attractive product. In other words, a positive result in a willingness-to-pay survey, which would be necessary in order to demonstrate that non-use value benefit exists in a more sustainable product, would also demonstrate the existence of demand for the product as well. Consumer demand for the product shows that the first mover disadvantage that the horizontal sustainability co-operation agreements usually intend to overcome, is non-existent.[225] Therefore, there would never seem to be acceptable reason to consider an agreement passing non-use value benefits on to consumers indispensable in the meaning of the Article 101(3) TFEU. The issue could be seen already when discussing the peculiarity of the Commission's distinction between individual use and non-use value benefits in the Draft Revised Guidelines.[226]

Effectively, this fundamentally flawed design would seem to render the whole category of individual non-use value benefits practically useless. However, since the category refers to benefits that would remain equally inapplicable for the exemption under the Article 101(3) TFEU because of their lack of indispensability even if they would be considered as use value benefits, this flawed categorization does little damage overall. It is only interesting, that the Commission would define such a category of benefits with no use whatsoever. Perhaps the Commission has mistakenly identified a sustainability deficit where it does not actually exist, which inadvertently has led to this result.

4.2.2 Collective Benefits and Polluter Pays or Polluter Profits Principle

Another issue widely recognized in the Draft Revised Guidelines is in relation to the collective benefits and the polluter pays principle as legislated in the Article 191(2) TFEU. The principal idea of the polluter pays principle is that the polluter must rectify the environmental damage caused by her action. This means that a producers should bear the cost of compensating for pollution caused by the production process of her product. These costs, in

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[225] Loozen, Edith, EU Antitrust in Support of the Green Deal. Why Good Is not Good Enough (June 5, 2022). Amsterdam Law School Research Paper No. 2022-21, Amsterdam Center for Law & Economics Working Paper No. 2022-04, p 19

[226] See Section 3.2.2

turn, may be added to the product's consumer price, thus laying some of the environmental costs to the consumer to bear, as she is buying a pollutive product. The problem that the proposed collective benefits doctrine raises with the polluter pays principle interestingly has been acknowledged by both those who persist in holding the competition law field 'purely economic' as well as those endorsing the change to a broader understanding of competition law goals.[227] However, there is a significant difference in how the actual problem is conceived by each of these parties. One way to identify the issue appears to be consumer-oriented, the other one producer-oriented. The consumer-oriented 'polluter-must-benefit' view seems to be the one favoured by those endorsing the multi-goals approach under the Article 101(3) TFEU in general.[228] The producer-oriented 'producer profits' perspective, on the other hand, is advanced by the opposition to the multi-goals approach.[229]

Now, the consumer-oriented perspective, or opinion, in short, is that the collective benefits doctrine under the Draft Revised Guidelines limits the application of the exemption under the Article 101(3) TFEU to situations where the consumers on the relevant market (polluters, when the product is pollutive) benefit from the agreement. More specifically, the argument is that the definition of collective benefits in accordance with the Draft Revised Guidelines, as explained previously,[230] limits the possible benefits to be considered based on the notion of the consumer on the relevant market, the consumer outside the relevant market, and the 'substantial overlap' between those groups of consumers. In effect, benefits which materialize outside the relevant market have to, in some form, accrue to the consumers on the relevant market. However, in the globalized world, it may be assumed that significant amount of the negative externalities connected to production of products intended for the European markets are in fact most felt outside of the EU, where both environmental and social protection is less strict compared to the EU. This also seems logical considering that it is at least in part exactly the actual unsustainability of the conditions in third countries that

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[227] See for instance: Loozen 2022, p 15 and Unilever, European Commission Consultation on Draft Horizontal Cooperation Guidelines: Unilever Response on Sustainability Agreements, ICC Global Competition Commission, ICC comments on the revised Research and Development Block Exemption Regulation ("R&D BER") and the revised Specialisation Block Exemption Regulation ("Specialisation BER", together the "HBERs") and Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements ("HGL") para 126

[228] Unilever, European Commission Consultation on Draft Horizontal Cooperation Guidelines: Unilever Response on Sustainability Agreements, ICC Global Competition Commission, ICC comments on the revised Research and Development Block Exemption Regulation ("R&D BER") and the revised Specialisation Block Exemption Regulation ("Specialisation BER", together the "HBERs") and Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements ("HGL") para 126

[229] Loozen 2022, p 15

[230] See Section 3.2.3, Draft Revised Guidelines para 602

provides for the low costs that entice companies to produce in and buy from those countries outside of the EU. According to some of those endorsing the acceptance of sustainability goals under the Article 101(3) TFEU, this leads to a situation, where polluters, in fact, must benefit (instead of paying), effectively turning the 'polluter-must-pay' principle into 'polluter-must-benefit' principle.[231] The polluter in this argument seems to be understood as referring mostly to the consumer of the product, not necessarily its producer, because of which this view is referred here as consumer-oriented. This orientation is probably also greatest weakness of this argument, as it seems that no regard is given to the role of the producer.

The notion in general, however, seems quite justified considering the fact that many negative effects that unsustainable products and their production has are felt for the most part outside the relevant consumer market. This seems especially true in case of not only environmentally unsustainable products but also those, the production of which is burdened by lack of respect to human or labour rights, and other social rights. Whether it, nevertheless, is an issue truly with the polluter pays principle seems questionable. It may be regarded as a misinterpretation that polluters should benefit, since the aim of genuine sustainability agreements is the lessened pollutive effect of the product and its consumption. The argumentation would, perhaps, more appropriately fit within the issue of lack of effectiveness of the collective benefits doctrine.[232] In certain ways, also the producer-oriented opinion, which will be discussed below, appears to refute this consumer-oriented one.

The producer-oriented view, similarly to the previously discussed consumer-oriented view, sees the collective benefits doctrine as undermining the polluter pays principle but for different reasons. According to Loozen, the general idea of this argument is that the collective benefits doctrine allows producers to charge higher consumer prices in order to produce more sustainable products, while the consumers buying these products no longer pollute as much as before, therefore effectively allowing the producers to gain extra profit from the consumers' sustainable choice.[233] Thus, allowing in essence, for the polluter pays principle to translate into 'producer profits' principle. The basis of this argument appears to be that the consumers on the relevant market who purchase less pollutive products (as a consequence of a

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[231] Unilever, European Commission Consultation on Draft Horizontal Cooperation Guidelines: Unilever Response on Sustainability Agreements, ICC Global Competition Commission, ICC comments on the revised Research and Development Block Exemption Regulation ("R&D BER") and the revised Specialisation Block Exemption Regulation ("Specialisation BER", together the "HBERs") and Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements ("HGL") para 126
[232] See Section 4.2.3 and 4.3
[233] Loozen 2022, p 15

sustainability agreement), could have to pay more for the product, if the product's price is allowed to increase as a consequence of the agreement, while polluting less than before the agreement. For an example, if competitors in the fuel industry would agree on only selling more eco-friendly less pollutive fuels, which would be expensive for the consumers than the conventional ones, it would be consumers that bought these less pollutive fuels that would pollute less but pay more.

The foremost promoter of this argument, Loozen, regards as a misunderstanding the view that accepting producers to agree on greener production at the expense of the consumer would coincide with the polluter pays principle.[234] This argument would seem, to some extent,logical, in the sense that truly consumers, effectively forced to buy more sustainable products due to producers' sustainability agreement, are no more polluters to the extent that they used to be before the sustainability agreement, but they still might have to bear even higher costs compared to when they were, or compared to those consumers purchasing products from competitors outside the sustainability agreement. The result indeed would not seem to be in line with the polluter pays principle, rather the opposite.

However, whether the even the producers would necessarily profit from this situation seems questionable. Admittedly, any horizontal co-operation agreement, be it a cartel or a legit one, would appear to allow for certain marginal of extra profit for the producers, and sustainability co-operation is likely not an exemption. The general problem of establishing whether producers overcharge consumers would seem to be the same in relation to any other type of co-operation agreement as well. Thus, it does not appear that sustainability co-operation would necessarily allow for any more abuse of the consumer than any other form of co-operation. Nevertheless, theoretically, allowing producers voluntarily to cause negative effects on the consumer market to enable them to produce more sustainable products would indeed seem to undermine the polluter pays principle, if the payer for the more sustainable world would be the consumer not polluting anymore.

In conclusion, it seems that the Commission has at least managed to find a strikingly fine compromise in defining collective benefits in its Draft Revised Guidelines, which serves to displease everyone regardless of whether or not they are willing to accept sustainability objectives under the Article 101(3) TFEU. It appears, that no matter which perspective one

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[234] Ibid

takes, the collective benefits doctrine would seem to result in potential conflict with the polluter pays principle.

4.2.3 Collective Benefits Limited to the EU

Another major problem brought up by many of the contributors is one connected to the apparent geographical limitations of the scope of collective benefits in the Draft Revised Guidelines.[235] There is no specific written limitation in the Draft Revised Guidelines, but this issue is caused by, essentially, the same reasons identified in connection with the consumer-oriented polluter pays principle-issue.[236] The fact that even collective benefits must be felt by the consumers of the product in question, in addition to limiting the scope of the collective benefits doctrine to actual users of the product, also limits, by necessity, the scope of the doctrine to benefits within the EU market. Therefore, for instance even significant environmental benefits that have a local positive effect, seem to be outcast from the scope of collective benefits in accordance with the Draft Revised Guidelines.[237] Even when clearly such is against the fundamental rationale of supporting sustainability actions in the first place.

Similarly, and perhaps more importantly, it seems that all other types of sustainability objectives, apart from environmental ones that bear a global effect, would unavoidably be placed outside the scope of collective benefits because of this *de facto* territorial limitation. For instance, any benefit related to labour or human rights of the workers in production outside of the EU would obviously benefit those workers directly. However, as it is unlikely that the group of workers affected by the benefit (beneficiaries) would be part of the same group as the European consumers of the product (consumers in the relevant market). Thus, in accordance with the Draft Revised Guidelines, the benefit would not probably count as a collective benefit, since the benefit would not accrue to the consumers paying the higher price for the more sustainable product.[238] If, on the other hand, the production in question would be placed within the EU, similar benefits would seemingly be more likely to be considered as

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[235] See for example: Unilever, European Commission Consultation on Draft Horizontal Cooperation Guidelines: Unilever Response on Sustainability Agreements, Jan Blockx, according to those endorsing the acceptance of sustainability goals under the Article 101(3) TFEU, ICC Global Competition Commission, ICC comments on the revised Research and Development Block Exemption Regulation ("R&D BER") and the revised Specialisation Block Exemption Regulation ("Specialisation BER", together the "HBERs") and Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements ("HGL"), para 126
[236] See Section 4.2.2
[237] Draft Revised Guidelines para 604
[238] Ibid

collective benefits, as the workers would more likely overlap with the group of consumers in the relevant market.

Considering this geographical limitation, it is interesting to note that in comparison the Commission's Draft Guidelines for Agricultural Sustainability Agreements[239] do not limit the benefits or the action to be taken within the EU. Instead, the exemption therein (based on the Article 210a of Regulation 1308/2013) applies for as long as the articles requirements are met irrespective of where a party or parties to the agreement are located, insofar as the agreement is either implemented in the EU or has the potential to disturb competition within the single market.[240] Admittedly, the Article 210a of the Regulation 1308/2013 and the Article 101(3) TFEU differ greatly in their scope and the wording of the Regulation is less ambiguous than that the of the Treaty, leaving less room for interpretation in the first place. However, it seems strange that the Commission would under the Draft Revised Guidelines effectively cast out any sustainability benefits that in practice materialize outside the EU and still accept such benefits under different, industry specific, guidelines. This could be considered a sign of incoherence on the Commission's behalf.

This geographical issue is essentially the same with those in connection with the definition of the relevant market,[241] the substantial overlap between beneficiaries and consumers in the relevant market,[242] which were identified in the public consultation. It also has a connection with the temporal notion of benefits/consumers,[243] as well. All of these issues seem ultimately to relate to the fact that benefits falling within the definition of collective benefits under the Draft Revised Guidelines appear to be limited to those which may be felt by EU consumers buying the product in question. In fact, similarly to what was described previously regarding the fundamental problem of including non-economic

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[239] Draft Guidelines for COMMUNICATION FROM THE COMMISSION Commission Guidelines on the application of the exclusion from Article 101TFEU for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation 1308/2013 Sustainability agreements in agriculture – guidelines on the antitrust exclusion

[240] Ibid, para 30

[241] See Section 4.2.5, Horizontal guidelines: new clarity on information exchange and sustainability agreements Zalando's contribution to the Public Consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines, April 2022, Chris Townley, The relevant market: an acceptable limit to competition analysis? E.C.L.R. 2011, 32(10), 490-499

[242] See Section, 4.2.5, CDC, Contribution to the public consultation of the draft revised Horizontal Cooperation Guidelines of the European Commission Date: 26 April 2022

[243] See Section 4.2.4, Natuur & Milieu, Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines Response from Natuur & Milieu (Netherlands) 26 April 2022, Chris Townley, Inter-generational impacts in competition analysis: remembering those not yet born, E.C.L.R. 2011, 32(11), 580-590

objectives under the Article 101(3) TFEU, the same issue may be identified in numerous different places within the exemptions requirements.[244] Here too, essentially the same limitation to the applicability of the collective benefits may be seen in connection with issues on different aims and principles because of their interconnectedness. One might, therefore, ask which of these issues resembles the chicken and which the egg?

The fact that the proposed collective benefits doctrine would necessitate a substantial overlap between the group of beneficiaries and the consumers in the relevant market is understandable from the perspective of the CJEU's caselaw, from which this rule derives from.[245] However, it seems that the principle of that rule does not entirely fit well with the objectives potentially pursued by sustainability co-operation.

4.2.4 Future Collective Benefits

Lastly, alongside the previously discussed geographical issue relating to the collective benefits doctrine, another potential limitation to collective benefits may be identified in connection to the temporal scope of the notion of benefits. It was noted in the public consultation, that it is not entirely clear to which extent benefits that do not materialize instantaneously count under the proposed collective benefits doctrine.[246] The Draft Revised Guidelines make minor references to this end in relation to the general nature of sustainability benefits,[247] the consumers' potential inability to recognize and balance future benefits with immediate disadvantages,[248] and their potential to do so.[249] The issue is considered of great importance by at least some contributors, since many sustainability benefits are considered to materialize slowly, yet the actions of today's consumers are of tremendous importance in their future attainment.[250]

The question of considering future benefits, or the definition of a consumer, under the Article 101(3) TFEU itself is, nevertheless, not new.[251] The issue has been actually taken into

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[244] See Section 4.1.2
[245] MasterCard Inc, C-382/12 P, EU:C:2014:2201 para 242-243
[246] For example: Natuur & Milieu, Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines Response from Natuur & Milieu (Netherlands) 26 April 2022, Unilever, European Commission Consultation on Draft Horizontal Cooperation Guidelines: Unilever Response on Sustainability Agreements
[247] Draft Revised Guidelines paras 543, 592
[248] Draft Revised Guidelines para 586
[249] Draft Revised Guidelines para 596
[250] Natuur & Milieu, Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines Response from Natuur & Milieu (Netherlands) 26 April 2022
[251] Jones 2019, p 268, Townley 2011a

consideration also in the Article 81(3) Guidelines, which would seem to allow a broad understanding of the consumer on the relevant market, including future consumers to some extent.[252] This argument appears to be supported by academic literature, although it has been pointed out that proving the existence or materialization of future benefits may become all the more uncertain the more distant the realization of the benefits becomes.[253] Whether the difficulty in predicting future benefits should be considered as an obstruction to their application seems, nevertheless, questionable as academics have underlined that such practice is already common under, for instance, merger control and application of the Article 102 TFEU.[254]

Evidently, the Commission does not in the Draft Revised Guidelines or in the Article 81(3) Guidelines outright decline consideration of future benefits, rather the opposite. Therefore, even though portrayed as a deficiency in the consultation, it appears that the issue more related to the ambiguity and lack of specific guidance on evaluation of future benefits than their actual disallowance and as such, is likely less problematic than the apparently categorical rejection of benefits materializing outside the EU geographically.

4.3 Usefulness from the Perspective of Sustainability Objectives

Having briefly introduced some of the problems related to the acceptance of sustainability benefits as benefits under the Article 101(3) TFEU as well as some of the issues identified in the Draft Revised Guidelines' new pass-on to consumers doctrine, it is time to evaluate the effect of this problems on the objectives the new Draft Revised Guidelines' Chapter 9 on sustainability agreements is seeking to attain. Because of the vastness of sustainability objectives in the meaning of the Draft Revised Guidelines, attention cannot be given to each individual goal identified by the UN Agenda or the Article 3 TEU, in this paper. Instead, the discussion will be structured roughly on the basis of environmental and social objectives.

Although far from exhaustive, these two branches and the possible differences between them will hopefully serve to illustrate the weaknesses of the proposed pass-on to consumers doctrine. This is not to say that the proposed system would be outright harmful

[252] Article 81(3) Guidelines paras 87, 88
[253] Jones 2019, p 268, Townley 2011a, p 587
[254] Ibid

from sustainability's perspective, but it seems critically important to point out the potential failures of the system to enable their balancing with its successes.

4.3.1 Environmental Objectives

It could be argued that the express acceptance of sustainability benefits under the Article 101(3) TFEU is probably the most significant leap, achieved by the Draft Revised Guidelines, positive from the point of view of environmental objectives. However, it should be recalled that this is nothing new from a historical perspective when looking at the Commission's horizontal guidelines and decisions of both the Commission and the CJEU. As stated previously, the former guidelines acknowledged environmental benefits and the Commission accepted them in *CECED*.[255] This approach may, and quite evidently is, still be challenged and poses a fundamental question regarding the goals of competition law in general.[256] Nevertheless, it would seem that the acceptance of sustainability benefits at large under the Article 101(3) TFEU would do little to damage the attainment of environmental goals in general, although the limiting effect that the lack of such notion in the present Guidelines to these aims may well be overestimated.[257]

However, as demonstrated in the previous sections, the proposed pass-on to consumers doctrine in the Draft Revised Guidelines, on the other hand, does not seem ideal from the perspective of attainment of environmental objectives for three main reasons. Firstly, the lack of meaningful effect of the individual non-use value benefits doctrine.[258] Secondly, the lack of coherence of the collective benefits doctrine with the polluter pays principle.[259] Thirdly, the geographically limiting effect of the substantial overlap between beneficiaries and consumers in the relevant market requirement of the collective benefits doctrine, as it stands in the Draft Revised Guidelines.

Individual non-use value benefits

The discuss the first of this point, it should be recalled, that the principal failure of this newly established category of benefits is that it is seemingly impossible to accept any exemption under the Article 101(3) TFEU based on these benefits, since any benefit that

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[255] See Section 3.1
[256] See Section 4.1
[257] Gerbrandy 2017, p 543-545, Wouters 2021
[258] See Sections 3.2.2 and 4.2.1
[259] See Section 4.2.2

consumers are willing to pay for would inherently seem to fail the subsequent indispensability test under the Article.[260] Why would a co-operation agreement be indispensable for the attainment of an benefit that is considered a characteristic worth paying for by the consumers on the relevant market?

To make use of an example from the Draft Revised Guidelines,[261] if a group of competitors from the clothing industry made an co-operation agreement to only use sustainable cotton, that being more environmentally friendly yet more expensive, which would raise the consumer price accordingly, and made a willingness-to-pay survey indicating that a significant part of the consumers in the relevant market would be willing to pay more for the sustainable pair of jeans, then where is the market failure which needs to be mended by the co-operation agreement? The competitors party to the co-operation could, at least in theory, compete against each other on the sustainability characteristics of their clothing instead of agreeing on certain level of environmental friendliness.

The Draft Revised Guidelines hint that in certain cases the co-operation agreement could be needed to overcome the co-called first-mover disadvantages.[262] However, if a willingness-to-pay survey indicates that the consumers to whom the product is intended are already willing to pay for the benefit, it would hardly seem like a disadvantage for the first mover. In fact, the positive result on the survey would seem to indicate a first-mover advantage on the market. Therefore, if the group of competitors would conduct a willingness-to-pay survey on their customers and found that the consumers are ready to pay increased price for more sustainable products, any one of the companies could make a move to offer sustainable cotton jeans and the others would logically follow suit. Probably a competition on the sustainability characteristic of the products would ensue, provided that the results of the survey were credible. This would seem to be supported by the findings of Gebrandy, that in certain cases, consumers might be willing to pay considerably higher prices for considerably more sustainable products, even if not slightly higher prices for slightly more sustainable products.[263] It would seem that these sorts of positive results indicate that non-use value sustainability benefits constitute competitive characteristics in the product market instead of potential market failures. Even though certain academics consider willingness-to-pay as an

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[260] See Section 3.2.2
[261] Draft Revised Guidelines para 604
[262] Draft Revised Guidelines para 584
[263] Gerbrandy 2017, p 540-541

appropriate parameter for quantifying consumer benefits,[264] it would seem to fail at this regard, or at least, work the other way round.

Therefore, the effect for this part of the revised pass-on to consumers doctrine on the attainment of any environmental objective would seem negligible at best. On the other hand, at least the effect would not seem to be harmful from the viewpoint of environmental objectives thanks to the non-use value benefits' inherently competitive nature. These benefits simply look out for themselves in the market, at least in theory.

Polluter pays. Or profits?

The second issue potentially affecting the effectiveness of obtaining environmental objectives would seem to be the problematic relationship between the proposed collective benefits doctrine and the polluter pays principle under the Article 191(2) TFEU. As discussed previously, the problem here may be seen in either the fact that the consumers in the relevant market (polluters) have to be beneficiaries of the sustainability benefit gained by the co-operation, or in that the consumers paying for the less pollutive product (as a result of the co-operation) are liable to endure the higher prices for the product even when they no longer pollute (as much).[265] From the viewpoint of environmental objectives the issue does not seem entirely irrelevant regardless of which approach is considered. However, as explained earlier, the former argument appears more appropriate to be discussed in relation to the collective benefits' limited geographical scope.[266]

The incoherence of the proposed collective benefits doctrine with the principle of polluter-must-pay, is not without consequence from the perspective of attainment of environmental objectives. As Loozen argues, the collective benefits doctrine is liable to enable companies to charge their consumers higher prices than without the co-operation agreement, while, because of the agreement, the consumers are not polluting as much as before the agreement.[267] This alone would appear to be more of a consumer welfare problem than a practical one from the environmental viewpoint in the sense that pollution would still decrease even if companies could make an extra profit via the agreement at the consumers' expense. If a whole industry would agree on a more environmentally friendly production

[264] Ibid, p 540
[265] See Section 4.2.2
[266] See Section 4.2.2
[267] Loozen 2022, p 15

standard, it could well be that the consumers now polluting less would pay more, but from the environments perspective, that is not a bad result as there would still be environmental net benefit.

However, there would seem to be ways, in which this system could play for the benefit of the polluters, even if the net result would still be on the positive from an environmental perspective. If, for instance, the agreement, used by the Commission as an example in the Draft Revised Guidelines,[268] concerning less pollutive fuel would entail only half of the relevant fuel market and the price of the less pollutive fuel would be higher than that of conventional fuel, consumers would perhaps be more likely to stick to the less expensive conventional fuel instead of the less pollutive one. Because of this, the parties to the sustainability agreement could lose some amount of business to their less environmentally friendly competitors, effectively increasing their relative market shares from the starting point. Nevertheless, the agreement would not be likely to increase the total consumption of fuel, and as such, even if the more sustainable half of the competitors would lose certain number of customers to their less environmentally friendly competition, the remaining part of the fuel sold would still be less pollutive than before the agreement. Whether such an agreement would be indispensable in the meaning of the Article 101(3) TFEU or commercially viable is another story.

Environmentally there would of course still be a net benefit even if the payers of this benefit would be the less pollutive consumers and the companies outside the agreement would profit from sticking to selling the less expensive, more pollutive fuels. How the inadvertent inverting of the polluter pays principle would affect environmental objectives overall in the long run is more difficult to estimate. Overturning the environmentally desirable incentive toward lessened pollution that the polluter pays principle is endeavouring to create in this way would seem unbeneficial.

It would seem systemically unwanted for the polluters to be able to benefit from such a doctrine. The Draft Revised Guidelines do consider this issue, indirectly perhaps, when stating that collective benefits are less likely to occur where the market coverage of the agreement is not significant.[269] It would be interesting to learn, whether any reference to the Article 191 TFEU in the Draft Revised Guidelines was left out actually because of this

[268] Draft Revised Guidelines para 604
[269] Draft Revised Guidelines para 605

incoherence that the collective benefits doctrine enables, since there is no other evident reason for this omission.[270] Whether this apparent conflict between the polluter pays principle and the collective benefits doctrine bears negative or positive effects for the environmental objectives in total, is difficult to verify without empirical knowledge. The principle that polluter must pay is based on a moral verdict, whereas environmental benefits, however insignificant, are a statement of fact detached from any such judgement and always positive from the environmental point of view. However, an incoherence this stark between environmental principles set by the Treaty and its competition rules seems difficult to justify even if some environmental benefits could be obtained through this approach. From the businesses' perspective, it could well be that the dreaded potential extra profit would be among the only real incentives to invest in sustainability co-operation agreements in an market environment where polluters would pay less than sustainability oriented consumers.

Environmental benefits only in the EU.

From the environmental perspective, without doubt the most significant problem would be the *de facto* geographical limitation to the collective environmental benefits, that follows from the Draft Revised Guidelines.[271] The fact that benefits must, in order to count as collective benefits under the Draft Revised Guidelines, accrue to the consumers in the relevant market and (or) the group of consumers must substantially overlap with that of the beneficiaries,[272] effectively seems to render any environmental benefits that can be localized subject to assessment of whether or not the location where the benefits occur is such that the consumer on the relevant market is likely to receive benefits from that area directly. In other words, if the consumer on the relevant market has a sufficient direct link to the area where the environmental benefit materializes. This approach seems less than desirable from the viewpoint of environmental objectives.

In theory, it seems that environmental sustainability benefits could be roughly placed into two different categories with regards to their pass-on to consumers: 1. local benefits, and 2. global benefits. The first category referred to consists of benefits that may be localized and which pass-on to consumers locally, as in the Commission's example concerning sustainable cotton.[273] The benefits created by decreased use of water and chemicals can supposedly be

[270] See Sections 3.1.3 and 4.1.2
[271] See Sections 3.2.3 and 4.2.3
[272] Draft Revised Guidelines paras 603-604, 606, See Section 3.2.3
[273] Draft Revised Guidelines para 604

rather easily localized into the area where the land is cultivated for growing cotton. The second category on the other hand, contains benefits which necessarily have a global effect, and thus accrue to consumers regardless of lack of geographical link between the benefitting area and the relevant market. For instance, such benefits as the decrease of greenhouse gas emissions. Also, these may be metered locally but the effect is, in principle, global. In this regard, it appears less clear, whether the air pollution example from the Draft Revised Guidelines would count only as a localized benefit.[274] Air pollution as such may be localized and air quality measured locally, yet the overall effect of air pollution appears to be global.[275]

This categorization is not meant to argue that local benefits could never accrue to the consumer on the relevant market outside their geographical area of occurrence, or to society at large, but only that they do not do so necessarily, unlike global benefits. The difference between the two might very well be merely a question of perspective or scale rather than anything else. A considerable decrease in greenhouse gas emissions in India, although it could very well be localized geographically, undeniably bears a direct global effect and thus passes on to consumers from India to EU, whereas significant reduction of soil contamination in the same place might have a less direct global impact but is easily recognized locally.

Although not expressly presented in this way in the Draft Revised Guidelines, the collective benefits doctrine is seemingly based primarily on an idea of localized benefits. The Draft Revised Guidelines do not outright seem to renounce the idea of global benefits either, but the acknowledgement of the existence remains ambiguous since such are not present in the examples provided by the Commission. In comparison, the 2001 Horizontal Guidelines as well as the Commission's *CECED* ruling would have seemed to allow for a broader interpretation of environmental benefits including, in principle, also global benefits.[276] This seems evident from the fact that in *CECED* the Commission specifically argued that the decrease in emissions of carbon dioxide, sulphur dioxide, and nitrous oxide in themselves would have sufficed for a fair share of benefits for the consumers even if individual consumers would not have received other benefits.[277] In theory, the Draft Revised Guidelines when requiring the parties to the agreement to identify the beneficiaries of the sustainability

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[274] Draft Revised Guidelines para 604, Jan Blockx, Should European competition law only care about clean air for Europeans? A comment on paragraph 604 of the European Commission's draft Guidelines on horizontal cooperation agreements, 1 April 2022
[275] WHO global air quality guidelines. Particulate matter (PM2.5 and PM10), ozone, nitrogen dioxide, sulfur dioxide and carbon monoxide. Geneva: World Health Organization; 2021
[276] COMP/36.718 [2000] OJ L187/47 para 56, 2001 Horizontal Guidelines para 193
[277] COMP/36.718 [2000] OJ L187/47para 56

benefits,[278] would seem to allow an interpretation that the society or humanity as whole could be recognized as beneficiaries when global benefits were in question. If that were the case, it would seem possible to accept global benefits as always accruing to the consumers on the relevant market as well. However, as the Draft Revised Guidelines do not have a specific example to this end and it remains unclear whether the air pollution example[279] is trying to illustrate this point or air pollution as a local benefit, it is impossible to be certain.

Therefore, it appears that the requirement of benefits accruing to the consumer on the relevant market, in the way prescribed by the Draft Revised Guidelines, is liable to limit the potential environmental actions taken on the basis of horizontal co-operation agreements to an unwantedly high degree from an environmentalist perspective. A lesser environmental benefit that occurs within the EU is far more likely to be accepted as a collective benefit under the Draft Revised Guidelines than a more significant benefit outside the EU, provided that the benefit may be considered local. And even whether the Commission acknowledges global benefits remains uncertain. This result does not seem desirable from the perspective environmental objectives, as it in fact appears stricter than the previous doctrine under the 2001 Horizontal Guidelines, at least on paper.

4.3.2 Social Objectives

Similar to environmental objectives, all social sustainability objectives would seem to suffer from the limitations of scope that follow from the collective benefits doctrine's requirements on overlapping groups on the beneficiaries and the relevant market. Benefits, such as improved living wages, working conditions, or human rights would seem to be subject the same geographical limitations with the environmental benefits in accordance with the Draft Revised Guidelines. Although there are no specific examples concerning social benefits in the Draft Revised Guidelines, it is to be presumed that their general treatment is subject to same limitations as the environmental sustainability benefits.

Social objectives and benefits could theoretically be categorized similarly to the previously discussed environmental benefits, as local or global ones.[280] Nevertheless, if the line between theoretically local and global environmental benefits was thin and obscure, it seems to be nearly invisible with regards to social benefits. For example, horizontal co-

[278] Draft Revised Guidelines para 606
[279] Draft Revised Guidelines para 604
[280] See Section 4.3.1

operation agreements aimed at improving living wages of the workers has a direct impact on the conditions of the workers in question, yet, when considered from the viewpoint of UN's sustainability goals, for instance, for ending poverty, this benefit could hardly be seen as merely local.[281] As However, in the light of the Draft Revised Guidelines and the contributions to the public consultation, it appears that similarly to environmental benefits, all local social benefits materializing outside the EU are outcast from the collective benefits' definition. Considering the Commission's rhetoric in relation to the cotton industry example in the Draft Revised Guidelines,[282] it appears quite unlikely that any social benefits would be accepted as 'global' by the Commission.

The effectiveness of the Draft Revised Guidelines from the social objectives' perspective thus, does not seem to be satisfactory. If social benefits are considered only locally, the most socially vulnerable people living and working outside the EU cannot in effect be benefitting from sustainability agreements between European companies where such agreements could be exempted under 101(3) TFEU if the same social benefits occurred directly in the EU. This result does not seem only unprincipled but also ineffective even from a more classical consumer welfare viewpoint. As World Fair Trade Organization (WFTO) pointed out, prevention of, for instance, poverty alleviation outside the EU by means of horizontal co-operation may cause also significant consumer price increases and drops in availability of products produced in unsustainable social conditions.[283]

[281] UN Agenda 2030 on Sustainable Development, Goal 1
[282] Draft Revised Guidelines para 604
[283] WFTO-Europe Feedback to the Draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines Brussels, 26th April 2022

5 Proposed Solutions

5.1 Away with Individual Non-Use Value Benefits

The previous two chapters have aimed at identifying and illustrating the issues caused by the acceptance of sustainability benefits and the revised pass-on to consumers doctrine proposed in the Draft Revised Guidelines. This chapter will make an attempt to propose some solutions to the problems discussed previously.

Based on the discussion in the previous section,[284] the most significant problems from the technical and objective oriented point of view are the following: 1. uselessness of the individual non-use value benefits because of their inherent lack of indispensability under the Article 101(3) TFEU, and 2. too limiting interpretation on the collective benefits due to the requirement of overlap between beneficiaries and the relevant market and the accruement of benefits from outside of the relevant market. A solution to the former will be proposed in this section and to latter in the following section.

As discussed previously,[285] the individual non-use value benefits seem to be faulty in their design. It was pointed out that it is not entirely clear, what is the supposed market failure that could need to be overcome by a sustainability agreement in a situation where consumers would be willing to pay for the sustainability-wise improved product. It appears, that a positive result in a willingness-to-pay survey in this regard would better illustrate the lack of a market failure, like a first-mover disadvantage, than the opposite. As indicated also by the Commission, there is little practical difference between the use value and non-use value benefits categories in economic sense.[286] The difference would seem to be the basis of non-use value benefits being in the consumer's subjective preference whereas use value benefits being based on the products 'objective' improvement from the classical consumer welfare perspective. On the other hand, the individual non-use value benefits as understood in the Draft Revised Guidelines are essentially the same with collective benefits, being mainly differentiated by the consumers' willingness to pay for them. There seems to be little reason therefore, to consider consumer preferences, such as those depicted as non-use value benefits in the Draft Revised Guidelines, separately under the pass-on to consumers doctrine under the

[284] See Section 4.3
[285] See Sections 3.2.2, 4.2.1 and 4.3
[286] Draft Revised Guidelines para 597, see section 3.2.2

Article 101(3) TFEU exemption, or at least, to employ consumers' willingness to pay as an parameter for its definition.

In conclusion, when defined in the way the Commission does in the Draft Revised Guidelines, the non-use value benefits seem to be lacking any practical usefulness. As long as proving the existence of a non-use value benefit is linked to the consumers' willingness to pay for the said benefit, it seems that the definition itself negates any potential application of these benefits under the Article 101(3) TFEU. Recalling the Commission's own cotton example,[287] if the consumers of cotton clothing would indeed be willing to pay extra for their clothing's increased sustainability, it is difficult to imagine a justifiable motive for any horizontal co-operation agreement to meet this demand. Each competitor could individually supply increasingly sustainable cotton clothing even at a price increase without having to resort to competition-restricting co-operation. Since the individual non-use value benefits seem to be burdened by inherent lack of indispensability of the restrictions allowing their attainment, it would appear best to do away with this whole category of benefits. This way the risk for the employment of this category of sustainability benefits, that appears practically useless, for 'sustainability-washing' purposes would be prevented and it would cause no distraction to businesses contemplating horizontal sustainability actions.

5.2 Clear Acknowledgement of Global Benefits as Collective Benefits

The problem posed by the collective benefits doctrine as prescribed by the Draft Revised Guidelines, in this regard, is that it omits any real guidance on evaluating how benefits occurring outside the relevant market can accrue to the consumers in the relevant market and appears to a significant extent to exclude benefits gained outside of the EU. Much of this controversy is caused by the text and examples in paragraphs 604 and 606 of the Draft Revised Guidelines. From the viewpoint of attainment of sustainability objectives referred to in the Draft Revised Guidelines[288] the collective benefits should not be limited geographically. As previously discussed, the Commission appears to acknowledge all sustainability benefits merely as 'local' instead of 'global', even where it is recognized by the

[287] Draft Revised Guidelines para 604
[288] Article 3 TEU, 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. The European Green Deal COM/2019/640 final, UN 2030 Agenda for Sustainable Development

sources, from which the different sustainability goals are derived from, that the problems these goals aim to alleviate are essentially global.[289]

To overcome the aforementioned faults identified in the Draft Revised Guidelines, at least two concrete, possibly even alternate, changes could be proposed: 1. broader definition of beneficiaries, and 2. highlighting that benefits can accrue to consumers in the relevant market even if the consumers in the relevant market are not substantially the same group of people with the beneficiaries. Each proposal will be discussed in their respective sections underneath.

5.2.1 Broad Understanding of Beneficiaries

The Draft Revised Guidelines do not provide almost any practical guidance on defining the beneficiaries for sustainability benefits, even though requiring, naturally, their identification.[290] This, along with the examples provided by the Commission,[291] conveying a very limiting local understanding of benefits is liable to support the assumption that beneficiaries, similar to benefits themselves, are understood on a local level. As previously argued, from the sustainability objectives perspective, this result is not desirable, and it is just as well questionable from the viewpoint of the coherence of the fundamentals of EU policies.[292]

One way to overcome this issue, and to effectively acknowledge the existence of global sustainability benefits would be to mend the Draft Revised Guidelines' guidance relating to defining beneficiaries. Evidently, the Commission presumes that beneficiaries similar to benefits, may always be localized in one way or another. Arguing that 'citizens' are the general group of beneficiaries in the air pollutant example, however, gives a hint, albeit an extremely obscure one, toward the possibility of identifying broader, even global, groups of beneficiaries. In the author's opinion, this approach could and should be further developed in a way that would highlight the possibility of accepting sufficiently significant global sustainability benefits as collective benefits under the Draft Revised Guidelines' new pass-on to consumers doctrine.

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[289] See Section 4.3
[290] Draft Revised Guidelines para 606
[291] Draft Revised Guidelines para 604
[292] See Sections 4.2.2, 4.2.3 and 4.3

For example, the Draft Revised Guidelines could rewrite the air pollutant fuel example to not refer vaguely to 'citizens' (presumably although not necessarily European citizens) but to global population as the beneficiary, since the effect that a sufficiently significant reduction in air pollutants, especially greenhouse gases, is recognized to have a global effect. This way, by providing a more reasoned and broader definition of the group of beneficiaries, the much criticised and frankly, unreasonable *de facto* geographical limitations of the collective benefits doctrine could be overcome. When the beneficiaries would essentially consist of the world's population, there would be risk of the Commission finding that there were no substantial overlap between the group of beneficiaries and the consumers in the relevant market. Similarly, the Draft Revised Guidelines should take into account social sustainability benefits in this regard too, for instance, by providing an example of social benefits in the nature of payment of living wages which would serve to alleviate poverty (as a global problem as understood by the UN).[293] The beneficiaries, if the agreement would have a sufficiently significant effect to this end, could again be defined as the human society itself, eradicating the limiting effect that the subsequent accruement to consumers requirement would likely have if the beneficiaries were defined locally.

The approach would result in further developed, possibly broader but certainly clearer guidance on the definition of the beneficiaries and would seem supported by the understanding brought up by certain contributors, that many sustainability benefits could be defined rather as societal benefits than ones obtained by a specific group of people.[294] As was argued in the public consultation, there indeed are other EU instruments, such as the Draft Corporate Sustainability Due Diligence Directive,[295] which indicate the acknowledgement of societal benefits by the Commission.[296] The idea thereof, of a societal benefit coincides significantly to what is referred to as 'global' benefit in this paper.

5.2.2 Either Overlap or Accruement

Should the Commission follow at some point the aforementioned approach on the broader and less ambiguous definition of beneficiaries, further technical changes in the collective benefits

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[293] UN 2030 Agenda on Sustainable Development
[294] For instance, Zalando, Zalando's contribution to the Public Consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines, April 2022
[295] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final 2022/0051(COD)
[296] Zalando, Zalando's contribution to the Public Consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines, April 2022

doctrine under the Draft Revised Guidelines would no longer be as necessary. If the Commission was willing to acknowledge global benefits as parts of the beneficiaries' definition, consumers on the relevant market would inevitably belong or 'substantially' overlap with the group of the beneficiaries, thus eradicating any geographical limitation of significant sustainability benefits on the basis of the collective benefits doctrine. However, if the definition of the beneficiaries, as is likely to be the case, remains untouched, it would be necessary to try and mend the issue at subsequent stage, that being the overlap and accruement to consumers requirement.

As illustrated before, it is somewhat unclear what is the intended difference between these two ways that benefits may arrive to the consumers and the requirement to prove both, that there is an overlap between the group of beneficiaries and the consumers in the relevant market, and that the benefits occurring outside the relevant market accrue to the consumers within it. [297] The purpose of the latter requirement is even less clear as the Draft Revised Guidelines apparently link these two cumulative requirements together in a way that where there is no substantial overlap in the market, there can be no accruement of benefits to the consumers in it.[298] Incidentally, where there is an overlap in the markets, the accruement of the benefits from the outside does no more appear to affect the evaluation anyhow.[299] These obscurities and the apparent necessity of substantial overlap between the market and the beneficiaries in order for the benefits to count as collective, have an significantly negative overall effect on the practical scope of exemptible horizontal sustainability co-operation, as argued before.[300]

Therefore, the Commission should in order to mend these faults, clearly differentiate these two requirements from each other and highlight that they are not cumulative, but instead alternative. It should be clear, that sustainability benefits significant enough to be considered global which materialize outside the EU are still able to accrue to relevant European consumers even if the defined group of beneficiaries can be localized completely outside the relevant market. Even in these situations, sustainability benefits may accrue to consumer as global, or societal, benefits enhancing the well-being for the whole humanity collectively, as the decrease in emissions in the *CECED* decision did.[301] In certain cases, such as the less

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[297] Draft Revised Guidelines para 606, see Section 3.2.3
[298] Ibid para 604
[299] Ibid para 604, see Section 3.2.3
[300] See Sections 4.2.2, 4.2.3 and 4.3
[301] COMP/36.718 [2000] OJ L187/47 para 56

pollutive fuel or the CECED-based washing machine examples in the Draft Revised Guidelines,[302] sustainability benefits can be identified as benefitting 'citizens' or 'overall population', terms which although not explicitly explained in the Draft Revised Guidelines may easily be understood to refer to world's general population or a significant part of it. In these situations, the substantial overlap likely exists between the beneficiaries and the consumers in the relevant market, therefore, there seems to be little need for explanations on how these benefits accrue to the consumers, who effectively are part of the beneficiaries.

However, there are situations, such as in the Commission's sustainable cotton example,[303] where the sustainability benefit may be localized geographically to place where the water and soil pollution is decreasing, or where for instance, competitors agree to paying living wages to African tea farmers. In these cases, the direct beneficiaries of the sustainability benefits can be identified as the people residing where the pollution of soil or water is lessened, or the people working or depending on the tea farms. Nevertheless, if the global or societal nature of the sustainability objectives in question (eradication of poverty and environmental protection in this example), which are also derived from EU's own legislation,[304] is acknowledged, it appears that these benefits are able to accrue to consumers from outside the relevant market even when there is no overlap between the direct beneficiaries and the relevant market. Following this approach, the question of whether sustainability benefits occurring outside the relevant market may be considered collective benefits would depend more on the scale of the gained benefits, not categorically on their direct place of occurrence.

Therefore, it should be made clear in the Draft Revised Guidelines that collective sustainability benefits should arrive to consumers in the relevant market *either* by way of overlap between the group of beneficiaries and the consumer in the relevant market *or* by accruing to the consumer in the relevant market from outside of it. Not only by the way substantial overlap between the beneficiaries and consumers as the Commission now appears to prescribe. The downside to this approach and the reason why the proposed changes to the definition of the beneficiaries should prevail over this option, is that the despite the ambiguities between the substantial overlap and accruement requirements, the substantial overlap is directly deduced from the CJEU's caselaw in *MasterCard*[305] which the

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[302] Draft Revised Guidelines paras 604 and 621
[303] Draft Revised Guidelines para 604
[304] Article 3 TEU and Article 191 TFEU in this case for instance.
[305] Case C-382/12 P, MasterCard Inc, EU:C:2014:2201, see Section 3.2.3

Commission obviously cannot override at will. Even if global benefits would accrue to consumers collectively, it would be considerably more difficult to align this accruement with the *MasterCard* decision otherwise than by accepting that global benefits benefit us all, rendering every consumer on the planet a beneficiary where collective benefits are considered significant enough.

6 Conclusion

The topic of this research paper has been the treatment of horizontal sustainability agreements under the Commission's Draft Revised Guidelines. The aim has been at finding whether the treatment of sustainability agreements, and especially the general acceptance of sustainability benefits under the Article 101(3) TFEU and the revised pass-on to consumer doctrine in the Commission's Draft Revised Guidelines, has changed from the historical perspective, and at identifying the theoretical weaknesses of the proposed evaluation scheme of these benefits under the Draft Revised Guidelines. The research questions have been 1. if the acceptance of sustainability benefits in the assessment under the Article 101(3) TFEU is a novel concept, 2. if the revised pass-on to consumers doctrine in the Draft Revised Guidelines is new from a theoretical and historical perspective, 3. what problems may be identified relating to the acceptance of sustainability benefits under competition law and the revised pass-on to consumers doctrine, and 4. whether the proposed pass-on to consumers doctrine is effective from sustainability objectives' perspective. The answers to these questions have been discussed based on both academic opinions, as well as those presented by different interest groups in the Commission's public consultation process for the Draft Revised Guidelines.

Conclusions reached in this paper have been, that the acceptance of sustainability benefits under the exemption prescribed in the Article 101(3) TFEU from the legal historical perspective is not an entirely new phenomenon. The Commission has rather early on accepted non-economic factors as part of its assessment in competition cases, most notably perhaps, in *CECED* decision, to which the horizontal guidelines from 2001 onwards have greatly leaned on in relation to environmental and sustainability agreements. This approach by the Commission appears to be warranted by the CJEU's argumentation in *Métropole Télévision*, where the Court considered that the Commission is free to base its evaluation on public interest in relation to the exemption under the Article 101(3) TFEU. However, the range of different sustainability benefits explicitly referred to in the Draft Revised Guidelines appears somewhat broader than what previously has been recognized in the horizontal guidelines specifically. Further, it was concluded that the revised pass-on to consumers doctrine for the part of collective benefits is not essentially new either. Although considerably more elaborated in the Draft Revised Guidelines, the concept of collective benefits was present in a recognizable form already in the 2001 Horizontal Guidelines.

As for the issues connected to the acceptance of sustainability benefits under competition law, it was concluded that there indeed is a fundamental issue in accepting non-economic factors under the Article 101(3) TFEU, when considering both the wording of the article, as well as the aims of competition law itself. However, it seems that the coherence of EU policies and application of EU law systemically require sustainability objectives to be taken into account also in the realm of competition law. This requirement may be derived from the Treaties themselves, *inter alia,* from Article 3 TEU, and Articles 7, 11, and 191 TFEU. What is more difficult to establish, is whether sustainability would still be better served by 'pure' economic application of competition law. Although, it would seem that since the 'pure' competition policy has not achieved better levels of sustainability to this point in time, it could be questioned whether such will happen in the future?

Issues related to the revised pass-on to consumers doctrine proposed in the Draft Revised Guidelines were concluded to be many. Most notably, the lack of apparently any meaningful practical function of the individual non-use value benefits and the highly undesirable *de facto* geographical limitation to the scope of collective benefits. In addition, the incoherence of the collective benefits doctrine with respect to the polluter pays principle prescribed in the Article 191(2) TFEU. It was also concluded that, all of these issues have potentially negative, or at least inadequate positive, effects on both the attainment of social and environmental objectives. In the case of collective benefits' geographical limitations, these deficiencies have a particularly stark effect on the on the overall effectiveness of horizontal co-operation. When it comes to the controversy between the collective benefits and the polluter pays principle, it was established that a conflict evidently exists between the principle and the fact that collective benefits doctrine would allow less-polluting consumers to pay more than worse polluters for the benefit of the producers of sustainable products. What was more difficult to conclude, was how this controversy could be overcome while retaining the effective inclusion of collective benefits under the Article 101(3) TFEU exemption. Apparently, the Commission has no definitive answer to this dilemma either, as they omitted any reference to the Article 191 TFEU in the Draft Revised Guidelines altogether.

Lastly, humble proposals were made in order to overcome some of the aforementioned issues, namely the practical uselessness of the individual non-use value benefits and the *de facto* geographical limitations of the collective benefits, which were considered the most significant ones at this point. Firstly, it was proposed, that the individual non-use value benefits should be done away with from the Draft Revised Guidelines, as they appear to lack

any meaningful function. Non-use value benefits were considered to be akin to collective benefits in principle, and being capable of being considered to constitute competitive characteristics, albeit subject to consumer preference, they could and should be left for normal market competition to obtain. In relation to the collective benefits' geographical limitations, it was proposed that, the either the definition of 'beneficiaries' should be further developed and broadened to clearly include the whole of the humanity where truly global sustainability benefits were in question, and either alternatively or in addition, the conditions of substantial overlap between the beneficiaries and the consumer in the relevant market and the accruement of benefits from outside the relevant market into it, should be clearly made alternative in relation to each other. It was considered that the Commission should make it clear in the coming revised horizontal guidelines, that globally effective sustainability benefits, or societal benefits, are capable of accruing to consumers in the relevant market even if the direct benefits could be localized completely outside the EU.

The Draft Revised Guidelines were intended for adoption in the beginning of 2023, yet we are still in the waiting in March of the same year. It will be interesting to see, whether the problems brought up in the Commission's public consultation process, to some extent discussed in this paper, will have been taken into consideration whenever the new horizontal guidelines are adopted.